

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **AN ORDER REGARDING CHILD’S ELIGIBILITY FOR SPECIAL IMMIGRANT**
3 **JUVENILE STATUS**

4 **INTRODUCTION**

5 This Memorandum of Points and Authorities is submitted in support of D. XXXX’s
6 request for an order making the necessary factual findings to enable him to petition the U.S.
7 Citizenship and Immigration Services (“CIS,” formerly “INS”) for Special Immigrant Juvenile
8 Status pursuant to Section 101(a)(27)(J) of the Immigration and Nationality Act (the “INA”).
9 The relevant provisions of the INA are codified at 8 U.S.C. § 1101(a)(27)(J) (attached hereto as
10 Exhibit 1); the Code of Federal Regulations sets forth the standard for implementing the statute
11 at 8 C.F.R. § 204.11 (attached hereto as Exhibit 2). A Special Immigrant Juvenile is an
12 immigrant who is in the United States and who has been declared dependent on a juvenile court
13 located in the United States or whom such court has legally committed to, or placed in the
14 custody of, an agency or department of a State, and who has been deemed by that court eligible
15 for long-term foster care due to abuse, neglect, or abandonment. (8 U.S.C. § 1101(a)(27)(J).)

16 D. is seeking the protection of the United States by applying for Special Immigrant
17 Juvenile Status. D. meets the criteria for a Special Immigrant Juvenile under Section 101
18 (a)(27)(J) of the INA. (See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.) If the CIS approves
19 his application, he will be eligible to adjust his status to an alien lawfully admitted to the
20 United States for permanent residence. (8 U.S.C. § 1255(a), (h).) That means D. will be able to
21 apply for his “green card.” As a “green card” holder, he will have the right to live and work
22 permanently in the United States. After five years as a lawful permanent resident, D. can apply
23 for U.S. citizenship. (8 U.S.C. § 1427(a).)¹

24 The INA has specifically delegated to the state juvenile courts the authority to make
25 special findings of fact. (8 C.F.R. § 204.11(a).) The juvenile court does not make any
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28 ¹ The fact that a deportation order and warrant were previously issued for D. does not bar him
from applying for and receiving Special Immigrant Juvenile Status. (See *Zheng v. Pogash*
(2006) 416 F.Supp.2d 550.)

1 immigration decisions, but rather, makes factual findings concerning the best interest of the
2 child. The juvenile court makes these findings because it is the court with expertise in juvenile
3 matters. The CIS has approved Special Immigrant Juvenile Status cases involving children
4 under the jurisdiction of the dependency court, delinquency court, and probate court.

5 In a SIJS case, federal law requires state courts to make the following factual findings:

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7 1. The juvenile has been declared dependent on a juvenile court or such a
8 court has legally committed the juvenile to, or placed him or her under the
9 custody of, an agency or department of a State. (8 U.S.C. § 1101(a)(27)(J)(i); 8
C.F.R. § 204.11(a), (d)(2)(i).)

10 2. The juvenile is “eligible for long-term foster care” due to abuse, neglect,
11 or abandonment. (8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(d)(2)(ii).)

12 3. It is not in the “best interest” of the juvenile to be returned to his or his
13 parent’s previous country of nationality or country of last habitual residence. (8
U.S.C. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(d)(2)(iii).)

14
15 An applicant for Special Immigrant Juvenile Status must also be unmarried and under the age of
16 21. (8 C.F.R. § 204.11(c)(1), (2).)

17 This Court’s order is a prerequisite to apply to the CIS for Special Immigrant Juvenile
18 Status. (8 C.F.R. § 204.11(d)(2).) D. cannot apply for Special Immigrant Juvenile Status unless
19 he has the requested court order. He must submit the order to the CIS as part of his application
20 packet for Special Immigrant Juvenile Status. Based on his Special Immigrant Juvenile Status
21 application, he can also apply for lawful permanent residency. The CIS will adjudicate his case
22 at his CIS “adjustment interview.” Attorney K has agreed to represent D. in applying for Special
23 Immigrant Juvenile Status, but only if this Court makes the required SIJS findings. (See letter
24 from Attorney K, attached as Exhibit 3.)

25 In point of fact, this Court has already determined that D. should be afforded the
26 protection of the dependency system by declaring him a dependent and removing him from his
27 mother due to her mental illness and neglect of D. Given that D’s mother has been found
28 removable and is scheduled to be deported within the next few weeks, if the Court were to

1 decline to issue the Special Immigrant Juvenile predicate order, the Court would, as a practical
2 matter, be returning D. to his mother's custody even though there has been no showing that she
3 is now fit to care for him or that such de facto reunification would be in D's best interest.

4 On the other hand, if the Court makes the Special Immigrant Juvenile predicate order,
5 nothing would bar the Court from continuing with efforts to reunify D. with his mother. Nor
6 does the Court actually have to order D. into long-term foster care: it need only determine that he
7 appears *eligible* for placement in long-term foster care at this time. Federal regulations
8 specifically contemplate that the Court may later alter its findings regarding (i) D's eligibility for
9 long-term foster care, and (ii) whether it would be in his best interest to be returned to Y or Z.
10 Such a change in the Court's findings would be determinative of D's eligibility for Special
11 Immigrant Juvenile-based adjustment of his immigration status. (See 8 C.F.R. § 205.1(a)(3)(iv)
12 [Special Immigrant Juvenile Status automatically terminates "(C) Upon the termination of the
13 beneficiary's dependency upon the juvenile court; (D) Upon the termination of the beneficiary's
14 eligibility for long-term foster care; or (E) Upon the determination in administrative or judicial
15 proceedings that it is in the beneficiary's best interest to be returned to the country of nationality
16 or last habitual residence of the beneficiary or of his or her parent or parents."].)

17 Moreover, regardless of D's federal immigration status, California has an independent
18 interest in protecting abused, abandoned, or neglected children in its dependency system. (See *In*
19 *re Malinda S.* (1990) 51 Cal.3d 368, 384.) (Review in 2014 found *Malinda S.* Superseded by
20 Statute as stated in *In re Lucero L.*, 22 Cal.4th 1227) This Court's issuance of the Special
21 Immigrant Juvenile predicate order will preserve the status quo and permit the orderly resolution
22 of the dependency proceedings, which will otherwise be cut short by D's deportation and de facto
23 reunification with a neglectful and presently unfit parent. Therefore, D. respectfully requests that
24 the Court enter the order making the appropriate findings of fact to enable him to apply for status
25 as a Special Immigrant Juvenile.
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28 **STATEMENT OF FACTS**

1 The XXX XXXXX County Social Services Agency (“Agency”) detained then-12-year-
2 old D. on July XX, 2005, after his mother abandoned him at the XXXXX Rescue Mission. (Det.
3 Rpt. dated 7/15/05, p. 3.) D. reported that he and his mother had been homeless and moving
4 from shelter to shelter for some time. He had not attended school regularly. (*Id.* at p. 4.) Nor
5 was this the first time that his mother had abandoned him. She once left him to sleep alone on
6 the streets. (*Id.* at p. 3.)

7 D. said his mother was mentally ill. (Det. Rpt. dated 7/15/05, p. 3.) The social worker
8 wrote that “CWS/CMS shows that mother was assessed as having mental health problems in that
9 she was tangential and failed to cooperate.” (*Id.* at p. 4.) The Agency had received two prior
10 referrals in 2005 alleging physical abuse and neglect by the mother, but neither one was
11 substantiated. (*Id.* at p. 5; Juris./Dispo. Rpt. dated 8/XX/05, p. 3; Status Rev. Rpt. dated
12 3/XX/06, p. 4.) On July 15, 2005, the Court ordered D. detained in foster care. (Minute Order
13 dated 7/XX/05.)

14 The Agency interviewed the mother, G. XXXX, prior to the jurisdictional hearing. The
15 mother “often appeared confused” and was reluctant to discuss the allegations. (Juris./Dispo.
16 Rpt. dated 8/XX/05, p. 9.) She said that she was born in Y and raised in Z, where her family
17 lived. (*Id.* at p. 6.) She had come to the United States in 2003 after having been homeless in Y.
18 (*Id.* at p. 9.) The mother confirmed that she and D. had been moving from shelter to shelter for
19 at least six months. (*Ibid.*) She also told the social worker that she and D. had received
20 deportation orders in February 2005. (*Ibid.*)

21 D. said that ““my mom gets kicked out of a lot of places because she has mental
22 problems. She screams at the police and stuff. She’s done this a couple of times. One night I
23 had to sleep outside cause she just walked off and I didn’t know where she was.”” (Juris./Dispo.
24 Rpt. dated 8/XX/05, p.10.) D. added that staff at the shelter had to coerce the mother into
25 enrolling him in school. (*Ibid.*)

26 On October XX, 2005, the Court sustained the petition as amended. (Minute Order dated
27 10/XX/05) On November XX, 2005, D. was declared a dependent of the juvenile court pursuant
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1 to Welfare and Institutions Code section 300, subdivision (b) (neglect). The Court ordered the
2 mother to complete parenting, individual counseling, and to participate in a full psychological
3 evaluation and psychiatric testing. The Agency was ordered to investigate and assist D. with his
4 immigration issues. (Minute Order dated 11/XX/05.)

5 The court held a six-month review hearing on March XX, 2006. The social worker
6 reported that while the mother had attended parenting and individual counseling, she had not
7 overcome the problems that led to D's removal. (Status Rev. Rpt. dated 3/XX/06, pp. 4-12.)
8 The mother continued to be homeless. She had not worked since D's detention. (*Id.* at p. 4.)
9 The parenting class facilitator told the social worker that while the mother attended classes every
10 week, "we're not sure why." (*Id.* at p. 8.) He said the mother continued to be elusive about her
11 situation and barely participated despite the efforts of other members of the parenting group to
12 include her. (*Ibid.*)

13
14 Mother's individual therapist also reported that it was difficult to get information from
15 the mother during therapy. The therapist was in the process of examining the mother's
16 evasiveness. (Status Rev. Rpt. dated 3/XX/06, p. 8.) Additionally, despite several attempts, the
17 mother was unable to find an agency willing to conduct a psychological evaluation of her. (*Id.* at
18 pp. 8-9.)

19 The mother continued to exhibit signs of mental illness. The social worker said that the
20 mother would call her or appear at her office unannounced. "Each time she calls or has face to
21 face contact with this CSW, she has flat affect, she repeats statements as well as her name and
22 then spells her name for CSW as if it is her first time she is having contact with this CSW."
23 (Status Rev. Rpt. dated 3/XX/06, p. 9.) When the social worker questioned the mother about her
24 progress, "she provides limited information, repeats herself, and rarely answers the questions
25 directly. This CSW has to redirect mother at times and repeat the questions to her in order to
26 obtain minimum cooperation from her." (*Id.* at p. 10.) The mother's interaction with D. during
27 visits was "limited and strained" according to the Foster Family Agency worker who monitored
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1 the visits. (*Id.* at p. 12.) The social worker believed that there was not a substantial probability
2 that D. could be returned to the mother. (*Id.* at p. 10.)

3 On the other hand, the Agency reported that D. was thriving and happy in the care of his
4 foster mother, Ms. B. (Status Rev. Rpt. dated 3/XX/06, p. 12.) Ms. B was willing to either
5 become D's legal guardian or adopt him. (*Id.* at p. 10.) D. had been experiencing nightmares
6 about being deported to Y or Z. (*Id.* at p. 7.) He was attending therapy weekly designed to
7 decrease his depression and anxiety related to his history of homelessness and the physical abuse
8 and neglect inflicted by his mother. (*Ibid.*)

9 Although the petition did not allege physical abuse, D. told his therapist that his mother
10 had hit and pinched him in the past. (Status Rev. Rpt. dated 3/8/06, p. 4.) His maternal
11 grandmother had also hit him with a stick with thorns on it when he was four or five. The
12 mother admitted hitting D., but minimized the incidents. The social worker concluded that the
13 allegations of physical abuse by the mother were substantiated. (*Ibid.*)

14 The Court found that the mother was in partial compliance with her case plan, but that D.
15 would be at substantial risk if returned to her. It continued reunification services and set a
16 twelve-month review hearing for September XX, 2006. (Minute Order dated 3/XX/06.)

17 On June XX, 2006, the Agency walked on a report informing the Court and parties that the
18 mother had been detained by immigration and was currently in federal custody. An immigration
19 officer had called the social worker to inform her that he had final removal orders for both
20 mother and D. (Ex Parte App. & Order dated 6/XX/06, p. 2.) The mother believed she would be
21 deported to Z because her papers for Y were no longer valid. (*Ibid.*)

22 D. told the social worker he did not want to go back with his mother. He wanted to remain
23 with his foster mother, where he was doing well at home and in school. (Ex Parte App. & Order
24 dated 6/XX/06, p. 3.) D. recalled how difficult times were when he lived with his mother and
25 they were homeless. The Agency recommended that D. remain placed with his foster mother,
26 Ms. B. (*Ibid.*)
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1 On June XX, 2006, the Court ordered that D. not be removed from the jurisdiction of the
2 juvenile court. It also ordered that D's attorney be noticed of any attempt to detain or deport D.
3 (Minute Order dated 6/XX/06.)

4 On June XX, 2006, after being informed by County Counsel that it intended to provide D's
5 address to immigration authorities within three hours, counsel for D. sought an emergency order
6 barring such disclosure pursuant to Welfare and Institutions Code sections 308, 368, and 827.
7 After hearing argument, the Court denied the request, but indicated that it would approve a
8 request to appoint an immigration attorney to represent D. to seek appropriate relief from federal
9 authorities or the federal court.² County Counsel represented that an immigration officer had
10 assured that D. would not be detained until July XX, 2006. (See Minute Order dated 6/XX/06.)
11

12 **I. THIS COURT DECLARED D. A DEPENDENT CHILD OF THE COURT**

13 In order for D. to apply for Special Immigrant Juvenile Status, a state juvenile court must
14 make certain findings of fact. (8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11.) Immigration
15 regulations define the term juvenile court as "a court located in the United States having
16 jurisdiction under State law to make judicial determinations about the custody and care of
17 juveniles." (8 C.F.R. § 204.11(a).) This Court has the authority to make the required factual
18 findings to permit D. to apply for Special Immigrant Juvenile Status. On November 9, 2005, D.
19 was declared a dependent child of the juvenile court. (Minute Order dated 11/9/05.) The Court
20 placed him in the custody of the agency. (*Ibid.*) He remains in a foster care placement.
21

22 **II. D. IS ELIGIBLE FOR LONG-TERM FOSTER CARE**

23 Federal immigration regulations define the term "eligible for long-term foster care"
24 liberally. Federal law does not expressly require the juvenile court to have already terminated
25 family reunification services, nor to have actually ordered the child into long-term foster care.
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28 ² Such appointment is authorized under section 317, subdivision (e) of the Welfare and
Institutions Code and rule 5.660(g) of the California Rules of Court.

1 Rather, the juvenile court need only find that reunification with a parent is not “a viable option.”

2 According to 8 C.F.R. § 204.11(a):

3 Eligible for long-term foster care means that a determination has been made by
4 the juvenile court that family reunification is no longer a viable option. A child
5 who is eligible for long-term foster care will normally be expected to remain in
6 foster care until reaching the age of majority, unless the child is adopted or placed
7 in a guardianship situation. For the purposes of establishing and maintaining
8 eligibility for classification as a special immigrant juvenile, a child who has been
9 adopted or placed in guardianship situation after having been found dependent
10 upon a juvenile court in the United States will continue to be considered to be
11 eligible for long-term foster care.

12 Although the juvenile court has not yet terminated family reunification services, the
13 evidence amply supports a finding that reunification is not a viable option.³ The mother is
14 currently in federal custody awaiting deportation. She has no realistic chance of regaining
15 custody of D. at the twelve-month review hearing scheduled for September XX, 2006. By that
16 time, she will likely already have been deported. In any case, the juvenile court is not required to
17 suspend dependency proceedings pending a parent’s release from federal immigration custody.
18 (*In re Maria S.* (1997) 60 Cal.App.4th 1309, 1312.)

19 Furthermore, the evidence presented at the six-month review showed that mother was
20 merely going through the motions of complying with case plan. She had not made any
21 substantive progress in treating the problems that led to D’s removal. She was still homeless and
22 she had not complied with the most important component of her case plan – obtaining a
23 psychological evaluation and psychiatric testing and following any recommendations for
24 treatment.

25 ³ In the event the Court believes it is necessary to terminate reunification services before making
26 the Special Immigrant Juvenile Status findings, on June 30, 2006 D. filed a Welfare and
27 Institutions Code section 388 petition requesting immediate termination of reunification services,
28 which would be well within the juvenile court’s discretion given the mother’s imminent
deportation and the futility of providing further reunification services. (See *In re Aryanna C.*
(2005) 132 Cal.App.4th 1234; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872; Welf. &
Inst. Code, § 361.5, subd. (e)(1).)

1 D. has stated since detention that his mother is mentally ill. This is consistent with the
2 observations of the social worker as well as the mother’s parenting instructor and individual
3 therapist, who describe the mother as unable to comprehend what is happening, evasive and non-
4 participatory. Mental illness does not simply go away. There is nothing in the record to suggest
5 that the mother’s mental health problems have been successfully treated or have subsided. Even
6 if the mother could show full compliance with the case plan by the twelve-month review, it
7 would not entitle her to return because D. would still be at risk. (See *Constance K. v. Superior*
8 *Court* (1998) 61 Cal.App.4th 689, 703-711; *In re Joseph B.* (1996) 42 Cal.App.4th 890, 900.)
9 Further, D. is adamant that does not want to return to his mother and fears becoming homeless
10 once again.
11

12 Thus, the great weight of the evidence is that reunification is not a viable option and
13 therefore that D. is “eligible for long-term foster care” – which in actuality may include legal
14 guardianship or adoption. (8 C.F.R. § 204.11(a).)
15

16 **III. IT IS NOT IN D’S BEST INTEREST TO BE RETURNED TO Y OR Z**

17 In commenting on the final regulations governing Special Immigrant Juvenile
18 Status, the CIS made it clear that the juvenile court has the sole discretion to make the
19 requisite finding that it is not in the child’s best interest to be removed from the United
20 States:

21 The final rule states that the decision concerning the best interest of the child may
22 only be made by the juvenile court or in administrative proceedings authorized or
23 recognized by the juvenile court. . . . The Service [CIS] does not intend to make
24 determinations in the course of deportation proceedings regarding the ‘best
25 interest’ of a child for the purpose of establishing eligibility for special immigrant
26 juvenile classification. *The rule does not contain any restrictions on factors*
27 *which may be considered in determining the best interest of the child.* The
28 Service believes that it would be both impractical and inappropriate for the
Service to routinely re-adjudicate judicial or social service agency administrative
determinations as to the juvenile’s best interest. Abuse of this provision is of
concern both to Congress, as shown by the statutory restriction on the grant of
future immigration benefits for the juvenile’s parent(s) based upon the
relationship, and to the Service. However, the *Service believes that a child in*

1 *need of the care and protection of the juvenile court should not be precluded from*
2 *obtaining special immigrant status because of the actions of an irresponsible*
3 *parent or other adult.* The Service also believes it would be impractical and
4 inappropriate to impose consultation requirements upon the juvenile courts or the
5 social service system, especially requirements which could possibly delay action
6 urgently needed to ensure proper care for dependent children.

6 (58 Fed. Reg. 42847 (Aug. 12, 1993), emphasis added, attached hereto as Exhibit 4.)

7 For the reasons already articulated, it is not in D's best interest to be returned to
8 either Y or Z. To do so would result in the de facto return of custody to his mother, who
9 this Court found had placed D. at substantial risk of serious physical harm or illness.

10 (See Welf. & Inst. Code, § 300, subd. (b).) Before coming to the United States, D. and
11 his mother lived in Y and were homeless by the mother's own admission. Moreover,
12 there is no evidence that authorities in Y ever intervened to protect D. from his mother.
13 D. would fare no better if deported to Z. Although D. has maternal relatives there, there
14 is no evidence that they have ever attempted to protect D. from his mentally ill mother.
15 In addition, D. has said that his maternal grandmother physically abused him.

16 For the first time in his young life, D. finally has some stability. He is able to
17 attend school, participate in after-school sports, and have some semblance of a normal
18 life. His foster mother has nothing but praise for him and wants to provide him with
19 permanence either through guardianship or adoption. To force D. to return to Y or Z with
20 his mother, whose mental health problems remain untreated, is unquestionably not in his
21 best interest. The paramount concern of the juvenile court in dependency proceedings
22 must be the child's protection and welfare. (See Welf. & Inst. Code, §§ 202, 300.2.)

23 Therefore, the Court should find that it is not in D's best interest to be returned to
24 his or his parent's previous country of nationality or country of last habitual residence –
25 Y or Z -- and enable him to apply for Special Immigrant Juvenile Status.
26

CONCLUSION

For purposes of eligibility for Special Immigrant Juvenile Status, D. is a dependent child of the juvenile court and is “eligible for long-term foster care.” It is not in D’s best interest to be returned to his or his parent’s previous country of nationality or country of last habitual residence. It is in D’s best interest to remain in the United States. This Court’s findings will enable him to apply for lawful permanent residence in the United States. Without this Court’s findings, D. will not qualify for immigration relief and may face deportation. For the foregoing reasons, D. respectfully requests this Court to issue an order making the requisite findings of fact to permit him to petition the CIS for Special Immigrant Juvenile Status.

Dated: July XX, 2006

Respectfully submitted,

XXXXXXXX XXX XXXXXXX, X

By: XXXX XXXX, Esq.
Attorneys for D. XXXX, Child