

Immigration Consequences of Juvenile Dispositions and Adult Transfer

Shiu-Ming Cheer (Catholic Legal Immigration Network, LA) and
Alexis Mazón (Youth Law Center, SF), Co-presenters
Pacific Juvenile Defenders Center Conference
March 2, 2002

- Questions for the audience

How many defenders have previously represented noncitizen youth or adult clients?

How do youth in your area come to be placed in INS custody?

What immigration-related issues are defenders interested in learning more about specifically?

Are defenders typically able to get background immigration information from their clients?

- **The importance of screening every client for immigration status cannot be overemphasized**

The 1996 changes to the immigration laws made deportation mandatory for many relatively minor adult convictions. Juvenile dispositions do not constitute criminal convictions and therefore still do not carry immigration consequences. However, if the youth is transferred to adult court, the conviction will count as a conviction for immigration purposes. A limited number of types of conduct underlying some juvenile findings may also carry immigration consequences.¹

PD's have a responsibility not only to *advise* clients about immigration consequences but to *defend them against* such consequences. For example, a general warning that a proposed plea bargain could make the client deportable or inadmissible is not sufficient.²

Effective assistance of counsel requires PD's to consult an immigration expert on the immigration consequences of the various dispositions, pleas, convictions, and strategies the PD and client are considering. *PD's should refer all clients who are noncitizens to an immigration lawyer.*

PD's should be able to explain to youth clients in clear, understandable language what the various options and consequences of his/her immigration status are.

PD's should be prepared for some youth to prioritize quick processing in the justice system over concern for the long-term consequences of different forms of processing for immigration purposes.

- **PD's should advise youth clients of their rights under the 5th Amendment not to speak to INS officials in detention facilities or anywhere else.**
- **Do juvenile courts, probation departments and prosecutors refer youth to the INS in your area?**

If yes, here are some ways you can stop them from making such referrals:

* Enforce the 48-hour hold rule: INS typically has 48 hours to pick up youth from the juvenile detention facility. If more than 48 hours has passed, youth must be released from custody. If the facility refuses release, PD can ask for a hearing or file a habeas. PD's should follow-up on clients to see if they have

¹ These include "engaging in" prostitution, making false claims to U.S. citizenship, lying or using false documents for immigration benefits, illegally smuggling people across the border or "encouraging" them to cross, being or previously being a drug trafficker, drug addict or drug "abuser," being found in civil court to have violated a domestic violence TRO.
² See *People v. Soriano* (1987) 194 Cal.App.3d 1470; *People v. Barocio* (1989) 216 Cal.App.3d 99. In *Soriano*, defense counsel was found ineffective not solely for failure to advise, but for a failure to seek a sentence of 364 days, rather than 365.

been picked up by INS and also if they have been deported. If PD can secure client's release from delinquency/criminal custody *before* the immigration hold is placed, client may never face the problem of an INS hold or deportation.

* Seek the enactment of a "non-cooperation agreement" between government entities, law enforcement and INS in your area. San Francisco and Santa Cruz have successfully implemented such policies.

* Educate juvenile court judges about the disastrous impact of deportation on immigrant youth and their families, including homelessness and poverty, physical and emotional violence, political persecution, and permanent separation from U.S. citizen children of their own, parents and other family members-- among many others

- **Juvenile adjudication is not considered a "conviction" for immigration purposes**

However, "bad acts" can later count against youth offenders when they try to adjust their immigration status. See fn. 1.

PD's should make sure that in the allegations there is nothing of this sort which might prejudice the client down the road. PD could also have youth's records sealed to prevent this.

Impact of disposition on "Family Unity" applications (benefits for relatives of amnesty recipients): This is a rare situation. Barred if delinquency, had it been committed by an adult, would have been a felony involving violence or threat of physical force against another person. Again, PD has a duty to consult with immigration counsel.

There are waivers available for prostitution, document fraud, drug addiction/abuser, but none for drug trafficking.

Therefore, counsel should if at all possible avoid dispositions finding trafficking or crimes of violence.

- **Consequences of adult transfer and conviction**

If the youth is undocumented and convicted of an aggravated felony they will be placed into "administrative removal" which means they do not get to see a judge. The only way to fight this is if the youth has a strong fear of being persecuted upon return. Youth are given 10 days to respond to a removal order before being deported.

If the youth has green card, they are put into regular removal proceedings where they do get a hearing.

Whether kids are placed in administrative or regular removal depends on the arbitrary decision of the INS.

Once a youth is in immigration proceedings, PD should argue that even though criminal law defines a juvenile as under 18, the federal definition of juvenile (under 21 years) should apply for immigration purposes. PD should make this argument even if youth was transferred to adult court. However, if the offense is considered a "crime of violence" under federal law, then if the youth could have been treated as an adult under criminal law they will be treated as such under immigration law also.

There is one exception to the above. If the youth was convicted in adult court of a "moral turpitude" offense, they are exempt from mandatory deportation if this is their only "moral turpitude" offense, and the commission of the offense and the release from any resulting imprisonment occurred over 5 years before the current application.

First-time drug possession convictions are expungeable for immigration purposes. See *Lujan-Armendariz*.

Conviction of accessory after the fact avoids most immigration consequences.

- **Undocumented immigrant youth may be eligible for Special Immigrant Juvenile Status (SIJS), which allows them to obtain a Green Card**

SIJS is often seen as a form of relief available only for children in dependency proceedings. As a result, relatively few children in delinquency proceedings apply. However, the statute specifically makes SIJS available to children in juvenile court proceedings other than dependency.

Youth under the jurisdiction of a juvenile court who are “deemed eligible for long-term foster care due to abuse, neglect or abandonment,” may be able to obtain special immigrant juvenile status (SIJS) and, based on that, apply for lawful permanent residency (a green card). Although INS has not yet drafted any regulations for SIJS, kids in both delinquency and dependency proceedings have already been granted status.

PD’s should be aware that since INS has not addressed the delinquency issue in writing, children in delinquency who apply for SIJS may be at greater risk of being denied by local INS. Therefore, it is safest for children in delinquency who may be eligible for SIJS to secure placement in dependency, or concurrent dependency/delinquency status, if this is permitted under state law. This eliminates any legal question. Youth in delinquency who are unable to obtain placement in dependency and are considering applying for SIJS should be informed of the possible risks of submitting an application.

PD’s and their undocumented youth clients should consult with an immigration attorney with a background in SIJS for further information. In addition, the ILRC has put together a comprehensive ILRC manual on SIJS which has recently been updated (Brady, 2001).

- **Remember: there is no substitute for expert immigration advice!**

Below are some organizations PD’s can contact for guidance on immigration consequences:

Immigrant Legal Resource Center (ILRC)
1663 Mission Street, Suite 602
San Francisco, CA 94103
415.255.9499

Provides advice, training and materials to non-profit community agencies, immigrants’ rights organizations and PD’s offices. Maintains a contract service and for a modest fee, ILRC lawyers will provide criminal defense counsel with expert telephone consultation about immigration consequences. Reduced fee is available to staff of PD’s offices and court-appointed counsel. ILRC staff attorney, Kathy Brady, has co-authored a handbook on immigration consequences, with a focus on California offenses and practice (K. Brady, et al., *California Criminal Law and Immigration*).

National Immigration Project of the National Lawyers Guild
14 Beacon Street, Suite 506
Boston, MA 02108
617.227.9727

A clearinghouse on recent developments and litigation in immigration law and criminal issues. Headed by Dan Kesselbrenner, co-author of a handbook focusing on the immigration consequences of federal

offenses and the laws of several states (D. Kesselbrenner and L. Rosenberg, *Immigration Law and Crimes*). May be able to provide a list of local immigration attorneys.

National Center for Immigrants Rights
1636 West 8th Street, Suite 215
Los Angeles, CA 90017

Publishes a national directory of community agencies which offer assistance to people with immigration issues. These agencies may or may not have a staff attorney.

Catholic Legal Immigration Network
1530 W. James Wood Blvd.
Los Angeles, CA 90015
213.251.3489

Provides direct representation of youth and adults in immigration proceedings.

**Sample Minor's Request for Order Pursuant to Section 153 of Immigration Act
of 1990**

Abigail Trillin (Bar # 179052)
Legal Services for Children
1254 Market Street, Third Floor
San Francisco, CA 94102
(415) 863-3762

Attorney for Minor

**SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO**

JUVENILE DIVISION

In the Matter of:	)	No. JD01-XXXXXX
)	
XXXXXX XXXXX,)	
	)	ORDER REGARDING MINOR'S
a Minor.	)	ELIGIBILITY FOR SPECIAL IMMIGRANT
	)	STATUS
_____)	

The request of the minor, XXXXX XXXXX, for an Order pursuant to the Immigration Act of 1990, Section 153 (8 U.S.C. Section 1101 (a)(27)(J)) came on for hearing before the Juvenile Court on October 15th, 2001.

Abigail Trillin, of Legal Services for Children, is appointed to represent the above-mentioned child and is directed to assure a timely application for special immigrant status is made to the Immigration and Naturalization Service and that all necessary information and supporting evidence is complied.

The Court reviewed the supporting material on file, heard arguments of counsel and found the following:

The minor was declared dependent on the Juvenile Court of the City and County of San Francisco on September 21st, 2001 .

The minor was deemed eligible by this Court for long-term foster care on September 21st, 2001.

This court finds that it is not in the best interest of the minor to be returned to his previous country of nationality or country of last habitual residence, Guatemala. It is in the minor's best interest to remain in the United States.

The above findings were made and orders issued based on neglect and abandonment of the minor.

An application is to be made to the Immigration and Naturalization Service pursuant to 8 USC Section 1101(a)(27)(J).

Dated: _____

Judge/Commissioner of the Superior Court

Sample Order Regarding Minor's Eligibility for Special Immigration Status

Abigail Trillin (Bar #179052)
Legal Services for Children
1254 Market Street, Third Floor
San Francisco, CA 94102
(415) 863-3762

Attorney for Minor

SUPERIOR COURT OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO

JUVENILE DIVISION

In the Matter of:	)	No. JD01-XXXXXX
)	
XXXXX XXXXX,	)	MINOR'S REQUEST FOR ORDER PURSUANT TO
	)	SECTION 153 OF IMMIGRATION ACT OF 1990
)	
a Minor.	)	Date: October 15 th , 2001
	)	Time: 9:00am
	)	Dept.: 406

The minor, XXXXX XXXXX, files this memorandum in support of his request for an order pursuant to Section 153 of the Immigration Act of 1990 (8 U.S.C. 1101 (a)(27)(J)).

I. INTRODUCTION

Pursuant to a 1990 amendment to immigration laws, minors who are in foster care have the right to apply for a Special Immigrant Juvenile Status with the Immigration and Naturalization Service ("INS"). Section 153 of the Immigration Act provides in relevant part that a special immigrant includes "an immigrant (i) who has been declared a dependent of a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the aliens' best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence"

In this matter, XXXXX meets the criteria for special immigrant status and would therefore apply for permanent residence in the United States.

II. XXXXX IS A DEPENDENT OF THE COURT AND ELIGIBLE FOR LONG TERM FOSTER CARE

On September 21st, 2001, XXXXX was declared a dependent of the San Francisco Juvenile Court in a dispositional hearing. XXXXX left his father's home in Guatemala approximately two years ago because his father was unable to care for him. XXXXX lived for a period of time with a brother in San Francisco, but that brother is not able to care for him at this time and XXXXX has no other relatives who are able to care for him. XXXXX's mother died when he was approximately seven years old. See DHS Dispositional Report filed August 31st, 2001. XXXXX's father signed a waiver of reunification services which was accepted by the Court on September 21st. See minute order, September 21st, 2001.

XXXXX continues to reside in foster care and there is no plan for reunification as his mother is deceased and his father has signed a waiver of reunification services. Under the regulations which define eligibility for long-term foster care, a child is deemed eligible for foster care if reunification is no longer a viable option. 8 Code of Federal Reg. § 204.11 Thus, at this time for purposes of the definition of special immigrant juvenile status, XXXXX is eligible for long-term foster care as reunification does not appear to be a viable option for XXXXX.

III. IT IS NOT IN XXXXX'S INTEREST TO RETURN TO GUATEMALA

There is no one available to care for XXXXX in Guatemala. As stated above, XXXXX's father has waived reunification services and does not wish to reunify. XXXXX does not have other family who could care for him in Guatemala. XXXXX is doing very well in San Francisco. He attends Mission High School where he has received excellent grades. He is a motivated student who wants to go on to college. He is playing varsity soccer. He is doing well in his foster care placement. See DHS Report filed 8/31/01. It would be very disruptive to interrupt his educational progress and

there is no one to care for him in Guatemala so it is in his best interest that XXXXX remain in San Francisco.

IV. CONCLUSION

For the reasons discussed above, XXXXX requests that the Court grant his request for an Order pursuant to Section 153 of the 1990 Immigration Act.

Dated: _____

Abigail Trillin, Counsel for Minor