

**May 2022 Policy Update:
Deferred Action for Special Immigrant Juveniles and Employment Authorization**

Special immigrant juveniles (SIJs) are abused, abandoned and neglected young people who may qualify for lawful permanent residence status under federal laws created to protect this vulnerable population. While some SIJs are eligible to apply for permanent residence immediately,¹ others must wait for one of the numerically limited slots to become available.² While they wait, they are not issued employment authorization documents (EADs), because until May 6, 2022, USCIS had been unlawfully denying SIJs such EAD authorization. This policy has harmed SIJs, who have been unable to help support their families, obtain social security numbers, apply for driver's licenses, and pursue higher education benefits. A confluence of advocacy efforts led USCIS to finally change this harmful policy. The American Bar Association adopted a resolution calling for work permits for such youth in February 2021 and SIJ advocates across the U.S., including MLRI, engaged in administrative and legislative campaigns and filed litigation to alter USCIS' policies and practices.³

In June 2021, MLRI wrote to Alejandro Mayorkas, Secretary of the Department of Homeland Security (DHS), identifying three specific mechanisms to remedy the issue of USCIS unlawfully deeming SIJs ineligible to apply for employment authorization, including deferred action, the policy ultimately chosen by USCIS to correct the problem. The MLRI letter referred to *Godinez v. USCIS*, 20-CV-0828-GAF, Dkt. 21 (W.D. Mo., 2/10/21), a lawsuit filed on behalf of an SIJ beneficiary unlawfully denied an EAD in Missouri, and sought to avoid further litigation in Massachusetts. When DHS did not change its policies on its own initiative, MLRI filed a lawsuit, *LFOP v. Mayorkas*, in September 2021 with Nutter McClennen & Fish, Demissie & Church and PAIR on behalf of several injured SIJ youth, and later amended the suit to a class action on behalf of all similarly situated SIJs in Massachusetts.⁴ In response, DHS filed a motion to stay the litigation and stated in court filings that USCIS was contemplating a new process to provide EADs to SIJs but did not provide the court with information committing to adopting any such process. Plaintiffs in *LFOP* opposed the stay, citing the significant hardship to the abused, abandoned, and neglected class members we represent. The judge sided with plaintiffs, denying the stay. Soon thereafter, the parties entered into an agreement whereby the named plaintiffs were offered deferred action and employment authorization in exchange for an extension of time. On March 7, 2022, DHS expanded the deferred action and EAD relief to SIJs nationwide, in a policy that took effect May 6, 2022.⁵ Under this new policy, thousands of SIJs in Massachusetts and tens of thousands nationwide are now eligible for deferred action status and corresponding EADs. As of April 2021, 2,309 SIJs in Massachusetts and 44,335 SIJs in the United States were in the permanent resident visa availability "backlog," (not yet eligible to apply for lawful permanent resident status), the subgroup of all SIJs nationwide who are covered by the new policy.⁶ This document provides information for SIJs and attorneys working with SIJs in the wake of this policy.

¹ See Volume 7- Adjustment of Status, Part F - Special Immigrant-Based (EB-4) Adjustment, Ch. 7 - Special Immigrant Juveniles, available at: <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7>

² See INA § 203(b)(4)(annual limit to visas available in EB-4, the SIJ category); INA § 202(a)(2)(annual limit to the number of applicants from a given country).

³ ABA Resolution 103A (February 22, 2021), available at:

<https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103a-midyear-2021.pdf>

⁴ *LFOP v. Mayorkas*, 21-CV-1156 (D.Mass. 2021)

⁵ See March 7, 2022 Policy Alert: Special Immigrant Juvenile Classification and Deferred Action, available at

<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>.

See also Volume 6, Immigrants, Part J, Special Immigrant-Based, Ch. 4, Adjudication, Section G, Deferred Action, available at: <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4>.

⁶ The Door and End SIJS Backlog Coalition, "Any Day They Could Deport Me": Over 44,000 Immigrant Children Trapped in the SIJS Backlog (November 2021), available at: <https://door.org/any-day-they-could-deport-me/>

Frequently Asked Questions⁷

1. What is deferred action for Special Immigrant Juveniles?

On May 6, 2022, USCIS implemented a new policy to consider deferred action for Special Immigrant Juveniles (SIJs) who are ineligible to apply for adjustment of status to lawful permanent resident (LPR) status solely due to visa unavailability.⁸ Individuals will be granted deferred action for four years, and can apply for employment authorization for the entire deferred action period.

2. What does deferred action mean?

Deferred action is an act of prosecutorial discretion that defers Immigration and Customs Enforcement (ICE) from removing a noncitizen from the United States for a certain period of time. It is not an immigration status, nor does it lead to any lawful status. Noncitizens with deferred action are eligible to apply for employment authorization.

3. Are all SIJs eligible for deferred action?

No. This new policy only affects SIJs whose priority date (the date that they filed a petition for SIJ status on Form I-360) is not current. In other words, deferred action is available only to SIJs in the “backlog,” meaning SIJs with approved I-360s who are not immediately eligible to apply for adjustment to lawful permanent resident status. Currently, these individuals are from countries that are considered “oversubscribed” for visa number availability, which at this time includes Mexico, El Salvador, Honduras, and Guatemala.⁹

4. How long is the period of deferred action granted?

A grant of SIJ deferred action under this policy is for a period of four (4) years.

5. When did USCIS start making deferred action determinations under this policy?

This new policy took effect May 6, 2022.

6. Do SIJs have to apply for deferred action?

No. SIJs are not required to submit a separate request for deferred action. USCIS will automatically conduct deferred action determinations for eligible SIJs and will not accept separate requests.

7. Is there a time frame for deferred action determinations?

No. USCIS has not provided a time frame for its deferred action determinations.

⁷ Last updated May 19, 2022

⁸ See March 7, 2022 Policy Alert: Special Immigrant Juvenile Classification and Deferred Action, available at: <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>. See also Volume 6 - Immigrants, Part J - Special Immigrant Juveniles, Ch. 4 - Adjudication, Section G - Deferred Action, available at: <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4>.

⁹ See Department of State May 2022 Visa Bulletin, available at: https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_may2022.pdf. Note that current priority dates for SIJs from these countries can change each month. For example, as of May 2022, Mexicans SIJs do not have as long a wait in the backlog as SIJs from Honduras, El Salvador, and Guatemala.

8. How will SIJs know when there is a decision on their deferred action?

Eligible individuals (those with approved SIJS petitions who are not able to apply for adjustment due to visa unavailability) can check the online USCIS Case Status Information page, available here: <https://egov.uscis.gov/casestatus/landing.do>. SIJs are required to enter the receipt number for their I-360 in order to check their deferred action status. While SIJs should also receive a receipt in the mail, USCIS has stated that the online system will provide faster results.

9. Is there anything SIJs can do if they have not received a deferred action determination?

If an SIJ has been waiting more than a month for a deferred action determination, we suggest calling USCIS at 800-375-5283 or submitting a status inquiry through the USCIS contact center, available here: <https://www.uscis.gov/contactcenter>. USCIS will ask for the I-360 receipt number in order to conduct the status inquiry. This process triggers USCIS to send an internal notice to the National Benefits Center, where deferred action decisions are made and SIJS petitions are adjudicated.

10. How does USCIS decide who receives deferred action?

USCIS considers deferred action on a case-by-case basis to determine who warrants a favorable exercise of discretion. USCIS may grant deferred action if, based on the totality of the facts and circumstances of the case, the positive factors outweigh the negative factors. Some particularly strong positive factors are:

- The approved I-360 petition; and
- The probate/state/juvenile court determination that it is not in the best interest of the SIJ to be returned to the country of nationality or last habitual residence of the SIJ or SIJ's parents.

Some strong negative discretionary factors include:

- Serious unresolved criminal charges; and
- An admissibility ground that cannot be waived.

11. Will SIJs have to submit new biometrics to be considered for deferred action?

Submission of biometrics is not required for consideration of deferred action, but USCIS may request that an SIJ complete new biometrics before making a determination.

12. Will there be an interview for deferred action?

An interview is not required for a favorable determination of deferred action, but USCIS may request an interview before making a decision on an SIJ's deferred action.

13. May SIJs with deferred action obtain employment authorization?

Yes. SIJs who are granted deferred action can apply for employment authorization documents (EADs) by filing an Application for Employment Authorization (Form I-765) under the (c)(14) category (deferred action) with the forms and attachments described below. If granted, the employment authorization will be valid for the same length of time as the deferred action grant.

14. When can SIJs apply for employment authorization?

SIJs can apply for employment authorization as soon as they receive deferred action. Once the online case status information page indicates that an individual has been approved for deferred action, the SIJ can submit an I-765 application for employment authorization under the (c)(14) category. We suggest printing the case status information page and including it in the I-765 application packet. There is no need to wait for a deferred action notice in the mail. Note: Individuals applying for I-360s cannot file concurrent I-360 and I-765 applications. They must wait for a decision on their I-360 and deferred action before applying for an EAD.

15. What will be required to apply for employment authorization?

SIJs with deferred action should submit the Application for Employment Authorization (I-765) indicating category (c)(14), a printout of the case status information page signifying approved deferred action, identification documents,¹⁰ a filing fee of \$410.00 or the Fee Waiver Form (I-912) accompanied by a copy of the I-360 approval notice. SIJs do not need to fill out Sections 4-6 of the Fee Waiver Form.¹¹ Applicants are similarly not required to fill out the I-765 Worksheet as USCIS presumes economic necessity.

16. Is there a minimum age requirement for seeking this kind of employment authorization?

No. USCIS has indicated that there is no minimum age requirement to apply for this employment authorization document.

17. Where should applicants send the work authorization application?

Applicants for work authorization should file the employment authorization application to the USCIS Lockbox in Chicago or Phoenix, depending on where the SIJ resides.¹² Applicants in Massachusetts should mail their applications to the Chicago lockbox.

18. How can applicants update their addresses with USCIS?

Applicants should update their mailing addresses by mailing a form AR-11 to USCIS.¹³

¹⁰ Documentation requirements for all I-765 Applicants for Employment Authorization are explained on page 25 of the I-765 application, available here: <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf>.

¹¹ According to the Instructions for the I-912 Fee Waiver, "If you are filing Form I-485, Application to Register Permanent Residence or Adjust Status, based on SIJ classification, accompany the fee waiver request by evidence that the applicant was approved or filed for SIJ classification ... SIJ Applicants seeking adjustment of status based on such classification are not required to complete Parts 4. – 6. of Form I-912 nor show proof of income." While these instructions refer to I-485 applications, USCIS stated at its April 27, 2022 stakeholders meeting that it would be applying these instructions to the deferred action employment authorization criteria for SIJs. The Form I-912 instructions are available at: <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf>.

¹² In order to locate the correct lockbox for deferred action recipients, please refer to USCIS Direct Filing Addresses for Form I-765, available at: <https://www.uscis.gov/i-765-addresses>.

¹³ SIJs with approved I-360s are also able to change their address online. For more information, refer to USCIS AR-11 Change of Address, available at: <https://www.uscis.gov/ar-11>

19. What happens to SIJs who applied for work authorization under another category prior to May 6, 2022?

The deferred action policy applies only to SIJs who are in the “backlog” described above (not eligible to apply for adjustment of status due to visa unavailability). Some individuals in the backlog currently have applied for but not received employment authorization in another category: (c)(11) – parole; (c)(8) – asylum applicants; and others.¹⁴

USCIS has stated that backlogged SIJs who applied for work authorization under the (c)(11) parole category must wait for a deferred action determination, and can then reapply for work authorization under category (c)(14). We are aware that these extra procedural steps waste valuable time and resources, and we will continue to advocate for a more streamlined process for individuals who have already applied for EADs. SIJs who receive an RFE under (c)(11) may contact MLRI for a template response.

At this time, we have not been informed how USCIS will respond to backlogged SIJs who have applied for work authorization in categories other than (c)(11), such as those in the (c)(8) category. We will provide you with an update as soon as we learn more.

20. Will USCIS issue Requests for Evidence or Notices of Intent to Deny in connection with deferred action adjudications?

No. USCIS has stated that it will not issue Requests for Evidence (RFEs) or Notices of Intent to Deny (NOIDs) in making deferred action determinations.

21. Can USCIS terminate or rescind deferred action?

Yes. USCIS can terminate or rescind deferred action as a matter of discretion. USCIS may terminate deferred action if an individual’s previous deferred action was granted in error, if USCIS determines that favorable discretion is no longer warranted, if the SIJS petition is revoked, or for other reasons within its discretion.

22. If deferred action is denied, terminated or rescinded, is there a way to appeal or reopen the adjudication?

No. USCIS has stated that denials, terminations and rescissions of deferred action determinations will not be appealable or subject to Motions to Reopen.

23. Are SIJs in removal proceedings eligible for deferred action under the new policy?

Yes. USCIS may grant deferred action to SIJs who have never been in removal proceedings, who are in removal proceedings, who have a final order of removal, or who have voluntary departure. However, deferred action will not be considered for individuals in ICE detention.

¹⁴ We request that SIJs who have applied for employment authorization in (c)(11), (c)(8) or another category notify MLRI so that we can track how these cases progress under the new policy.

24. How does this policy affect SIJs with current priority dates who are eligible to apply for adjustment of status but have not yet been able to apply for permanent residency?

Deferred action for SIJs under this new policy is only available for individuals who are not eligible to adjust status because of the visa availability “backlog” described above. Therefore, individuals eligible to apply for adjustment to permanent residence as SIJs are not covered by this policy, regardless of whether they have applied for permanent residence and employment authorization under (c)(9).

25. How will USCIS apply this policy to people who will be approved as SIJs in the future?

USCIS plans to evaluate all individuals for deferred action at the time that they adjudicate the I-360 petition. Individuals will receive one Notice of Action Form (I-797) indicating USCIS’s determination for both the I-360 and the deferred action. The SIJ does not have to request deferred action, send in a concurrent I-765 or take any other extra steps. USCIS will conduct a deferred action review automatically. Note: this process differs from the procedure USCIS is using for SIJs whose I-360s were approved before May 6, 2022 – those individuals will receive a decision on deferred action only.

26. Will SIJs who applied for adjustment of status under category (c)(9) before the March and April 2022 visa retrogressions be eligible for deferred action?

SIJs who applied for adjustment of status and work authorization before the March and April 2022 visa retrogressions,¹⁵ but who now lack a current visa due to retrogression, are not eligible for deferred action under the policy because they have pending adjustment of status applications (and through it, an alternative means of obtaining work authorization under category (c)(9)). If you have questions about the retrogression and deferred action, please contact MLRI.

27. Is there a process to renew deferred action?

Yes. USCIS has indicated that there will be a process to renew deferred action for SIJs who are still ineligible to apply for adjustment of status due to visa unavailability 150 days before the end of the deferred action period. We do not yet know what this process will be, but MLRI will continue to request more information on this issue.

28. How can I find out more about this policy?

MLRI intends to continue updating resources and will provide trainings for anyone interested in learning more about the policy once we have more information from USCIS about the implementation and rollout process. In the meantime, please contact Heather Yountz at hyountz@mlri.org or Iris Gomez at igomez@mlri.org for more information.

¹⁵ In March 2022, the visa processing times of SIJs from Guatemala, Honduras, and El Salvador retrogressed (moved backwards) from March 15, 2019 to May 1, 2017. In April 2022, the visa processing times of SIJs from Mexico retrogressed from current to April 1, 2020. This retrogression had a devastating effect on SIJs who were on brink of adjusting status, and it created confusion for SIJs who were eligible to apply for adjustment of status but had not yet filed their I-485 applications. The March 2022 Visa Bulletin is available at: https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_March2022.pdf, and the April 2022 Visa Bulletin is available at: https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_April_2022.pdf.