



Left in Limbo: Why Special Immigrant Juveniles Need Employment Authorization

Patricia,¹ a 21-year-old Salvadoran woman, received her green card in 2021, almost six years after fleeing El Salvador due to parental abuse. During most of this time, despite qualifying for Special Immigrant Juvenile Status (SIJS), Patricia was unable to apply for employment authorization. Although SIJS approval meant that the U.S. government had already decided it was not in her best interest to return to El Salvador because she had been abused, abandoned, neglected or otherwise harmed and that Patricia would ultimately become eligible to apply for a green card in the United States, limited SIJS visas meant that Patricia had to wait years to file her green card application. Longstanding Department of Homeland Security (DHS) policy, meanwhile, prohibited Patricia from seeking an Employment Authorization Document (EAD) until there was a green card available to her. Contrary to the goal of SIJS being a protective measure for children, DHS policy left Patricia unable to obtain a Social Security card, lawfully work, or feel secure in her new country.

Patricia's case is not unique. DHS policy prevents tens of thousands of SIJS recipients and petitioners who are trapped in a far-reaching SIJS visa backlog² from applying for EADs. An EAD not only allows SIJS youth to obtain lawful employment, in many cases it is the sole available form of government-issued identification that may be used to access essential social services and benefits. By shutting out these young people from EAD eligibility, DHS often creates severe setbacks to building a secure and dignified life in the United States while increasing children's vulnerability to exploitation.

Fixing the backlog requires a legislative solution but allowing children to apply for a work permit as their case makes its way through the lengthy immigration process does not. DHS should implement policy and regulatory changes to ensure that SIJS youth can expeditiously apply for employment authorization. Doing so would render SIJS a far more predictable vehicle for offering safety and stability, improving quality of life, and ensuring a transition to independence and adulthood for young people in need of support and protection. This policy brief examines the SIJS classification and visa backlog, highlights the adverse consequences of withholding EAD eligibility from backlogged SIJS recipients and petitioners, and offers practical recommendations for ensuring EAD eligibility far earlier in the SIJS process.

SIJS and the SIJS Visa Backlog

Created by Congress in 1990, the SIJS classification allows children who have been found by a state court to have been abused, abandoned, neglected or who have experienced similar harms at the hands of one or both parents, and whose return to their countries of origin would not serve their best interests, to petition U.S. Citizenship and Immigration Services (USCIS) for SIJ status.³ A young person classified by USCIS as a Special Immigrant Juvenile may apply for lawful permanent residence, or a "green card," as soon as an immigrant visa is "immediately available,"⁴ and may ultimately seek U.S. citizenship.

The number of visas available in all immigration categories is determined annually, based on numerical limits imposed by Congress, which allocates visas according to the category of

admission and the petitioner's country of origin. Even though SIJS is a form of humanitarian protection, SIJS visas are counted against the annual employment-based cap of 140,000 visas, and only a small fraction of those visas are available to those with SIJS.⁵ The available numbers are further limited by per-country caps, which means that the greater the demand for a SIJS visa from a single country, the more likely it is that there will be an extended wait time for citizens of that country to obtain a visa.⁶ Since April 2016, the number of Special Immigrant Juveniles from northern Central America and Mexico, in particular, have far exceeded the country caps, resulting in years-long waits between SIJS approval and eligibility to apply for a green card. In Fiscal Year 2019, for example—the year Patricia's SIJS petition was approved—USCIS granted 23,145 SIJS petitions⁷ but issued only 4,988 green cards based on the SIJ classification.⁸ As of April 2021, the number of young people in the SIJS visa backlog—that is, those with approved and pending SIJS petitions but without available visa numbers—exceeded 44,000 nationwide.⁹

KIND's own experience in providing legal representation to unaccompanied children illustrates this plight. More than a decade ago, when KIND first began working with unaccompanied children in need of protection, the period between receiving SIJS and lawful permanent residence was generally a short window of six months or less, a timeframe that was relatively consistent until 2016. The rise of migrant child arrivals from Mexico and Central America, however, created a demand that began to outstrip visa availability. The resulting backlog, coupled with administrative delays in processing SIJS petitions, means that our clients routinely wait between one and two years after their SIJS grant before they can **even apply** for lawful permanent residence. For example, many of KIND's clients who received their green cards in 2021 first obtained SIJS in 2017 but could not apply for their green card until much later.

Impact of the Prohibition on EADs for Backlogged SIJS Recipients and Petitioners

Under USCIS policy, SIJS youth can apply for EADs only when they apply for green cards, which in turn requires an available visa number.¹⁰ As such, neither SIJS recipients nor SIJS petitioners in the visa backlog are eligible to apply for employment authorization—even though DHS has already found that those recipients qualify for humanitarian protection after suffering abuse, abandonment, neglect, or similar harm, and that return to their countries of origin would not serve their best interests. The underlying assumption at the time the SIJS program was created in 1990 was that there would be virtually no wait between SIJS approval and applying for a green card and that ample visas would be available.¹¹ The backlog for SIJS youth waiting for a visa to become available, however, underscores that DHS' EAD policy is no longer consistent with congressional intent nor serves these youths' best interests.

While many SIJS youth need the ability to work to earn income and save for the future, acquiring an EAD has another paramount value. Access to an EAD unlocks essential services and opportunities, particularly at the state and local level, such as internships, experiential learning, counseling or other psycho-social training, and in some cases vital medical services that may be unavailable to young people without proof of work authorization. Blocking access to the EAD during this pivotal time in a young person's life undermines the nature of the immigration benefit itself as a humanitarian response for a young person already found to need protection within the child welfare system and for whom it is not in their best interests to return to their country of origin.

Ultimately, for these young people, access to an EAD represents far more than the right to work in the United States. It is the key to accessing independence, recovering from past harms, and building a safe, secure future. The below graphic, based on the experiences of KIND SIJS clients, illustrates the range of hardships and obstacles young people may face without an EAD.¹²

<h2>Consequences of EAD Ineligibility for SIJS Youth</h2>	
 <p>Inability to support oneself and family members</p>	<p>A young father in Baltimore struggles to adequately support his child because he cannot legally work in the United States. This dilemma is common for many SIJS recipients around the country.</p>
 <p>Denial of vital medical services</p>	<p>A deaf and chronically ill eight-year-old boy is awaiting a kidney transplant. His mother died in an accident in 2017, after which his father refused to play a role in his life. Though USCIS approved his SIJS petition in July 2021, he is ineligible for an EAD—and likely will remain so for years—due to the SIJ visa backlog. Without employment authorization, he cannot obtain a Social Security card nor access needed health benefits in California.</p>
 <p>Absence of essential identification documents</p>	<p>A young woman whose visa is available cannot complete her application for permanent residence without obtaining proof that she has no police record. To obtain the police clearance form, however, she must present photo identification. Without the EAD, she has nothing that is accepted by the police department.</p>
 <p>Ineligibility for long-term foster care</p>	<p>SIJS recipients turning 18 in some states may qualify for long-term foster care or other transitional programs, but to be accepted must comply with work requirements, which they cannot do without the EAD.</p>
 <p>Need for fee waivers due to lack of income</p>	<p>Some SIJS recipients must seek fee waivers to proceed with their applications because they have little or no income. Some KIND clients have waited over a year for their fee waiver to be approved.</p>
 <p>Blocked access to higher education</p>	<p>Aspirations for college or vocational training are frequently put on hold because SIJS students can neither access financial aid without an identification document and a Social Security card nor work to fund their own education.</p>
 <p>Heightened risk of exploitation</p>	<p>The need to support themselves and others could imperil some SIJS recipients without employment authorization, as exploitative employers or even traffickers may take advantage of their vulnerabilities.</p>

SIJS recipients, in particular, are caught in a catch-22 in which they are encouraged to build a future but are denied access to one of the fundamental tools—the EAD—for doing so. DHS’ EAD policy wastes human potential and, in many cases, endangers the health and safety of children whose cases have already been adjudicated by both a state court and USCIS and found to be in need of protection. Congress intended SIJS to safeguard vulnerable young people, grounding protection for them in the principles of child welfare¹³ with an emphasis on quick resolution and permanency. But as the need for this relief has increasingly eclipsed available visas, DHS has failed to respond administratively by evolving its EAD policy to uphold Congress’ aim.

Recommendations for Ensuring EAD Eligibility for SIJS Youth

Congress should pass legislation that eliminates the cap on SIJS visas, disentangling this humanitarian status from employment-based visa restrictions and providing necessary and speedy relief to vulnerable young people. But the Biden Administration can and must act on its own to ensure access to EADs for SIJS recipients and petitioners alike, affording them the opportunity for safety and stability even in the absence of congressional action. To this end, KIND recommends the below administrative options.

A. Confer deferred action on SIJS recipients, which would then permit them to apply for work authorization.

In recent years, DHS has opposed continuances in removal proceedings and even sought the deportation of some SIJS recipients, despite the department’s own determination that they were victims of abuse, abandonment, or neglect and that return to their countries of origin would not serve their best interests.¹⁴ DHS could foreclose these unjust outcomes and resolve this precarious legal situation by granting to SIJS recipients “deferred action”—a formal declaration that DHS will not seek to remove an individual for a specific time or under specific circumstances. As the benefits of deferred action include the ability to apply for work authorization,¹⁵ this measure would represent a dual step forward in ensuring safety and stability for SIJ youth: permitting them access to EADs that are essential to a dignified and productive life in the United States while also lifting the threat of removal to the unsafe situations they fled.

B. Issue policy guidance instructing that SIJS recipients be considered paroled for purposes of applying for an EAD.

Adjustment of status to lawful permanent residence requires that an individual be admitted or paroled into the United States. For purposes of adjustment, an individual with SIJS classification is considered paroled, regardless of the manner of entry into the United States.¹⁶ While the purpose of deeming SIJ recipients to be paroled has been narrowly construed by the government as limited to the application for adjustment of status, the statutory language provides the opportunity for USCIS to issue new policy guidance, re-interpreting the SIJS grant as a form of parole for purposes of applying for a work permit under § 274a.12(c)(11).¹⁷ This solution lacks the additional benefits associated with deferred action, but nonetheless offers expanded security for those caught in the backlog.

C. Promulgate regulations permitting work authorization upon the filing of an I-360 petition.

The Secretary of Homeland Security has broad authority to authorize the employment of foreign nationals in the United States and is charged with implementing regulations governing access to employment documents. Current regulations should be amended to recognize the humanitarian necessity of permitting SIJS petitioners to work while their cases are pending from the time of initial filing of the I-360 petition until their adjustment of status application has been adjudicated. Allowing an SIJS petitioner to apply for work authorization at the time of filing the I-360 petition—regardless of visa number availability— would optimize the benefits of the EAD for a young person and can be easily justified based on the existence of the underlying state court order. A more limited remedy, but still far superior to current policy, would be permitting youth to apply for work authorization upon the receipt of the SIJS grant.

Ultimately, DHS should adopt a multi-prong strategy to address the plight of Special Immigrant Juveniles barred from employment authorization, swiftly implementing policies that leverage existing remedies such as deferred action while also advancing regulatory reform. For these young people, EAD eligibility is a lifeline **that DHS must provide as soon as possible**.

¹ Name changed to protect confidentiality of client.

² See End SIJS Backlog Coalition and The Door, “*Any Day They Could Deport Me: Over 44,000 Immigrant Children Trapped in the SIJS Backlog*” (Nov. 2021); <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/Any+Day+They+Could+Deport+Me-+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf>

³ Immigration and Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C. 1101(a)(27)(J). SIJS is available to an individual who is: present in the United States; under 21 years of age at the time of filing; unmarried; has been declared dependent on a juvenile court, or has been 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. The petitioner must also establish that they are the subject of a state or juvenile court determination that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law, and have been the subject of a determination in judicial or administrative proceedings that it would not be in the child’s best interest to be returned to the country of nationality or last habitual residence. Finally, DHS consent to classification as a Special Immigrant Juvenile is required. For background on the evolution of the SIJS statute, see Congressional Research Service, “Special Immigrant Juveniles: In Brief, Congressional Research Service” (Aug. 2014); <https://sgp.fas.org/crs/homsec/R43703.pdf>.

⁴ INA § 245(a), In its discretion, however, USCIS sometimes permits limited I-485 filings at the beginning of a fiscal year, even if a visa is not immediately available, for administrative convenience when it anticipates that visas will soon become available in a given category.

⁵ The United States offers 140,000 employment-based visas every year, with 7.1% (9,940) going to EB-4 “special immigrants,” a category that includes Special Immigrant Juveniles, religious workers, Afghan and Iraqi military translators, and others. 8 U.S.C. § 1151(d); § 1153(b)(4).

⁶ The Center for Public Interest Law/Commission on Immigration, American Bar Association, “A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation,” by Dalia Castillo-Granados, (Feb. 23, 2021); https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo/.

⁷ USCIS, “Number of I -360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ)” https://www.uscis.gov/sites/default/files/document/reports/I360_sij_performancedata_fy2020_qtr4.pdf.

⁸ DHS, “Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2019” (<https://www.dhs.gov/immigration-statistics/yearbook/2019/table7>).

⁹ See END SIJ Backlog Coalition and The Door, “*Any Day They Could Deport Me*” (Nov. 2021); <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/A>

[ny+Day+They+Could+Deport+Me-+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf](#).

¹⁰ 8 CFR 274a.12(c)(9). If SIJS visa numbers are available, individuals may concurrently apply for SIJS, SIJS-based lawful permanent residence, and employment authorization. *See* USCIS, “Concurrent Filing of Form I-485” (Nov. 10, 2020); <https://www.uscis.gov/green-card/green-card-processes-and-procedures/concurrent-filing-of-form-i-485>; “Filing Form I-765 with Other Forms” (Mar. 4, 2021); <https://www.uscis.gov/forms/all-forms/filing-form-i-765-with-other-forms>. Lucy Grindon, “Catholic Charities Pushing to End Immigration Backlog for Abused, Neglected Minors” *National Catholic Reporter* (Jul. 13, 2021); <https://www.ncronline.org/news/justice/catholic-charities-pushing-end-immigration-backlog-abused-neglected-minors>.

¹¹ *See* Meaghan Fitzpatrick and Leslye Orloff, “Abused, Abandoned, or Neglected: Legal Options for Recent Immigrant Women and Girls,” 4 PENN. ST. J.L. & INT’L AFF. 614 (2016). Available at: <https://elibrary.law.psu.edu/jlia/vol4/iss2/12>; Dalia Castillo-Granados, The Center for Public Interest Law/Commission on Immigration, American Bar Association, “A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation” (Feb. 23, 2021); https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo/.

¹² This graphic draws from experiences of KIND clients as well as other sources. *See, e.g.*, Cal. Dept. of Social Servs., All County Letter No. 11-61 (Nov. 4, 2011), <https://bit.ly/3fgiZF8>; Wash. State Dept. of Children, Youth & Families, Extended Foster Care, <https://bit.ly/3fee3g5>; The Marshall Project, “These Young People Were Told They Could Stay in the U.S. They Might Get Deported Anyway,” by Andrew Calderon, (Jan. 28, 2021); <https://www.themarshallproject.org/2021/01/28/these-young-people-were-told-they-could-stay-in-the-u-s-they-might-get-deported-anyway>; North American Congress on Latin America (NACLA), “An Immigration Courts Backlog Keeps Central American Youth in Legal Limbo,” by Daniel Zawodny, (Jun. 29, 2021); <https://nacla.org/immigration-courts-backlog-central-american-youth-SIJS>.

¹³ Meaghan Fitzpatrick and Leslye Orloff, “Abused, Abandoned, or Neglected: Legal Options for Recent Immigrant Women and Girls,” 4 PENN. ST. J.L. & INT’L AFF. 614 (2016). Available at: <https://elibrary.law.psu.edu/jlia/vol4/iss2/12>; Center for the Study of Social Policy, “Special Immigrant Juvenile Status: A Critical Pathway to Safety and Permanence,” <http://cssp.org/wp-content/uploads/2018/08/SIJS-Fed-Practitioners.pdf>; The Center for Public Interest Law/Commission on Immigration, American Bar Association, “A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation,” by Dalia Castillo-Granados, (Feb. 23, 2021) https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo/.

¹⁴ *See, e.g.*, Brief of Amici Curiae, *C.M.L. v. Barr*, No. 20-9564 (10th Cir. 2020), available at <https://www.lowenstein.com/media/6305/cml-v-william-barr-us-court-of-appeals-for-the-tenth-circuit-amicus-brief-11252020.pdf>.

¹⁵ 8 CFR 274a.12(c)(14).

¹⁶ Section 274a.12(c)(9) states that a noncitizen who has filed for adjustment of pursuant to § 245 of the regulations—including SIJS recipients, who are deemed parolees under INA 245, 8 U.S.C. § 1255—“must apply for work authorization.”

¹⁷ The first federal judge to confront the question found that SIJS recipients are *also* paroled for humanitarian reasons pursuant to INA 212(d)(5), 8 U.S.C. § 1182(d)(5), making them eligible for EADs under this provision of the regulations. *Godinez v. DHS*, No. 20-00828-CV-W-GAF (W.D. Mo. 2021) (finding eligibility at the motion to dismiss stage).