

Chapter 1: Representing Children In Immigration Matters

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

Who is an unaccompanied alien child?

An unaccompanied alien child is a minor who is under eighteen years of age and who has no parent or legal guardian (refers to a formal legal/judicial arrangement) in the United States who is available to provide care and physical custody. This definition encompasses separated minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members.

NOTE: A child who entered the United States with a parent or other adult guardian but who subsequently left the parent's or guardian's care is considered an unaccompanied minor.

How does a child client differ from an adult client?

This might be the first time you have represented a child as a client, or you may have had experiences representing children in other contexts such as custody, abuse, and neglect cases, or parental rights termination hearings. For a variety of reasons, representing children can be very challenging. For the same reasons, representing a child will be some of the most rewarding work you will do as a lawyer.

When representing a child, it is important to be aware of the differences between a child client and an adult client. A child does not have the same capacity as an adult to understand her situation and its implications. While some children appear mature beyond their years, it is important that you remember that they are children. In fact, this appearance of maturity is most likely due to the

tremendous adversity and trauma the child has had to overcome at a very young age.

In fact, for some children, you may be the first or one of a handful of adults who have wanted to help them. Too often, the adults in these children's lives have abused and mistreated them. You may have to work very hard, especially in the beginning of the relationship, to establish and build trust and rapport.

A child's developmental, intellectual, psychological, and emotional level of functioning will greatly affect your ability to establish a positive working relationship with the child, to communicate and obtain information from the child, and ultimately, to provide effective representation. Some children simply do not have the ability to provide the information needed for their case, much less provide it directly or in a straightforward manner. Remember that a child will not act or react like the adult clients with whom you may be accustomed to working.

What should I consider when working with my child client?

Children do not know what the lawyer's job is or why they may need a lawyer. Children find it difficult to distinguish each person's role and to understand how a lawyer is different from a social worker, a counselor, an immigration officer, or another government official. Be clear that you work for the child, not for "Immigration." You might want to consider explaining the roles to them or asking them to explain the roles to you as an ice breaking technique.

Children are not used to keeping appointments. You should constantly remind your child client about appointment dates and times. Be repetitive. Tell her the appointment date, write it down for her, have her write it down in a calendar or book, and remind her about it often. Children will miss appointments for many reasons: because they forgot, because they did not know how to get to your office or did not have transportation, or because they did not want to deal with the sensitive or traumatic issues they know you will want to discuss. It is also a good idea to remind the guardian or caregiver about the appointment, if they will be accompanying the child.

Some children may have a hard time trusting adults. This is because for many of these children, adults have abused and mistreated them. As mentioned above, you will have to work hard to establish rapport and trust. Building trust is essential because you want your child client to feel secure in disclosing sensitive or painful facts.

Some children are predisposed to rely on adults. If this is the case, it is important that you ensure that the child is still directing the representation and that you are not making decisions for the child.

Children are much more susceptible to suggestion than adults. Children want to please and will give you the answers they think you want, so make sure you are asking open-ended questions. It is important not to ask leading questions, particularly in light of the fact that once a relationship of trust is established between you and the child, the child may be more likely to want to answer in a way that they think you want. Open-ended questions are generally preferable so as not to influence the child's response. It is also important to avoid compound questions (e.g., "Were you ever punished for not doing your chores, and if so, were you hit or yelled at?"), because this can be confusing for children.

Children are often reluctant to disclose sensitive and relevant information. It may take several conversations over a period of time for the child to open up enough to provide the information that ultimately leads to relief from removal. It is important to spend enough time with the child to establish the necessary level of trust and comfort.

Children may have suffered physical, psychological, or sexual abuse. The resulting trauma may affect the relationship a child client has with you and may make it difficult for her to talk about her experiences. Keep in mind the effect your questions, tone of voice, and responses to your client's answers may have. Try not to be judgmental and allow the child to express emotions.

Children often recant disclosures of abuse, neglect, or maltreatment. Whether out of guilt, loyalty, recent communication with family, fear, denial, or some other circumstance, a child may come to you and say that "nothing really happened" or that she made something up. This is a natural phenomenon for children who have been abused or neglected. It is important to give children the space they need to work through their emotions. Follow up with children who recant. Ask them why they are recanting, what else is going on in their life right now, who they have been speaking to, if they feel afraid and if so, why, and what they think will happen if they do/do not go ahead with their case.

Children may not remember details such as dates, duration, and frequency of occurrence, or the locations and names of people or places. Some may also be illiterate and/or lack basic knowledge of numbers and math. This may be frustrating, as these are the details that immigration judges or adjudicators often want. If possible, try to have the child provide details of her account within a context that makes sense to her (e.g., have her describe the season or what the weather was like when something happened, rather than stating the month; ask what grade the child was in when something was going on, rather than the exact year; have the child provide a description of her home

or where she lived rather than the name of the town/city; have the child use holidays/important occasions, like birthdays, Christmas, summer vacation, etc., as "before" and "after" references to explain when something occurred). In addition, helping the child to create a visual timeline may assist her in recalling the chronology of events.

Children's understanding of the truth may vary. It is important to ensure early on that the child understands the difference between the truth and a lie, and understands the importance of providing only information that is true. Although in cases such as asylum it is common practice to refer to a client's "story," you may want to avoid using that word with children as a child's understanding of "story" may be suggestive and trigger a made-up or embellished account of events. Instead, suggest alternative descriptions such as "personal history," "story of your life," or ask the question, "If someone was writing a book about your life, what information would they need to know?"

Children may not have the life experience or cognitive ability to answer questions about why something happened. This is particularly relevant in asylum claims, as the applicant has the burden of proving that she suffered or fears suffering persecution on account of a particular ground. Therefore, consider other strategies early on for obtaining such evidence. This may include speaking with family members or other individuals who know the child and may have knowledge of the facts relevant to her claim. It may also involve speaking with an expert on particular issues in the child's country of origin. Whomever you speak to, it is vital to obtain permission from the child first. In addition to raising attorney-client confidentiality concerns, such conversations can hurt the relationship with the child if she feels that you were speaking to others about her without her knowledge.

Children define normalcy in relation to their own experiences. It is important when questioning a child that you ask fact-based questions that elicit factual and descriptive details, rather than conclusions. For example, if you ask a child whose parents regularly hit her and her siblings with a belt as a form of punishment, a question such as, "Did your parents ever hurt you?" or "Did anything bad ever happen to you in your house?" the child might honestly answer, "No" because she might feel that such treatment is normal or accepted. She might not recognize it as "harm" or something "bad." However, regardless of the child's contextual understanding of what constitutes "harm" or "bad," a question such as, "What would happen to you if you did not listen to your parents?" could elicit the response, "They would hit me with a belt."

What is your role as the child's lawyer?

Your role is to explain the law and legal processes, to help the child understand what she can expect and make decisions, to prepare the child's applications, and to advocate zealously for the child's express wishes. The child is the client and should direct the case.

The child needs to understand your unique role and relationship with her. The child can share her thoughts and feelings with you, knowing that you will not tell anyone what she says without permission. You will help the child understand her own rights and how her decisions may affect her future. You will explain what the child wants to the immigration court. Establishing rapport and trust with the child client is critical to fulfilling these responsibilities but may be hindered by differences in language, culture, race, education, age, and economic status. There are specific standards for representing children, as well as special techniques and resources for developing an effective working relationship with them. These standards and strategies will be covered in upcoming sections.

What special considerations should I be aware of when meeting with my child client for the first time?

Your first meeting with a child is very important. A safe environment is crucial to helping the child feel at ease in the midst of what is often a new and stressful situation. The goal is to facilitate the opportunity for the child to engage in self-expression. Creating a safe and comfortable environment for a child requires taking certain factors into consideration, such as space and office set up. As much as possible, the interview location should be the same for every meeting with the child, as this creates a sense of consistency and continuity.

The interview space should generally be a quiet and private setting.¹ You may also want to provide a few items that can be used as distractions (e.g., a tennis ball, crayons and paper for drawing, pen and paper, a doll, etc.) if the child begins to withdraw into herself during a particularly difficult topic of conversation.

Keep in mind that different cultures have their own norms as to appropriate distance for personal space. Regarding seating arrangements, generally, the suggested approach is not to have any barriers (e.g., a desk) between you and the child, and to have equal level seating. In addition, to increase the child's feeling of security, you may want to ensure that the child's access to the door is not restricted by any physical barrier (e.g., a wall), or by you or the interpreter, where your child client would have to make her way around one of you in order to exit the interview space.

What are some techniques for interviewing child clients? ²

- Initiate the meeting by explaining the purpose of the interview and by introducing yourself, the interpreter, and other members of the legal team.
- Start the interview with small talk, for example, about the child's interests (e.g., soccer, drawing, sports teams, music).
- Allow the child to set the pace of the interview, with appropriate breaks due to a child's limited attention span.
- Be attentive to the child throughout the interview.
- Show the child respect and empathy by not interrupting and by affirming responses when appropriate.
- Use age appropriate language and avoid technical and/or legal terms.
- Children who do not feel comfortable talking about themselves may be able to draw detailed pictures of their families and experience.
- Recognize when the child may feel overwhelmed.
- Give clear instructions and establish clear expectations.
- Let the child know how to reach you.
- Keep promises.

As a lawyer should I advocate for my child client's express wishes?

Yes. Every attorney-client relationship is client driven. This is true in the case of child clients as well. You may not be accustomed to dealing with children as clients. It is important to remember that your role is to advocate for what the child wants, even if what the child wants is not, in your opinion, the most appropriate decision. The child has the right to participate in the entire process of her case. It is important to ensure that the child understands that she has some control, such as, over where to sit, when to take breaks or what to talk about first. This child-centered approach not only increases the child's feelings of security and control, but also contributes to the self-empowerment of the child.

What if you think your client's express wishes are not in the child's best interest?

You may want to seek out a third party to help you determine how to proceed if you believe that the child's wishes are in direct opposition to what may be in your client's best interests. As a lawyer, you are interested in protecting the child's legal interests; however, you do not have the specialized expertise to assess a child's overall best interests and it may be appropriate to turn to a neutral third party for additional guidance (See below on guardian ad litem).

How can I advise my child client?

Children are often unable to conceptualize long-term consequences and have a limited capacity to understand their options. They may only be concerned with the here and now instead of recognizing the future effects of the decisions that they make. For example, signing a stipulated order of removal (i.e., an order conceding and agreeing to deportation) may cause the child to be released from detention more quickly, but it also keeps her from legally returning to the United States for 10 years or more. Part of your role will be to help the child understand how her long-term interests may be affected by her decisions. One way to properly advise the child is to help her consider all of the possible consequences of the decision. For example, if the child says that she wishes to return even though she is still afraid, you can walk the child through her hypothetical return with questions such as these: Who will you live with if you go back? What will it be like there? What do you think may happen? Who will you be able to ask for help if you need it?

What can I do to ensure I am communicating effectively with my client?

You have a duty to communicate effectively with your child client. This means not only understanding all of the facts and circumstances relevant to the child's case, but ensuring that the client understands them as well. Further, a child may not admit that she does not understand an explanation, even if you ask. You should make concerted efforts to verify that the child does in fact understand what is being said, what her options are, and what may result from each possibility. Rather than ask the child if she understands, you should ask the child to tell you in her own words what she understands. This is a much better indicator of the child's comprehension level. Further, it may be helpful to explain issues to the child in multiple ways, including non-verbal explanations (e.g., drawing a chart or diagram).

What is my duty of confidentiality with my child client?

Just as with your adult clients, you have a duty to keep confidential all communication between you and the child client, unless the child gives you permission to share such information. It is important to remember this when representing children because it is common for attorneys working with children to make decisions on behalf of the child without consultation, based on what the attorney thinks is best. However, you must ensure that when acting in the child's best interests, you are not in any way violating your duties or disclosing information without prior permission from the child. For example, if you intend to call an expert witness in the case, you may want or need to share information about the client with the witness, (e.g., a copy of the client's affidavit). In this situation, as with adults, you must obtain the child's permission before sharing any information with the expert. You must be careful never to disclose anything to the immigration judge or other parties that may thwart the child's wishes.

Do standards for representing an unaccompanied child exist?

In August 2004, the American Bar Association issued [*Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*](#). These standards and their accompanying comments are extremely comprehensive.

With respect to your role, generally, the standards require the following:

- Ensure the child's participation in the proceedings to the greatest extent possible, taking into consideration the child's developmental needs, abilities, and circumstances.
- Advise the child of her legal options and their consequences, without imposing your own views as to what the child should do.
- Zealously advocate for the child's legal interests, as expressed by the child. If the child does not express her wishes, or is found incompetent (pursuant to a competency evaluation “it is not sufficient for you to just have a hunch that the child is incompetent), then you should advocate for the child's legal interests.
- Make contact with the child as quickly as possible upon being assigned, and maintain frequent contact with the child.
- Respect the child's right to confidentiality, including with any third parties in the child's case (e.g., translators, interpreters, experts, etc.).
- Ensure that each covered person or entity involved with the child complies with the ABA Standards, and if they are not doing so, advocate for such compliance. When a child is detained, ask the child on a regular basis about her treatment and living conditions in order to ensure compliance.³

What expectations do children have of their attorneys?

A child expects and wants you to be honest with her, even in the face of negative information.⁴ Fear of the unknown is more distressing for children than facing the reality of bad news. It is important to regularly communicate with the child about all of the details, both positive and negative, of the case.

Your child client expects that you will meet with her regularly, talk with her, and listen. The establishment of a positive relationship between you and the child is key to making the child feel comfortable enough to disclose sensitive information. Many children do not tell their lawyers about relevant sensitive information because they do not feel that they can trust the lawyer. It is vital that you take the time to build that trust.

What are some common questions you should be prepared to answer about a child in immigration proceedings?

A child is likely to have many questions about immigration proceedings. Depending on a child's social and cognitive development, you may have to repeat information numerous times. The need to repeat information arises in part because the child can become confused about other people's roles and her own rights in the immigration system. Here are some questions you should be prepared to answer; be sure to "translate" the answers into child-friendly language.

Q: Who decides whether the child can legally stay in the United States?

A: Immigration judges decide if a child in removal proceedings in immigration court can legally stay in the United States. Asylum officers decide for children applying affirmatively at the asylum office. U.S. Citizen and Immigration Services (USCIS) officers decide for Special Immigrant Juvenile Status (SIJS) applications and other applications/petitions. U.S. Immigration and Customs Enforcement (ICE) officers enforce immigration laws but they do not make decisions about legal relief.

Q: What happens if the child loses the case before the immigration judge or USCIS?

A: There is the possibility of appealing the case before the Board of Immigration Appeals (BIA) or Administrative Appeals Office (AAO), respectively. The child needs to understand that if she loses the case, ICE is not going to take her into custody that day and put her on a plane to her country of origin. However, when a child is placed in the care of the Office of Refugee Resettlement (ORR), it should be explained to her that during the appeals process, she may remain in government custody unless a sponsor deemed eligible by ORR takes custody of the child.

Q: What happens to a child when an immigration judge issues a final order of removal?

A: If the judge's decision at the individual hearing is not appealed within 30 days from the date of the decision, it becomes a final order of removal. Thereafter, ICE will enforce the order by mailing a "bag and baggage letter," stating the date, time, and place the child is to report to be removed from the United States.

Questions about children who are in the custody of ORR or who have been detained under the care of ORR, but were released to a qualified sponsor and placed in removal proceedings:

Q: Once released from the government's custody, is the child free to stay in the United States permanently?

A: Being released from government custody does not mean that a child has the legal status to stay in the United States. Once a child is released from government custody, she must attend all future court hearings to determine if she can remain in the United States.

Q: What happens to the child if she doesn't attend future hearings?

A: The immigration judge can and may issue a final order of removal in absentia, without the

child being present in court. This may result in the child losing any right to relief from removal, including her ability to legalize status in the United States in the future and to return to the United States in a lawful manner.

Q: What happens to the ORR sponsor if the child doesn't attend a future hearing?

A: This is a difficult question to answer. When an ORR-approved sponsor takes custody of the child, the sponsor signs a release agreement stating that she will take the child to all future immigration court hearings. To date, there is little, if any, information to say what exactly the government may do to a sponsor if the child does not show up to court. In situations where the child is no longer living with the sponsor (e.g., runaway or relocation), the sponsor is supposed to notify ICE of such a change in custody, pursuant to the ORR release agreement.

Q: Does a child's behavior at the ORR shelter affect the child's legal case?

A: A child's behavior does not have any bearing on the immigration case, unless the child's actions rise to criminal conduct. ORR-contracted shelters can contact the police if the child is violent towards other people or property is damaged. If there is a police report, such evidence may be used against the child in her immigration case.

Q: Can a child work after being released from ORR custody?

A: A child can only work if she applies for and receives employment authorization from USCIS. Not all children will be eligible for a work permit. The child's release from custody does not have any effect on whether the child is or is not eligible for a work permit.

Q: What happens if a child wins her case?

A: Different forms of relief have different benefits. For example, while asylum allows the child to apply for a green card after one year, withholding of removal does not. It is important for you to

explain the various benefits available to the child should she win the case. However, it is also important to be honest with the child about what the child will not be able to do should she win. For example, if a child is granted Special Immigrant Juvenile Status (SIJS), she will not be able to petition for her biological parent(s) to come to the United States.

What other issues should I be aware of when working with immigrant children?

Many children have been abused and traumatized.

Physical and sexual abuse. Physical and sexual abuse of children crosses all boundaries and might occur within a variety of circumstances, including, for example:

- **Abuse by non-relatives in the home country.** Unaccompanied children may have been victims of violence and abuse at the hands of strangers targeting them for a particular purpose, or simply as a result of general conflict. Sexual abuse, such as rape, has been used during times of armed conflict as a weapon of war to humiliate and oppress.
- **Abuse by relatives in the home country.** Their own family members may have victimized unaccompanied children. Parents, grandparents, or other relatives or caretakers may have physically or sexually abused them with impunity.
- **Abuse on the journey to the United States.** Unaccompanied children may have suffered physical abuse, kidnapping, or sexual abuse such as rape and forced prostitution at the hands of perpetrators they encountered in the course of their travel from their home country to the United States.

For any abused child, discussing the incident of abuse can lead to feelings of embarrassment, shame, anger, fear, and low self-esteem. This is even more likely in the case of a sexually abused child who may also have feelings of guilt associated with the experience. In the case of sexual abuse, boys may find it more difficult and more shameful to discuss their experience than girls.

Allow for appropriately paced interviews over a period of time. If necessary, have a mental or medical care provider evaluate the child. This will enable you to best serve the needs of the victimized child

without re-traumatization. Trust is a big issue for abused children. The more the child trusts you, the easier it becomes for the child to open up about painful and perhaps partially lost memories. Information about painful experiences may emerge late in the professional relationship after trust has been established, rather than early on.

Because of their vulnerability to trauma, children need to feel that the world is safe and that they will be protected. Creating a safe and comfortable interviewing space, coupled with sensitivity towards the child based on her age, development, culture, and life experiences will help you provide the feeling of safety the child seeks and help establish a trusting relationship, thereby enabling a productive and successful interview.

Post-traumatic stress disorder. Some children may exhibit symptoms of post-traumatic stress disorder (PTSD), an anxiety disorder. PTSD is an emotional reaction to overwhelming experiences, such as seeing or surviving a dangerous event.⁵

Symptoms of PTSD can make it difficult to interact with others appropriately. PTSD may affect the child's ability to remember or describe events and experiences. In the process of interviewing children who could potentially be suffering from PTSD, be aware that certain behaviors, such as lack of interest, moodiness, and an inability to concentrate are not indicative of a lack of interest in the case or the interview, but perhaps a product of PTSD over which the child has little or no control.

Experiences that produce PTSD are outside usual human experience. They may include rape, crime, war, torture, or witnessing death, particularly of a loved one, as well as other traumatic experiences. Children respond differently to traumatic events depending on their age and understanding. For example, some common symptoms for young children (ages 1-6) include sleep disturbances, separation fears, and somatic symptoms (e.g., stomach aches, headaches). Children ages 6-11 tend to have symptoms such as withdrawal, guilt, anxiety, fear, feelings of responsibility, and distractible behavior. Young adolescents with PTSD may exhibit symptoms such as depression, eating disorders, and social withdrawal, among others.⁶

What about cultural differences?

The child will bring to the interview the totality of her learned behavior patterns, beliefs, identity, attitudes, and perceptions. Working cross-culturally requires you to recognize that your personal views may not be universally held. The child's statements and actions will come from her cultural context, and it is very important that you perceive and interpret them in that light, rather than from a

personal perspective.

Cultural differences may be expressed through non-verbal cues such as body language and facial expressions and can lead the child to misinterpret these as disapproval or disinterest. This becomes more crucial when a language barrier exists and the only way for the child to assess her interviewer is through non-verbal communication. You may also misinterpret the child's body language or other non-verbal cues to be a sign of dishonesty or disinterest, when in fact, it may be a product of the cultural norm for that child and considered appropriate behavior when showing deference to adults.

Examples of social norms that may differ by culture include:

Personal space; eye contact; ways of showing respect for elders, or deference to authority; physical contact between males and females; body language indicating discomfort or displeasure; significance of smiling or laughter.⁷

How do I consider the differences in our education?

Some unaccompanied children may not be able to read or write. Often, due to poverty or other circumstances, a child must stop attending school to earn income or to help her family with chores and other responsibilities. The school may be too far to attend regularly. When parents and other family members lack education themselves, they may not see the value of education for their children. It is important for you to assess and determine the child's literacy level at the early stages of representation. This determination may be accomplished by asking the child how many years of schooling she has received in her home country (and how many months each year and days each week she attended school), asking her to read or write something in her native language, talking with the child's U.S. teacher, or arranging for a professional educational assessment - particularly if it is believed that the child is developmentally delayed.

Take into consideration any educational impediments that a child may have when assessing the child's case and determining how to proceed.

Who else besides the child should I expect to interact with?

You should expect to work with your client's family. The family's involvement may trigger confidentiality and loyalty issues, but maintaining a good relationship with the family is also important to the success of the child's case. The child's family can help you by obtaining information from the

home country, offering declarations in support of the child's claim, and providing important information about the child's background that the child may be unable to tell you. Working with the family is always a balancing act, but in the end, the child's case can benefit from the family's involvement. It is important for the family to understand and trust that you are only acting to promote and protect the interests of the child, as the child expresses them.

You may need to consult with a social worker. In working with your child client, you may find that your client will call upon you to address non-legal matters. For example, a child may look to you for help with emotional issues or housing needs. When a child asks you to get involved in these types of matters, the child is signaling that she trusts you enough to ask for your help in other areas of her life. Children often do not understand the concept of specialties. The child may not understand that you are only helping with the immigration case and cannot serve the role of a social worker. You may be asked to deal with situations outside of the scope of your knowledge and which are more suited for a social worker. Contact your KIND pro bono coordinator for social services resources in your area.

What are the roles of guardians ad litem and child advocates?

In legal proceedings outside of the immigration system, such as juvenile, family, or even probate court, a judge can appoint an attorney or social worker to serve as guardian ad litem (GAL) who is responsible for protecting a child's best interests. In contrast, immigration courts do not utilize GALs for children placed in removal proceedings. Typically, decisions about how to proceed in a child's immigration case have been left to the child to make, in consultation with her attorney. An exception to this may arise when a child is involved in both immigration court proceedings and juvenile court dependency proceedings, through which the state juvenile judge might appoint a GAL. Under those circumstances, the state court GAL could communicate to the immigration judge about what is in the child's best interests.

Citations

¹These are generalizations and may not be appropriate for a particular client. For example, if the child was regularly abused by an adult figure in a small private room, you may want to conduct the interview in a more open space that is visible to others (while ensuring confidentiality of information).

² For more information, see the American Bar Association, Interviewing and Counseling a Child Client <http://www.abanet.org/litigation/committees/childrights/materials.html>.

For accompanying materials

http://www.abanet.org/litigation/committees/childrights/docs/childclient_notes.pdf

³ American Bar Association Commission on Immigration, Standards for the Custody, Placement and Care; *Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, Section V (Aug. 2004).

⁴At a conference regarding unaccompanied alien children sponsored by the Vera Institute of Justice, three unaccompanied juveniles who had been through removal proceedings in the United States provided this advice to attorneys.

⁵For more information see, What is Post Traumatic Stress Disorder? Signs and Symptoms, <http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> (last visited October 28, 2010).

⁶See Diagnostic and Statistical Manual of Mental Disorders 424, at 427-29 (American Psychiatric Association 1994); Andrea E. Bopp Stark, Post-Traumatic Stress Disorder in Refugee Women: How to Address PTSD in Women Who Apply for Political Asylum Under Grounds of Gender-Specific Persecution, 11 Geo. Immigr. L.J. 167 (1996); 4therapy.com Network, How do Young Kids and Teens Respond to Trauma? Is Posttraumatic Stress Disorder (PTSD) a Concern?, 2009, available at www.4therapy.com; Mental-health-today.com, Post-Traumatic Stress Disorder, <http://www.mental-health-today.com/ptsd/part.html> (last visited October 28, 2010).

⁷See the video or audio version of, Child Clients Are Different: Best Practices for Representing Unaccompanied Minors, for information about cross-cultural and language issues when interviewing children and preparing them to testify, available at <http://www.abanet.org/litigation/committees/childrights/materials.html> (last visited November 15,

2011); to learn about the types of child maltreatment and how to recognize child maltreatment in refugee families, considering cultural factors see the BRYCS, Child Abuse Issues with Refugee Populations (PART I)- Recognizing Suspected Child Maltreatment in Culturally Diverse Refugee Families, audio and PowerPoint presentation and highlighted materials, available at <http://www.brycs.org/askBrycs/webinars-archived.cfm> (last visited November 15, 2011).

Chapter 2: Overview of Immigration Law and Relevant Agencies

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Introduction to immigration law

This introduction is designed to provide a brief overview of the various laws and regulations that govern immigration and naturalization, introduce the various federal administrative agencies responsible for administering these laws and regulations, and provide general information about the criteria and procedures for obtaining admission to the United States, as well the grounds and procedures for removal.

What entity has authority in U.S. immigration law?

The U.S. Constitution does not expressly authorize the federal government to regulate immigration. Yet, there are several compelling arguments that the federal government's power to regulate immigration is constitutionally derived.

For example, Congress has the authority to regulate interstate commerce and commerce with foreign nations.¹ The Supreme Court has held that Congress can regulate activities that substantially affect interstate commerce. One argument is that immigration affects both commerce between states, and international commerce.

In addition, the Migration or Importation Clause provides Congress with the authority to prohibit migration and importation after 1808.² However, historical sources agree that this provision was to address the slave trade and not the migration of free persons.

The Naturalization Clause authorizes Congress to establish a uniform Rule of Naturalization³ Admission and deportation are different from naturalization in some important ways. However, there are arguments that the necessary clause confers Congress authority over admission and deportation because Congress had decided to make lawful admission as a permanent resident a requirement to naturalize.⁴

Federal law governs

While there are various arguments for where Congress derives its authority to regulate immigration, the Supreme Court has repeatedly held that immigration is federal and mostly a plenary power of the U.S. Congress.⁵

Federal law governs the categories of people who may enter the United States, the terms under which they are admitted, the conditions of their stay, and establishes the grounds and procedures for expelling individuals who violate these laws. It also sets the requirements for acquiring U.S. citizenship and when and how citizenship can be revoked.

Child Practice Pointer:

Federal law recognizes that unaccompanied alien children (UAC) constitute a unique class and provides unique protections, treatment, and legal remedies for them.

Immigration law is civil and violations of immigration law are generally civil violations that are adjudicated by administrative agencies. This means that certain rights that attach to criminal defendants, most notably the right to government funded counsel for the indigent, does not apply to an individual the government is attempting to remove from the United States. Deportation is not viewed as criminal in part because any attempt to remove an individual is not punitive in nature,⁶ but rather a political decision about who gets to remain in the United States.

Federal law also controls various employment-related issues concerning foreign workers, including wages, labor standards, and anti-discrimination protections. Under federal law, employers are required to verify that employees are authorized to work in the United States and subjects violators to fines or criminal penalties. Other federal laws restrict noncitizen access to specific forms of federally funded public assistance and services. The limits of federal control and extent of state authority over immigrants are being tested by the states and in the courts.

State interests

State lawmakers have increasingly sought to regulate the treatment of non-U.S. citizens and even to criminalize their presence in their states.⁷ State lawmakers can restrict the eligibility of noncitizens to

receive certain public benefits and driver's licenses. States may also restrict access to higher education. States may not restrict access to primary and secondary public education. States' authority to inquire into immigration status and to limit access to employment, housing, and other services is being tested. The precise boundaries between federal and state regulation of immigration are being litigated in the federal courts and working their way up to the U.S. Supreme Court.

State courts lack authority to determine a person's immigration status. However, state courts are routinely called upon to make decisions in cases involving immigrants and other noncitizens, and these decisions may affect an individual's immigration status. Unaccompanied alien children, for example, require state courts to make dependency and neglect findings that will enable them to obtain Special Immigrant Juvenile Status from USCIS. In addition, certain state criminal convictions make an individual ineligible for immigration benefits and can lead to deportation.

What are the sources of immigration law?

Immigration and Nationality Act

The McCarran-Walter Act of 1952⁸, also known as the Immigration and Nationality Act (INA), established the basic architecture of immigration law by establishing a system for immigration, criteria for exclusion, and procedures for deportation. The INA has been amended frequently since original enactment in 1952 and is now hundreds of pages long and remains the core of immigration law.

Congress has amended the INA since its original enactment by passing legislation to reform the immigration system.⁹ Congress has also passed legislation to provide protection to certain vulnerable classes of immigrants including refugees fleeing persecution and victims of domestic violence and human trafficking.¹⁰

The INA is codified at Title 8 of the United States Code. The statute will often be referred to in two parallel cites, one referring to the INA and the other to the U.S. Code, (e.g., INA §101, 8 USC § 1101).

The INA and administrative regulations spell out the procedures by which noncitizens may enter the United States, and which of those noncitizens already here may stay. In addition to the INA and its implementing regulations, there are agency operating instructions, policy memoranda, and field guidance that interpret and implement the statutes, as well as precedential administration decisions, and federal case law. Some aspects of immigration law draw heavily from and, in many cases, are interpreted in accordance with, international law. Each of these sources of law is discussed in greater depth below.

The federal statutes are implemented in a large number of regulations. They are further interpreted and shaped by a growing body of agency interpretation, administrative decisions, and federal case law. Most regulations pertaining to provisions of Title 8 U.S. Code will be found in 8 CFR, as mentioned above, but important regulations are also within other titles.

Federal regulations

Statutes are interpreted and implemented by regulations that are promulgated through formal rulemaking. Each federal government agency issues its own regulations. When several agencies must interpret the same provisions of law, as in the immigration context, there is a process to ensure they agree and have conforming provisions.

Most of the immigration-related regulations, including those governing the immigration courts, are published in Title 8 of the Code of Federal Regulations (CFR) . These regulations change more often than the INA.

Other relevant regulations are included within:

- Department of Health and Human Services - 45 CFR
- Department of State - 22 CFR
- Department of Labor - 20 CFR
- Department of Homeland Security - 6 CFR
- Department of Justice - 28 CFR

Agency memoranda and operating instructions

The agencies also interpret their authority and clarify their internal procedures through policy memoranda. These memos may be relied upon to ensure that each government agency is in fact performing in accordance with its own standards.

Memoranda and policy guidance of particular interest to lawyers of unaccompanied minors include asylum officer guidelines, as well as training materials and memoranda to immigration judges.

Administrative and judicial decisions

In addition to the statutes and regulations, immigration law is shaped by decisions of the U.S.

Supreme Court, the U.S. Circuit Court of Appeals, and the Board of Immigration Appeals (BIA). These decisions can be binding on future applications and immigration judge decisions.

Administration appeals office

A separate administrative review board is responsible for reviewing approximately 46 different types of petitions, applications, and other benefits if they are denied by officers within the U.S. Citizenship and Immigration Services (USCIS). Denials of Special Immigrant Juvenile Visa petitions, VAWA self-petitions, applications for Temporary Protected Status (TPS), and orphan petitions are among those decisions that may be appealed to the Administrative Appeals Office (AAO) of USCIS.

The AAO may sustain or dismiss the appeal or remand the matter to a USCIS Service Center for additional action. In many cases, a litigant must exhaust AAO remedies prior to seeking judicial review.

What federal agencies have immigration responsibilities?

[U.S. Department of Homeland Security](#)

Prior to the establishment of the Department of Homeland Security (DHS), immigration benefits and enforcement were housed at Immigration and Naturalization Service (INS), an agency within the U.S. Department of Justice. In 2002, in the largest federal government restructuring since the Department of Defense was created, the Department of Homeland Security was established and with its creation it assumed the primary authority for administering and enforcing the nation's immigration laws.¹² Today, DHS's administrative, adjudicatory, and enforcement responsibilities are divided among three bureaus, although several other federal agencies continue to hold distinctive roles.

- [U.S. Customs and Border Protection \(CBP\)](#) patrols 6,000 miles of border with Canada and Mexico, inspects people and goods at the nation's ports of entry, and regulates their admission into the United States. CBP is the largest law enforcement organization in the nation.
- [Immigration and Customs Enforcement \(ICE\)](#) enforces immigration laws within the interior of the U.S., including overseeing detention and removal matters. It is the principal investigative arm of DHS and the largest of the three main components.
- [U.S. Citizenship and Immigration Services \(USCIS\)](#) processes applications for immigration benefits, including for lawful permanent residence (green cards), asylum and refugee status, naturalization, and the benefits that may be particularly relevant for children, such as special

immigrant juvenile status, and visas for victims of domestic abuse, trafficking, and other crimes.

- Other components of DHS, such as the [Coast Guard](#), [Office of Civil Rights and Civil Liberties](#), and [U.S.-Visit](#), also have distinctive immigration responsibilities.

[U.S. Department of Justice](#)

The Executive Office for Immigration Review (EOIR) at the U.S. Department of Justice houses both the immigration court system and the Board of Immigration Appeals (BIA), which is the administrative appeals body. Immigration judges and the Board of Immigration Appeals exercise their functions and duties under the power of the Attorney General. With more than 260 immigration judges sitting in 59 courtrooms spread out across the United States, the Office of the Chief Immigration Judge establishes policies and priorities and manages the immigration court functions from its headquarters in Falls Church, Virginia.

In addition to EOIR, the Civil Division of the U.S. Department of Justice houses the Office of Immigration Litigation (OIL). OIL represents the U.S. government on most immigration appeals before federal courts.

[U.S. Department of Health and Human Services](#)

The Department of Health and Human Services (HHS) houses the [Office of Refugee Resettlement \(ORR\)](#), which provides funds to states, public and private entities, and nonprofit voluntary agencies to assist refugees and asylees with the resettlement process in the United States. ORR is also tasked with overseeing the care, custody, and placement of unaccompanied minors, specifically under the [Division of Children's Services \(DCS\)](#).¹³

[U.S. Department of State](#)

The [Bureau of Population, Refugees, and Migration \(PRM\)](#) is housed within the U.S. Department of State. PRM is responsible for formulating policies on population, refugees, and migration, as well as administrating U.S. refugee assistance and admissions programs.

The [Bureau of Democracy, Human Rights, and Labor](#) supports democratic governments and organizations abroad and submits annual reports to Congress on the human rights practices and conditions around the world. These country reports on human rights practices are utilized in making refugee determinations and asylum decisions.

In addition, consular officers located in U.S. embassies and consulates around the world review and process visa applications.

Admissibility and inadmissibility: Who can enter the United States?

The U.S. government has the power to decide who is allowed to enter the United States and who is barred from entry. Generally speaking, a noncitizen seeking admission must show she is not inadmissible to the United States to be granted a visa, to apply for permanent resident status, or any other immigration benefit. INA § 212(a) describes the 10 broad grounds of inadmissibility for a person seeking entry into the United States. If an individual is subject to these grounds of inadmissibility, the person will generally be deemed "inadmissible" and not allowed to enter the United States.

Child Practice Pointer:

Some of the grounds of inadmissibility may not apply to unaccompanied children, or in other instances certain grounds of inadmissibility can be waived by DHS or an immigration judge at the request of the child.

What makes a child inadmissible?

The following is a list of the general classes of inadmissibility for children and some select examples. This is not an exhaustive list. You should consult the INA to assess if your client may be inadmissible. Note that some grounds of inadmissibility may be waived. (See section below on waivers.)

- **Public health grounds:** including alcoholism, drug abuse, and communicable diseases that endanger the public health, such as tuberculosis, are bars to admission.

- **Crimes:** the certain commission of crimes and criminal convictions including felonies, crimes involving moral turpitude, and drug offenses are bars to admission.
- **National security concerns:** supporting a terrorist group, being a member of a terrorist organization, or being involved in terrorist activity is a bar to admission.
- **Past immigration violations:** including unlawful presence in the United States, returning to the United States without authorization after being removed, failure to depart the United States after a grant of voluntary departure or issuance of a removal order, and smuggling other illegal immigrants to the United States are bars to admission.
- **Public charge:** proving that an individual will not become a public charge if admitted into the United States. If a person will not be able to support herself financially and is likely to become dependent on the U.S. government for assistance, the individual will generally be barred from admission.
- **Document violations:** fraud or misrepresentation when using documents, including a passport or visa, as well as lacking proper documentation when entering the United States are bars to admission.

When do the grounds of inadmissibility come into play?

- **Upon entry into the United States.** When noncitizens enter the United States at a border or airport, the person must be admissible at the time of entry or may be refused admission at the border even if the person is in possession of a visa.
- **Removal proceedings.** A person who entered without inspection (EWI) or committed fraud to enter will be charged as inadmissible and subject to removal if the person is not eligible for any immigration relief.
- **Adjustment of status.** When a noncitizen applies to "adjust" her status to that of lawful permanent resident (LPR), the person is treated as an applicant for admission and must prove that she is not inadmissible in addition to proving eligibility for benefit sought.

Removability: Who can remain in the United States?

Removal¹⁴ is expulsion from the United States after the noncitizen is provided an opportunity to contest removal or pursue any eligible immigration benefit. There are a number of different administrative processes that may result in a final removal order, depending predominantly on an individual's status in the United States, whether or not she entered legally after inspection, and the violations of immigration or criminal law charged.

Child Practice Pointer:

Some unaccompanied children enter the United States without government permission, or have entered with authorization and failed to maintain legal immigration status. As discussed above, the lack of legal status in the United States may subject an unaccompanied child to removal proceedings.

What makes a person deportable?

It is important to note the acts that make a person deportable are not the same as the acts that make a person inadmissible.

Common grounds of deportability/removability include:

- **Certain criminal convictions:** various types of crimes can render an individual removable, including crimes involving moral turpitude or an aggravated felony in immigration law.
- **Immigration status violations:** a person in violation of the INA or any other U.S. law is deportable.
- **Inadmissible at time of entry or adjustment of status:** this incorporates all grounds of inadmissibility to deportability. If your client was admitted but should not have been, your client can now be subject to deportation.
- **National security grounds:** a person is deportable if she has engaged in an activity that endangers public safety or national security, or any activity that violates U.S. law relating to espionage, sabotage, or law prohibiting the export of goods, technology, or sensitive information.

- **Failure to register and falsification of documents:** a person will be deportable if the individual fails to notify DHS of a change in address, fails to register with DHS as required by law, commits document fraud, or falsely claims to be a U.S. citizen.
- **Public charge:** an individual must prove that she will not become a public charge if admitted into the United States. If a person will not be able to support herself financially and is likely to become dependent on the U.S. government for assistance, the individual will generally be barred from admission.
- **Unlawful voting:** a person who is not a U.S. citizen is ineligible to vote. Any person who votes in violation of any federal, state or local law, ordinance, statute or regulation is deportable. A conviction is not required.

Practice Pointer:

An individual cannot be charged under the grounds of removability/deportability under INA § 237a unless she was first inspected and admitted. Individuals who were never legally admitted to the United States are charged with being inadmissible under INA § 212(a), discussed above. The type of charge determines the legal procedures that will be followed and the standards applied.

Are waivers available?

Yes. The law provides for "waivers" of some grounds of inadmissibility and removability. The requirements and process for obtaining a waiver depend on the ground of inadmissibility involved and the status sought. Obtaining a waiver often involves filing a separate application (and fee) and demonstrating statutory eligibility at an interview or hearing. Many waivers are discretionary. Some waivers are available only to individuals with specified U.S. citizen or LPR family members and involve proving that the family member would suffer some degree of hardship if the noncitizen was removed from the United States. If the applicant is granted a waiver, she is allowed to enter or remain in the United States, or receive an immigration benefit, despite being otherwise inadmissible or removable.

You should consult the INA to assess if there are waivers available for the specific grounds of inadmissibility.

How does a person gain permanent status to live in the United

States?

U.S. immigration law distinguishes between citizens and noncitizens. Foreign-born individuals who are not U.S. citizens are collectively referred to as "aliens." Noncitizens, or aliens, are further divided into numerous categories and sub-categories, each with specific eligibility criteria, application procedures, and conditions for maintenance of status. The term "immigrant," for example, is a term of art used exclusively in the INA to refer to a "lawful permanent resident."

It is not uncommon for children to arrive in the United States with a temporary status, or with no legal status, and to obtain another temporary status or even permanent resident status. The immigration system recognizes that people will acquire and change status over time, and there are procedures in place for doing so. For example, an individual who enters the United States legally on a tourist or student visa but continues to stay beyond the visa's time limit is now without legal status. This is also referred to as a visa "overstay."

Even people who enter the United States without authorization may later obtain permanent residence and naturalize to U.S. citizenship. It is not unusual for a child to be completely unaware of her immigration status, or that of her parents, or to live in the United States for years under the incorrect assumption that she is legally present. It's best not to make any assumptions about the child or any of her relatives.

Many U.S. families are "mixed immigration status" families in which some members are U.S. citizens while others are legal residents, in temporary status, or undocumented. Many unaccompanied children may be members of mixed-status families, although they have no legal immigration status themselves. In some cases, an unaccompanied child may be able to secure legal status through one of the legal or U.S. citizen family members.

A person who remains in the United States during an unauthorized period is said to be accruing "unlawful presence." Unlawful presence for six months or longer can have far-reaching consequences under U.S. immigration law and will likely bar or severely delay acquisition of lawful permanent residence in the future even if the person is otherwise eligible.

Child Practice Pointer:

Juveniles under the age of 18 do not accumulate any unlawful presence,¹⁵ but unlawful presence begins to accrue on a youth's eighteenth birthday. Fortunately, there may be legal remedies for some of these children. In other cases, however, immigration law will bar a child from acquiring permanent status or subject her to removal.

What are the benefits and responsibilities of permanent resident status?

In addition to the benefit of living permanently in the United States, lawful permanent residents may hold most jobs, attend state universities as in-state residents, change jobs without permission, travel in and out of the United States, purchase homes and businesses, and may be able to sponsor their spouses and children. Like U.S. citizens, permanent residents must pay income taxes, register for selective service, and obey all U.S. laws. They are also eligible for some services (housing and tuition assistance, legal services, driver's licenses). After a specified number of years, a permanent resident may apply for citizenship, which involves establishing good moral character, demonstrating knowledge of English, U.S. government, and history, and having attachment to the United States and U.S. Constitution. Unlike U.S. citizens, permanent residents are subject to removal if they violate immigration or criminal laws.

Citations

¹U.S. Const. art. I, § 8, cl. 3.

²U.S. Const., art. I, § 9, cl. 1.

³U.S. Const., art. I, § 8, cl.

⁴INA § 316.

⁵See *Ping v. U.S.*, 130 U.S. 581 (1889) (holding that the authority of the federal government to exclude noncitizens was tantamount to its sovereignty); see also *Shaughnessy v. U.S. ex. rel. Mezei*, 345 U.S. 206 (1952) (holding that government's decision to detain a noncitizen on Ellis Island without a hearing did not violate due process because Congress has the authority to decide what process is due to noncitizen).

⁶Yet, the U.S. Supreme Court ruled that deportation is simply not a collateral consequence to a criminal conviction, and therefore is not outside Sixth Amendment review. Rather, deportation is a unique consequence that is closely connected to the criminal process. As a result, failure to advise a criminal defendant that deportation could result from a criminal plea is not outside of Sixth Amendment right to counsel claim. See *Padilla v. Kentucky*, No. 08-651, slip op. at 8-9 (U.S. March 31, 2010).Normal

⁷The National Conference of State Legislatures tracks state immigration legislation. See <http://www.ncsl.org/default.aspx?tabid=19897>

⁸Public Law Number 82-414

⁹The 1986 Immigration Reform and Control Act, which created the first major legalization program for undocumented immigrants and established sanctions against employers who knowingly hire undocumented workers; the Immigration Act of 1990, which significantly expanded the legal immigration system and provided for Temporary Protected Status for victims of natural disasters and civil conflicts; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which drastically reduced many forms of relief, as well as expanded the grounds of inadmissibility and deportability; the Uniting and Strengthening America by Providing Appropriate Tools Required to

Intercept and Obstruct Terrorism Act of 2001 (USA-PATRIOT Act), which abolished the Immigration and Naturalization Service (INS) and created the U.S. Department of Homeland Security (DHS); and the Homeland Security Act of 2002, which transferred care, custody, and placement responsibilities for unaccompanied alien children to the Department of Health and Human Services/Office of Refugee Resettlement.

¹⁰The 1980 Refugee Act, the first comprehensive refugee legislation in U.S. history, brings the U.S. into compliance with international treaty law relating to the protection of refugees. Pub. L. No. 96-212 (1980); The Violence Against Women Act (VAWA) of 1994 provided protection for battered spouses and children of U.S. citizens and legal permanent residents. The Trafficking Victims Protection Act created immigration status for victims of human trafficking and its subsequent 2008 reauthorization made substantial changes in the law to protect unaccompanied alien children, The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L. No. 109-13.

¹¹An understanding of administrative law principles may be helpful in understanding the regulatory process. Most agency regulations are subject to the "notice and comment" procedures under the Administrative Procedure Act (APA). When this procedure is used, an agency wishing to change its regulations must first publish the proposed change in the Federal Register. The public is allotted a time period in which to comment on the proposed rule. After the comment period and consideration of the comments, the agency must publish the regulation again in the Federal Register as a "final rule."

¹²The Homeland Security Act of 2002. Public Law 107-296

¹³The division was called the Division of Unaccompanied Children's Services (DUCS) until November 2011. Federal Register Vol. 76, No. 218

¹⁴It is common to refer to immigrants who are forcibly expelled from the United States as being "deported." This is not always technically correct. Statutory changes in 1996 introduced the new terminology of "removal," "removable," and "removability." Before 1996, noncitizens who were present in the United States were charged with being deportable and their expulsion was termed "deportation." In 1996, Congress amended the INA, revising the grounds for removal and renaming the deportation process "removal." The removal grounds are found at INA § 237. The removal process is laid out at INA § 240. However, because the title of INA § 237 remains "General Classes of Deportable Aliens," it is not uncommon to see the terms "deportation" and "deportability" interchanged with "removal" and "removability." If an individual falls under one of these grounds of deportability, she is considered "removable." An individual charged with inadmissibility has the burden of establishing her admissibility "clearly and beyond doubt" once the government establishes that she is an "alien."

¹⁵See INA § 212(a)(9)(B)(iii)(1)

Chapter 3: The Immigration Court System

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What is the immigration court system?

The Immigration Court system is located within the U.S. Department of Justice's Executive Office for Immigration Review (EOIR). EOIR exercises its functions and duties under the power of the Attorney General. Decisions of the Attorney General "with respect to all questions of law" are controlling unless overturned by a federal court.¹

EOIR is comprised of 58 administrative immigration courts located throughout the United States and the Board of Immigration Appeals (BIA), an administrative appellate body. Immigration judges conduct removal hearings and decide whether or not a noncitizen can remain in the United States. Immigration judges advise noncitizens of their legal rights, hear testimony, make credibility findings and rulings on the admissibility of evidence, entertain legal arguments, adjudicate waivers and applications for relief, make factual findings and legal rulings, and issue final orders of removal. Immigration judges are administrative law judges, but they are not appointed pursuant to the Administrative Procedures Act.

What are the rules of procedure that govern immigration court?

There are several manuals/memoranda that you should review before appearing in immigration court.

Perhaps one of the most important tools when preparing to appear in immigration court is the [EOIR Immigration Court Practice Manual²](#), which provides a comprehensive overview of the court's policies and procedures and is relevant for all immigration courts in the United States. Attorneys appearing in immigration court must follow the practice manual instructions, or else risk great detriment to their client's case.

In 2007, EOIR released [the Interim Operating Policies and Procedures Memorandum \(OPPM\) 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children](#). This memorandum gives guidance to immigration judges on various issues impacting children in the courtroom including appropriate procedures and courtroom modifications to make the court more [child friendly](#).

What should I expect when appearing in immigration court?

There are two types of hearings you will appear in while representing your client in removal proceedings. The first is a master calendar hearing and the second is an individual calendar hearing, also referred to as the "merits hearing."

What is the role of the clerk of the court?

Each immigration court has a clerk of the court who may be useful in answering questions regarding filing requirements, deadlines, and other miscellaneous questions that arise. This clerk does not work for an individual judge, but rather for the court itself.

Also, many immigration judges have their own individual law clerk. If you have a specific question regarding the child's case, you may call the court and ask to speak to the immigration judge's law clerk. This is the most efficient way of clarifying any problems that arise and the best way to ensure adherence to the immigration judge's specific requirements.

You should make sure to note the person you spoke with, as well as the day and time, in case there is a discrepancy that later arises regarding information that the individual law clerk or clerk of the court provided.

How do I notify the court and the government attorney that I am representing my client?

At or before your first appearance on behalf of a client in immigration court, you must file with the court, and serve upon ICE, Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative (called an E-28).⁴

How I can access the government files on my client?

Once retained, at the earliest opportunity, you should submit requests to the relevant government agencies to review the files they possess on your client. The principal file is the EOIR Immigration Court file. If your client is detained, there will also be an Office of Refugee Resettlement (ORR) file. Requests may be made under the Freedom of Information Act (FOIA) for information about your client in USCIS, ICE, and CBP files. These files may contain documents that clarify case history or are relevant to the client's claim. Although you can ask for expedited processing, requests should be made well in advance as the agencies may require four to six months to process your requests.

Requesting the ORR file. You may send a written request for a copy of a client's ORR file to the director of the Division of Children's Services (DCS).⁵ This requires a fully executed copy of Form G-28 and a signed release from the client before releasing medical or psychological records. The request may take four weeks to process.

FOIA request. You may submit a FOIA request to the National Records Center seeking any and all immigration information on a client that the government has in its records. The request may be made using Form G-639. The form must be signed by the client and notarized, and a Form G-28 should be attached. If you are requesting an expedited process you must provide proof that your client is in removal proceedings. An expedited response may take about six weeks or more.

Reviewing the court file. You may review the client's immigration court file by arrangement with the immigration judge's clerk. You will also need to submit Form E-28 with the immigration court to access your client's file. When reviewing the file you should be given the opportunity to listen to taped transcripts of any of the appearances your client has made before the immigration judge. You should also be allowed to request copies of any of the documents contained in the file.

What is a Notice to Appear?

The Notice to Appear (NTA), Form I-862, is the charging document initiated by DHS that places your client in removal proceedings. The NTA states the exact charges DHS is alleging against the child

and the section(s) of the law allegedly violated. It is important to review the facts alleged and legal charges with your client. The client will be asked to plead to them at the master calendar hearing.⁶

Your client will either be charged as being deportable pursuant to INA § 237(a) or being inadmissible pursuant to INA § 212(a). How the child came to the United States will determine if the child is deportable or inadmissible. If your client was admitted to the United States prior to the issuance of the NTA, the child will be charged with being deportable. "Admission" is defined in INA § 101(a)(13)(A) as the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." In contrast, if the child entered the United States without inspection or was otherwise never legally admitted, the child will be charged as being inadmissible. In either case, the child will be facing removal from the United States.

What can I expect at a master calendar hearing?

A master calendar hearing is a short procedural hearing which may only last a few minutes. The main purpose of this hearing is for the child to admit or deny factual allegations contained in the Notice to Appear (NTA) and concede or deny removability. The NTA will also inform your client of the date and time of the initial master calendar hearing. Once a person is placed in removal proceedings they are referred to as "the Respondent."

The court usually holds master calendar hearings on the same day each week. The courtroom will be crowded with many people waiting to be called before the judge for their master calendar hearing. When the child's name (or A number) is called, you and the child will sit before the judge and discuss the case with the judge and the ICE trial attorney. Depending on the circumstances, there may be more than one master calendar hearing scheduled over a span of many months before the child will have her individual merits hearing.

Practice Pointer:

If you are appearing with a client for the first time at a master calendar hearing and are not prepared to plead, you may request a continuance for "attorney preparation." The immigration judges typically grant such requests for pro bono counsel and will schedule another master calendar hearing at which pleadings will be taken.

During a master calendar hearing, an immigration judge is prohibited from accepting an admission of removability from an individual under 18 years old who is not accompanied by an attorney or legal representative, near relative, guardian, or other adult representative. In the case of a minor under 14 years of age, DHS must personally serve the NTA on the person with whom the minor resides.⁷

The immigration judge will first rule on whether or not the child is removable as charged. This determination must be made before the child can seek any relief. DHS has the burden to establish that it has the legal right to remove your client before the immigration judge will entertain any potential avenues of relief from removal. If DHS cannot prove at the master calendar that your client is removable, the immigration judge will schedule a hearing to determine removability.

Once removability is established, the immigration judge will ask your client if there is any relief from removal that the child is requesting. It is imperative that you identify for the court each and every form of relief that your child client may apply for, even if such relief will not be applied for simultaneously. For example, if the child is eligible for both special immigrant juvenile status (SIJS) and asylum, you should inform the court that the child is seeking SIJS and in the alternative, asylum; the same is true if the child will seek voluntary departure in the event that other forms of relief are denied.

In addition, the court will ask if the child wishes to designate a country of removal should the child be ordered removed. In the case of an asylum claim, since the child is claiming a fear of returning to her country, the best practice, generally, is to decline to designate a country of removal, in which case the government will designate the child's country of nationality.

The master calendar is also the appropriate time to set a trial date and request an interpreter for future hearings if necessary.

What happens when my client is released from custody?

While a child is initially in ORR custody, ORR may determine that the child should be released to the care and custody of a "sponsor." A sponsor is a responsible adult, usually a relative of the child. If the NTA was already filed with an immigration court and the sponsor's home is in another jurisdiction, the child will need to request a change of venue from the immigration judge.

A motion to change venue must be properly served on the government and filed in the jurisdiction where the removal proceedings were originally brought, which is usually where the NTA was filed. Once the motion is granted, the child will be scheduled to appear before an immigration judge in the

new venue. If the motion is the attorney's first appearance in the case, the attorney will have to file a Notice of Entry of Appearance, Form E-28.

What is an individual calendar/merits hearing?

The individual calendar hearing, or the merits hearing, is where the applicant is given the opportunity to present evidence not only to establish eligibility for immigration relief but also to show that she merits a favorable exercise of discretion by the immigration judge. This hearing will be audio recorded (except for off-the-record discussions) by the judge and then subsequently transcribed if the case is appealed.

A merits hearing takes place in an immigration courtroom in front of a single immigration judge. Those participating in the hearing will include the child, the child's attorney, the judge, an interpreter if necessary, and the government trial attorney. Any witnesses that you intend to call will be required to wait outside the courtroom until it is their turn to testify.

Generally, removal hearings are open to the public. However, the immigration judge has the authority to order the hearing closed if there are sensitive issues or concerns about confidentiality. Often immigration judges are sympathetic to the sensitive issues surrounding a child testifying, particularly an unaccompanied minor child. If you think that your child client would benefit from a closed hearing, you should file a "Motion to Request a Closed Hearing" with the immigration judge prior to the date of the actual hearing. You should be prepared to articulate why your client would benefit from a closed hearing.

What should I expect at the individual calendar hearing?

While the immigration judge decides how each hearing is conducted, parties should be prepared to:

- Make an opening statement.
- Raise any objections to the other party's evidence.
- Present witnesses and evidence on all issues.
- Cross-examine opposing witnesses.

- Make a closing statement.⁸

The judge's role is to listen as well as to actively ask questions for clarification. It is not uncommon for the judge to interrupt testimony or the proceedings if she or he has an issue to clarify or follow up on.

The child presents her case first. Usually, the hearing starts with the child as the witness in support of the application. The immigration judge swears in the child and then you proceed with the direct examination of the witness.

After the conclusion of direct examination, the ICE trial attorney will proceed with cross-examination of the witness. The trial attorney's objective is to test the veracity of the witness's testimony and raise doubts about her credibility. The trial attorney may ask about specific dates or details or jump back and forth among various topics - testing whether the witness is easily confused or contradicts herself. After cross-examination, you may ask to be allowed to re-direct as a way of clarifying any questions that the trial attorney raised. Usually, the judge will allow some form of re-direct. The judge may also ask witnesses questions during direct or cross-examination. This process will then repeat itself for additional witnesses. The government typically will not present any witnesses.

At the end of the hearing, the judge may issue an oral decision immediately on the record, schedule a future hearing date for you and the child to return to receive an oral decision, or decide to provide a written decision - in which case either the decision will be mailed to the child or a continuance will be scheduled for her to return at a later time to receive the judge's decision.

How are motions, evidence, and objections dealt with in immigration court?

During direct testimony and cross-examination, oral objections to questioning by either side are permitted. You should refer to the EOIR Immigration Court Practice Manual for general guidelines on motions and courtroom procedure.

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence formally apply in immigration proceedings (although they may be referred to for guidance). Overall, the admission of evidence in immigration court is extremely broad. The immigration judge "may receive in evidence any oral or written statement made by the respondent or any other person" if the statement is "material and relevant to any issue in the case."⁹ Further, hearsay is generally admissible in

immigration court unless it is "fundamentally unfair."¹⁰

Most judges will deal with evidentiary issues prior to any testimony. You will offer documents into evidence (without having to lay a foundation through testimony). The trial attorney may make objections to the evidence, most often based on authentication, relevance, undue repetitiveness or hearsay. You should always argue that based on the relaxed evidentiary standards applicable in immigration court, any objection by the trial attorney should go to the weight of the evidence, not its admissibility. In response to an objection that a document is unduly repetitive (most often arising with respect to country conditions information), it is helpful to be able to pick out one particular issue from each report that is not necessarily covered by others. You can also argue that while the information contained within several reports is similar, they each come from distinct sources, which proves that it is more likely that the information is accurate and/or widely accepted.

Should I consider calling an expert witness?

Yes. The testimony of an expert witness may be a crucial part of the child's case. Many experts will agree to act as an expert for a reduced fee or waive it entirely. Expert testimony is often provided on the following subjects: (a) country conditions, especially when the U.S. Department of State Country Report on Human Rights Practices for the particular country does not sufficiently address the persecution at issue in the case or is incorrect in some respects; (b) medical doctors who can examine bullet wounds, scars, and x-rays to confirm that a particular condition likely resulted from the torture or abuse described by the child; and (c) psychologists or psychiatrists who can examine the child to confirm post-traumatic stress disorder or some other condition that resulted from the applicant's persecution or torture.

In preparing the expert, it may be helpful for you to give the expert a copy of the child's application and, if applicable, written affidavits and any other relevant pieces of evidence, so she can become familiar with the child's case. You should always obtain the child's permission before disclosing her statement to any third party, including an expert. It is helpful if the expert can prepare an affidavit and also be available to testify in person, or if the court will allow it, via telephone.

On cross-examination, the trial attorney may want to know exactly how much time the expert has spent evaluating the child (thus establishing the expert's ability to accurately assess the child's case) and to ensure that the expert is not giving generic but rather individualized testimony. You may consider speaking with the trial attorney prior to the individual hearing to see if the trial attorney will consent to the expert witness being deemed an "expert." This will preclude the need to spend time

questioning the witness on the stand regarding her or his expertise.

Finally, expert witnesses are often obtained from a non-local area and sometimes, outside of the United States. It may be expensive to have the witness appear at the hearing in person. An alternative is to have the expert witness testify by telephone. If so, the Immigration Court Practice Manual requires that a written motion to present telephonic testimony be filed with the immigration court.¹¹ Again, the immigration judge must approve the motion before proceeding with telephonic testimony. Some judges are greatly opposed to witnesses testifying telephonically.

NOTE: You should consult your KIND pro bono coordinator for guidance on a particular judge's preferences with respect to telephonic witness testimony.

Practice Pointer:

You are required to present a witness list to the court at least 15 days before the hearing. The witness list should include the name of the witness, the alien registration number if applicable, a written summary of the testimony, the estimated length of the testimony, the language in which the witness will testify, and a CV or resume for any expert witness.¹²

If you plan to present a witness at the individual hearing, some judges also require a written affidavit from each witness. You should clarify with the judge ahead of time to confirm if an affidavit is required.

Is it necessary for my client to testify in immigration court?

No. It is not always necessary for a child applicant to testify in immigration court. If the child is very young, traumatized, or has difficulty recalling substantive information, you may choose to have other adults testify who can substantiate the child's claim in lieu of testimony from the child. It is also possible to use experts including psychologists and therapists to testify to the events in support of the child's claim.

What if my client's testimony is inconsistent?

If you think that your client will have difficulty testifying or if you are concerned that your client's oral testimony will conflict with the written application, it is very important that you are able to provide persuasive evidence to explain these inconsistencies so that they do not undermine your client's overall credibility.

There are several plausible explanations for why your client's testimony may be inconsistent with submitted written documents. First, many seemingly inconsistent statements can be a result of interpretation or cultural particularities. Second, children suffering from traumatic events may have memory lapses and/or flashbacks, which may explain their failure to remember specific facts or details. Third, the hearing itself may be an intimidating environment for the child. The courtroom is full of unfamiliar adults and an ICE attorney conducting adversarial cross-examinations of your client and other witnesses. These circumstances may cause a great amount of anxiety in a child. This anxiety can contribute to memory loss or the inability to answer questions in the same detailed manner as in her written application.

It is your job to explain these factors to the judge if your client's testimony is inconsistent. You may also want to argue that any inconsistencies are in fact minor and not material to the child's claim. If you are making these types of arguments you should provide concrete evidence to the court to support your reasoning. Such evidence could include reports/statements/expert witnesses submitted in the form of exhibits.

What are the consequences of failing to appear for master or individual hearings?

If your client fails to appear for a scheduled calendar hearing, the immigration judge has the authority to order your client removed in absentia. This order can only be overcome by filing a motion to reopen the case. There is no guarantee that a motion to reopen will be granted and your client could be removed from the United States with an in absentia order of removal. It is essential that you warn your client (and sponsor, if applicable) about the drastic and often irreversible consequences of failing to appear for a hearing or any other type of government appointment. If the child is in removal proceedings, it is imperative that she attends all hearings.

How do I work with the ICE trial attorney?

In many cases, the ICE trial attorney may be amenable to working out issues before the hearing occurs. A trial attorney's enormous workload makes her or him likely to consider requests for continuances (within reason) and the stipulation of various issues. If you have a question or would like to know the trial attorney's view on an aspect of the case, you should call the trial attorney and discuss the case.

Practice Pointer:

Trial attorneys are often difficult to reach; it may take several attempts before finally reaching him or her. Also note that trial attorneys are not assigned to individual cases until a few weeks before the hearing. As the hearing nears, you may call the ICE Chief Counsel's office and ask which trial attorney has been assigned to the judge presiding over the child's case. If you have a question before the trial attorney has been assigned, you should contact the ICE Office of Chief Counsel and request to speak to the "duty attorney."

Will an interpreter automatically be provided for my client?

No. Interpreters are not automatically provided at individual hearings. If a child needs an interpreter, a request must be made either orally at a master calendar hearing or by filing a Motion to Request an Interpreter. You should also confirm with the court's law clerk a few days before the hearing that the court has arranged an interpreter in your client's language for the individual hearing.

Practice Pointer:

While the court provides its own court interpreter, it is advisable to bring your own interpreter if the child does not speak English well. This will enable you and your client to consult as necessary and will serve as a check on the accuracy of the court interpreter.

How do I prepare my child client for the hearing?

Testifying in court can be a difficult and emotional experience, even for adults. This adversarial setting can be even more difficult, trying, scary, and possibly traumatic for a child witness, particularly when the child has suffered in some way. The courtroom environment alone can be intimidating, not to mention that the child is forced to sit through repeated questioning and delays. A child's anxiety of being in a courtroom can be compounded by unfamiliar adult faces, a language they do not understand, and the novelty and strangeness of the courtroom's ceremonial procedures.

Because of the stress children may feel, they may be more likely to make mistakes in their testimony. The more comfortable you can make a child with the courtroom and the process of telling her story, the less likely it is that mishaps will occur. It is important to tell a child who will testify that it is okay to cry, ask for a break, ask for a question to be repeated, or say, "I don't understand." Have the child practice saying these things beforehand.

You should begin by familiarizing your client with what to expect at the hearing. One way to do this is to take the child on a tour of the courtroom before the hearing so she knows what the room will look like. You should also explain to the child the different roles of each individual (e.g., the judge, the trial attorney, the judge's clerk, etc.) and what the child can expect to see and hear at the hearing. It is important not to leave a child guessing the roles of the adults present in the courtroom or what will happen during the proceeding.

You should also attend a hearing, preferably with the same judge that your client has been assigned to, in order to become familiar with the procedures and courtroom environment.

NOTE: Please ask your KIND pro bono coordinator for helpful information regarding specific local immigration judges and trial attorneys.

Who's who in the courtroom? Help your client visualize the hearing.

The courtroom

It is likely that the child has never set foot in a courtroom before so it's best to start here. The child, depending on her age and exposure to American media, may also hold preconceived notions of the courtroom as a place for criminals. As mentioned above, it is important to familiarize the child with the seating arrangements and equipment used (e.g., immigration judges use voice recording devices to create a contemporaneous record of all immigration hearings in the event of an appeal) and to arrange to take the child into a courtroom beforehand, if possible. When visiting the court is not an option, showing the client photographs of the courtroom, engaging in role-playing activities, and watching the video "What Happens When I Go to Immigration Court?"¹³ will help the child feel more comfortable with the process.

In addition, although courtrooms are set in their design and furniture, you may take minor steps to create a more child-friendly environment. For example, the child may be encouraged to sit with a

trusted adult at the witness table or stand. Or the child may be allowed to bring a personal item for comfort (e.g., a favorite toy, blanket, book, or good luck possession).

Immigration judge

The immigration judge is usually the first person who comes to mind when thinking of the courtroom; the judge will most likely be the person who will stand out immediately for the child upon entering the courtroom. According to the Executive Office for Immigration Review's Operation Policies and Procedures Memorandum, judges are expected to be mindful of unaccompanied children in their courtrooms and to employ child sensitive procedures whenever a child respondent is present. Explain that the judge may be wearing a black robe and is usually seated behind a bench or platform or in a place of authority. Explain to the child that the judge may directly question her throughout the hearing.

Opposing counsel

The government lawyer in immigration proceedings, referred to as Assistant Chief Counsel (ACC) or trial attorney, is another potentially intimidating adult who the child will encounter in the courtroom. Explain the role that the government's lawyer will play in the proceedings, including that this person is not on the child's side and will be asking a lot of questions to find reasons why the child should not be allowed to stay in the United States. Explain that the child may encounter new ACCs or trial attorneys throughout the immigration court proceedings due to rotations within the Office of Chief Counsel's office. The appearance of a new face at the opposing counsel's table at each immigration court appearance may be confusing to the child.

Court interpreter

The role of the court interpreter should also be explained to the child. Upon request, the immigration court will provide an interpreter for the child's hearing. You should explain to your client that the interpreter will speak in the child's language throughout the hearing. Similarly to the ACCs or trial attorneys, the child should not be surprised if there is a different interpreter at each court appearance. Explain the independent but important role of the interpreter, as well as the importance of clear communication and understanding between the child and the interpreter. The child should feel comfortable voicing any problems in understanding the interpreter and practice asking for clarification. Because the child's testimony is so crucial, try to have the interpreter spend a few minutes with the child before testimony is given to establish a rapport and ease the child's anxiety.

Child client

You should explain to the child the role that she will play in the removal hearing. Discuss the physical and verbal responses that may be expected from her the day of the individual hearing as a matter of procedure. For example, the judge may ask the child if she wants to be represented by you and if she

is ready to proceed with the hearing. The judge may also ask the child to state her true name and to stand up, raise her right hand, and swear to tell the truth. Practicing these procedural questions will make the child more at ease so that when the substantive questions are asked, the child feels comfortable in her ability to answer them confidently.

How do I teach my client how to answer questions in court?

Once you have made efforts to reduce the child's anxiety about testifying in the courtroom, you can focus on preparing the child for her own role. The child should be introduced to the basics of testifying.

The sworn oath

Explain to the child that she will be answering questions under oath and that an oath means that she must tell the full and complete truth. The judge may ask the child to state the difference between a lie and the truth to qualify the child as a competent witness. Although seemingly obvious, the child should be advised to always tell the truth, especially given the possibility of suggestibility.

Prepare your client for questioning

Remind the child that you, the trial attorney, and the immigration judge will take turns asking her a lot of questions. Remind the child to answer only the questions that she understands and to feel comfortable saying "I don't understand." Your client should not be afraid to ask for the question to be repeated as many times as needed or for the question to be asked in a different way.

Take note if you hear something that is a different response to a known fact by raising a concern to the court, such as whether the child understood the question or whether there was an interpretation error. Due to the possibility of such confusion and a child's deference to authority figures, your attentive ear must always complement a child's testimony.

Explain to the child the need to provide her answers in short sections in order to give the interpreter a chance to understand the answer and to translate it.

As mentioned above, you should tell the child that it is okay to cry, ask for a break, ask for a question to be repeated, or say, "I don't understand." Have the child practice saying these things beforehand. You should also watch for signs of fatigue or discomfort and request a break for a child.

Objections

The child should be made familiar with the practice of objections that both you and the government

lawyer may raise during the child's testimony. Further, explain to the child that she should wait for the judge to make a ruling on the objection before answering the question or being instructed not to answer the question.

Use child sensitive questions

You should use child-sensitive questions during direct testimony. The goal is to elicit a complete, accurate, and truthful version of the child's experiences. Language, voice tone, and phrasing of questions are important. For example, in questioning children, use short, clear, age-appropriate sentences and easy, one- or two- syllable words. As discussed earlier, children are more prone to suggestibility than adults, so avoid leading questions. These same principles also apply to trial attorneys and judges.¹⁴

In addition, immigration judges should be mindful that children are usually not able to provide the precision to which judges are accustomed with adult respondents. Judges may need to be reminded, where appropriate, that inconsistencies are not evidence of lying or dishonesty, but can be a product of the child's age, use of language, educational level, trauma, or anxiety.¹⁵

Keeping your client's voice

The child's story in her own voice should buttress the claim for relief. The child should not memorize her affidavit or declaration. The key to presenting a child's testimony is to enable the child to tell her story in her own words and in her manner of speaking. Let the child be heard. You should be so well versed in the child's story that you can guide her in presenting the necessary facts in her own terms. Allowing the child to tell the story in her voice and from her perspective validates the child's experience and helps to mitigate the effects of being forced to recount her tale of suffering to unfamiliar adults in a strange setting. While retelling a story can be difficult, some children find it is an opportunity to overcome or take control of a painful experience.

How does the immigration judge issue a decision?

Immigration judge decisions are usually rendered orally in the courtroom at the conclusion of the hearing. If it is not favorable, a decision about whether or not to pursue an appeal will have to be made without the advantage of a written decision or transcript. Because the Notice of Appeal must state the errors of law and/or fact to be reviewed, it is a good idea to have a colleague in the courtroom to take contemporaneous notes of the judge's decision. You may appeal a case before the Board of Immigration Appeals (BIA) or ask the immigration judge to reconsider. You should explain to the child that the appeals process can take many months and, if the child is in the care of the Office of

Refugee Resettlement (ORR), she may remain in government custody unless an ORR sponsor takes custody of the child.

What happens after the decision?

Once you complete the child's legal case, explain to the child what will happen next. For example, if a child is granted voluntary departure, advise the child to make travel arrangements and explain how the child is to confirm her departure from the United States with the U.S. government after arriving in her country of origin. If legal status is granted, warn the child about ways in which she could lose the immigration benefit recently granted. Do this both verbally and in a written letter in the child's language. Also, provide the child with guidance as to how to get a social security card and other documents. Finally, send a reminder letter to the child about completing any follow up phases of the case. For example, about 10 months after a child is granted asylum, send a letter advising the child that in two months time, she will be eligible to apply for adjustment of status. A follow up phone call to the child is also advisable.

How do I appeal if the immigration judge denies relief?

Immigration judge

Prior to filing an appeal with the Board of Immigration Appeals, the losing party can file a motion with the immigration judge to reconsider the decision. This must be done within 30 days of the decision and before filing a motion with the BIA because once a Notice of Appeal has been filed with the BIA, the immigration judge loses jurisdiction over the case. These motions are usually filed when you request that the judge reexamine or reconsider his or her own decision based on either new evidence or new case law.¹⁶ Again, any motion to reopen or reconsider must be filed with the correct fee within 30 days of the decision and before filing a Notice of Appeal (Form E-26). See 8 C.F.R. § 1003.23.

The Board of Immigration Appeals

The Board of Immigration Appeals, which is part of the U.S Department of Justice's Executive Office for Immigration Review (EOIR), is the appellate administrative body for interpreting and applying immigration laws. The BIA is comprised of 15 Board Members, who are aided by staff lawyers. A Chairman and Vice Chairman share responsibility for BIA management.

Decisions rendered by immigration courts nationwide may be directly appealed to the Board of Immigration Appeals (BIA), headquartered in Falls Church, VA. The government (DHS) and the child may both file appeals with the BIA. Details about the requirements for an appeal before the BIA are

found in the BIA's Practice Manual available on the EOIR website.¹⁷

The BIA has jurisdiction to hear appeals from removal orders and other decisions rendered by any immigration judge. The BIA also hears some appeals from DHS proceedings involving a noncitizen, a citizen, or a business and the U.S. government. BIA decisions are binding unless modified or overruled by the Attorney General or a federal court. Most BIA decisions are reviewable by federal courts.

The majority of appeals reaching the BIA involve orders of removal and applications for relief from removal.

The BIA designates some decisions as precedential. These decisions are binding on all DHS officers and immigration judges unless modified or overruled by the Attorney General or a federal court. The precedential decisions are also published in bound volumes entitled [Administrative Decisions Under Immigration and Nationality Laws of the United States](#).¹⁸ [Volume 24](#)¹⁹ contains a searchable subject matter index to decisions in Volumes 16 - 24.

[Volume 15](#)²⁰ contains a cumulative index to Volumes 1 through 15.

The BIA reviews findings of fact by the immigration judge under a "clearly erroneous" standard and applies a de novo standard to issues of law. Most appeals are decided after the submission of written briefs and are issued as written decisions. Oral arguments are allowed only on rare occasions.²¹

To file an appeal with the BIA, the appealing party must reserve the right to appeal at the time the immigration judge renders a decision in the case. If the losing party waives her right to appeal, the immigration judge's decision will become final.

NOTE: The "waiver" of the right to appeal violates due process if it is not "considered and intelligent."²²

After the immigration judge issues the decision, the appealing party has 30 days to file the Notice of Appeal with the BIA. The Notice of Appeal must be filed along with an Entry of Appearance (Form E-27), and the appropriate fees or an Appeal Fee Waiver Request (Form E-26A)²³. The BIA is strict about deadlines, even in cases in which there are special circumstances, thus it is highly recommended that all documents and forms, including the Notice of Appeal, be filed well in advance of the filing deadline to avoid dismissal of the appeal due to untimely filing.

Once the Notice of Appeal is received, the BIA will order a written transcript of the proceedings and

send the attorney a copy of the transcript together with a briefing schedule. This may take two or three months for a detained case and longer for a non-detained case. For this reason, it is a good idea for you to begin preparing the brief even before the transcript arrives. The BIA typically grants at least one three-week extension upon attorney request. However, any such requests need to be filed as soon as possible after receipt of the briefing schedule and before the deadline set in the schedule.

In the Notice of Appeal and brief, you may request that a three-judge panel review the decision of the immigration judge. Otherwise, a single judge will decide the appeal. Requests for a three-judge panel are evaluated based on certain factors.²⁴

The filing of a direct appeal of a decision by the immigration judge in a timely manner, within the 30-day period, results in an automatic stay of execution of that order.²⁵ Unless the child waives the appeal, she will not be removed from the United States pending her BIA appeal.

Federal court review

Once the BIA decision is issued, the losing party (now referred to as the "petitioner") may be entitled to judicial review of the decision in the federal circuit courts of appeal. However, not all issues are entitled to judicial review by the federal circuit courts.

Although asylum is a discretionary form of relief, the court retains jurisdiction to review most aspects of the asylum determination pursuant to INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). However, INA § 208(a)(3), 8 USC § 1158(a)(3) limits review of several determinations related to asylum, such as whether an individual established changed circumstances or extraordinary circumstances regarding a delay in filing for asylum. Again, the prohibition does not apply to cases that raise a constitutional claim or a question of law. Not all courts agree on what constitutes a "question of law." The ninth and second circuits have held that questions of law include the application of statutes or regulations to undisputed facts, or mixed questions of facts and law. Therefore, in the ninth and second circuits, a decision on "changed circumstances" or "extraordinary circumstances" is a mixed question of law and fact over which the court has jurisdiction.²⁶

A petitioner has 30 days to file a petition for review with the federal circuit court from the date the BIA renders its decision. The circuit court is determined by the location of the immigration court where the immigration judge completed proceedings. For example, if the underlying immigration judge decision took place at the Arlington, VA immigration court, the petition would be filed in the U.S. Court of Appeals for the Fourth Circuit.

There is no automatic stay of removal when filing for a Petition for Review. A separate request for stay of removal must be filed with the federal circuit court. If the petitioner is detained or is in danger

of being imminently removed, you should entitle it "emergency request for stay of removal."²⁷

The federal courts give considerable deference to agency decisions, but they do not hesitate to reverse the BIA when error is clear, such as when the BIA fails to follow the legal reasoning of its own precedential decisions. INA § 242(a)(2)(D) provides federal courts have jurisdiction to review "questions of law," which include the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.

The federal district courts may review custody decisions by habeas corpus²⁸ and address systemic practice issues involving the application of statutory and constitutional law, such as detention conditions and practices. Habeas corpus also provides review of deportation orders for permanent residents (and perhaps others) who cannot obtain review through direct petition.²⁹

Practice Pointer:

The law in this area is extremely complicated and varies dramatically by circuit. For additional reference, please ask your KIND pro bono coordinator. Further, the AILA Practice Advisory, "[Applying For a Stay Of Removal During Federal Court Proceedings](#)," is an extremely helpful resource.

Citations

¹INA § 103(a)(1)

²http://www.justice.gov/eoir/vll/OCIJPracManual/Practice%20Manual%20Final_compressedPDF.pdf

³<http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>⁴When you represent a client before EOIR and ICE, you must enter your appearance on Form E-28. A different form is used to enter your appearance before USCIS, Form G-28. You may need to complete Form G-28 several times during the proceedings, because it is necessary to specify on the G-28 form the purpose for which it is being submitted (e.g., for purpose of making a Freedom of Information Act (FOIA) request or filing Form I-360, etc.) Unlike the E-28, both the attorney and client must sign Form G-28.

⁵The office was known as the Division of Unaccompanied Children's Services until it was renamed in November 2011. Federal Register Vol. 76, No. 218

⁶See the immigration judges' master calendar checklist at <http://www.justice.gov/eoir/vll/benchbook/tools/Script%20MC%20Checklist.htm>

⁷See 8 C.F.R. § 103.5a(c)(2)(ii), 236.2 (2002).

⁸An example of a closing argument is provided by Regina Germain in AILA's [Asylum Primer](#) (5th Ed.); (American Immigration Lawyers Association 2005).

⁹8 CFR § 240.46(c)

> ¹⁰*Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

¹¹ICP Manual § 4.15(o)(iii).

¹²ICP Manual § 3.3(g).

¹³"What Happens When I Go to Immigration Court?" was created by the Women's Refugee Commission for attorneys to use with their clients. The DVD is available in several languages, including Spanish. Ask your KIND coordinator for a copy of this video if you are interested in viewing

it.

¹⁴For more examples of suggestions in questioning children, David L. Neal, [Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Minors](#), US Department of Justice, Executive Office for Immigration Review, at Exhibit A (March 22, 2007), <http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf>

¹⁵DOJ, www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf (advising judges to "[n]ot assume that inconsistencies are proof of dishonesty, and recognize that a child's testimony may be limited not only by his ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.")

¹⁶See 8 C.F.R. § 1003.23.

¹⁷<http://www.justice.gov/eoir/>.

¹⁸http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

¹⁹http://www.justice.gov/eoir/vll/intdec/Vol%202024_pdf/Volume%202024%20Index.pdf

²⁰http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

²¹8 C.F.R. § 1003.1(d)(3)(i).

²²See *U.S. v. Zarate-Martinez*, 133 F.3d 1194, 1097-98 (9th Cir. 1998).

²³Forms and fee schedules are available at: <http://www.usdoj.gov/eoir/formslist.htm>

²⁴8 C.F.R. § 1003.1(e)(6).

²⁵8 CFR 1003.6(a).

²⁶American Immigration Council Legal Action Center, *How to File a Petition for Review*, Feb. 28, 2011, http://www.aifc.org/lac/pa/lac_pa_041706.pdf. (citing *Taslimi v. Holder*, 590 F.3d 981, 985 (9th Cir. 2010); *Husyev v. Mukasey*, 528 F.3d 1172, 1178 (9th Cir. 2008); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007); *Chen v. United States DOJ*, 471 F.3d 315, 322 (2d Cir. 2006)).

²⁷For more specific guidance on stays of removal, refer to "How to file a Petition for Review," Id.

²⁸*Zadvydas v. Davis*, 533 U.S. 678 (2001) - The court held that habeas corpus may be used to bring statutory and constitutional challenges to post-removal order detention. This case addressed whether the government could detain a removable person indefinitely beyond the removal period.

Demore v. Kim, 538 U.S. 510 (2003) - The court held that habeas corpus may be used to bring a constitutional challenge to pre-removal order detention. The court considered the constitutionality of the mandatory detention provision, INA § 236(c). *Clark v. Martinez*, 543 U.S. 371 (2005) - The court held that its decision in *Zadvydas v. Davis* also applied to government detention of persons found to be inadmissible.

²⁹In *INS v. St. Cyr*, the Supreme Court clarified that the courts retain habeas corpus review of deportation orders, at least for permanent residents who cannot obtain review through direct petition at 325.

Chapter 4: Special Immigrant Juvenile Status (SIJS)

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

Introduction

Special Immigrant Juvenile Status (SIJS) allows immigrant children in the state juvenile system who cannot reunify with their parents due to **abuse, abandonment or neglect**, and who meet certain other criteria, to obtain lawful permanent immigration status.¹

SIJS is unique among immigration remedies because a state court order is a prerequisite to filing for the SIJS-based I-360 petition with the immigration service (U.S. Citizenship and Immigration Services (USCIS)).

What is Special Immigrant Juvenile Status?

Special Immigrant Juvenile Status (SIJS) is unique among immigration remedies in that the application process requires the involvement of a state "juvenile court." Whereas applicants for other immigration remedies proceed solely before federal immigration authorities, a child seeking SIJS must first ask an appropriate state court judge in the state where the child is living to make certain findings. These findings involve determinations that, among other things, reunification with one or both parents is not viable for the child due to abuse, neglect, abandonment or similar grounds under state law. The involvement of state court in the SIJS process reflects Congress' judgment that an appropriate state court is best suited to make findings relating to family law or child protection - matters that lie within the state court's traditional expertise.

A child may not proceed to file her SIJS petition with USCIS until she first obtains an SIJS predicate

order from an appropriate state juvenile court. The state court is not being asked to grant a child lawful immigration status; that responsibility lies solely with USCIS. The state court's role in the SIJS process is simply to make the factual determinations necessary for SIJS eligibility. Once this takes place and a SIJS predicate order is entered that includes these specific determinations, the child may proceed with the immigration phase of the case by submitting the SIJS petition to USCIS.

Upon the adjudication and receipt of an approved SIJS petition (I-360) from USCIS, the last step is for the child to file an application for adjustment of status (I-485) to lawful permanent resident of the United States.

Why are state court decisions necessary for an immigration application?

The involvement of state court in the SIJS process reflects Congress' judgment that an appropriate state court is best suited to make findings relating to family law or child protection - matters that lie within the state court's traditional expertise.

What is required in the state court order?

An appropriate state court judge in the state where the child is living is required to make certain findings involving determinations that, among other things, reunification with one or both parents is not viable for the child due to abuse, neglect, abandonment, or similar grounds under state law. The state court judge includes these requisite findings in an order - referred to as the "SIJS predicate order."

What is considered a "juvenile court"?

The SIJS regulations define "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."² In many states, this means a traditional juvenile court, a family court, or the family division of a court of general jurisdiction. In some states, multiple courts share such jurisdiction and a probate court or surrogate court may be a "juvenile court" for immigration purposes.

Are state court judges deciding to grant a child lawful

immigration status?

No. The state court is not being asked to grant a child lawful immigration status; that responsibility lies solely with USCIS. The state court's role in the SIJS process is simply to make the factual determinations necessary for SIJS eligibility. Once this takes place and an SIJS predicate order is entered that includes these specific determinations, the child may proceed with the immigration phase of her case.

Who is a special immigrant juvenile?

The INA defines a special immigrant juvenile as a person who has been declared dependent on a juvenile court or who has been placed in the custody of an agency or individual because one or both of the child's parents are not able to care for the child due to abuse, neglect, abandonment, or a similar basis under state law.³ The child must continue to be dependent on care from the juvenile court. In addition, the child must show that the juvenile court determined it would not be in the child's best interest to be returned to the child's country of origin.⁴ Also, the child must be under the age of 21, in the United States,⁵ and remain unmarried⁶ throughout the immigration process to qualify as a special immigrant juvenile. Finally, the child cannot have committed certain crimes, such as crimes of moral turpitude or drug offenses, and cannot be otherwise inadmissible to the United States.

Child Practice Pointer:

If the child gets married before her I-360 is approved, the I-360 must be denied. If she gets married after the I-360 is approved but before the I-485 is granted, the I-360 will be revoked and thus the underlying basis for the I-485, the adjustment of status to legal permanent resident, will be lost.

How is abuse, abandonment, neglect, or a "similar basis" determined?

The SIJS statute requires a factual determination of abuse, abandonment, or neglect, or similar basis under state law. The SIJS regulations do not define these terms, and so you will have to consult the relevant state laws for guidance on what constitutes abuse, neglect, or abandonment. Further, the 2008 TVPRA provides an additional category, "similar basis under state law" that gives more latitude in states that use different terminology or recognize additional bases for foreclosing a child's reunification with parents. For example, there are situations in which a child may be mentally ill or physically incapacitated and the parent is unable to care for the child, but in which there was no

actual abuse, abandonment, or neglect.

Child Practice Pointer:

It is important to note that while a determination of abuse, abandonment, or neglect, or similar basis under state law individually will suffice, it is wise to argue for as many of the findings as you can support.

What does it mean to be declared dependent on a juvenile court or placed in custody?

A juvenile judge cannot make the requisite SIJS findings until a child is first declared dependent on the juvenile court. As set forth in the SIJS regulations, the declaration shall be "in accordance with state law governing such declarations of dependency."⁷ Of all the aspects of SIJS eligibility that are determined under state law, this element probably entails the most variation among states or within them.

It is important to understand that the above requirement does not limit SIJS eligibility to children who are financially dependent on the state or in state custody. In fact, there are a number of scenarios that will qualify under this element. One of the more common circumstances in which a child is declared dependent on the juvenile court include when she is placed into state foster care. However, SIJS eligibility can also be established in cases that do not fit the more "typical" models. For example, it can include the situation of a child in juvenile delinquency proceedings who has been placed under the state probation department. It can also include the situation where a responsible adult is made the guardian or custodian of the child.⁸

Child Practice Pointer:

The SIJS predicate order must contain language stating that a child is dependent on the court.⁹ If the judge you appear before is unwilling to state that the child is "dependent on the court," request that the court write "the child is dependent upon the court in that the child's parents have relinquished control over him or her and the court has accepted jurisdiction over the child's custody."

Practice Pointer:

You should contact your KIND pro bono coordinator for specific guidance on relevant state law.

What if the child has only one parent with whom she can't

reunify?

Your client may still qualify for special immigrant juvenile status. SIJS is available only where "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, or abandonment, or a similar basis found under state law."¹⁰ Before 2009, the law required that neglect or abandonment had to come from both parents; the new law greatly expands the number of vulnerable and neglected children who may now qualify for SIJS.

Practice Pointer:

Since this change in the law is fairly recent, we recommend that you attempt to obtain findings of abuse, neglect or abandonment, or a similar basis with respect to both parents whenever appropriate under the facts. This finding should be expressly stated in the juvenile court's order (as was made clear under the previous wording of the statute).

What do I need to show to prove that return is not in the child's "best interests"?

For a child to qualify for SIJS, it must be "determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."¹¹ The standard of "the best interests of the child" is a familiar one under the laws of almost every state. You should contrast the advantages of the client's present situation with the mistreatment that she experienced previously or would face in the future to demonstrate that the current situation would best serve the child's interests.

Be sure to determine what factors may be taken into account under the law of the state when considering the "best interests" of a child. Normally, there are a wide range of factors that may be taken into consideration that do not necessarily just relate to abuse or abandonment. Such factors may include family/friend support systems, emotional/mental well being, medical considerations, and educational resources.

How do I get DHS express consent for my client's application for SIJ status?

Under current law, the Secretary of Homeland Security must consent to the grant of special immigrant

juvenile status.¹² An approval of the underlying petition for SIJ status by DHS/USCIS is evidence of the Secretary's consent. The consent determination by the Secretary (through the USCIS District Director) is simply an acknowledgement that the request for SIJ classification is bona fide (sought primarily for the purpose of obtaining relief from abuse, abandonment, or neglect, or similar basis under state law, and not solely for immigration purposes).¹³

NOTE: KIND works primarily with released children. Be aware that there is a separate process for "express consent" when a child is in federal immigration custody (non-released child). The Department of Health and Human Services (HHS) must give its consent before the state court is allowed to change the child's custody status or placement.¹⁴ This is referred to as "specific consent."

If you are representing a child in federal immigration custody (non-released child), consult with your KIND pro bono coordinator for additional resources.

What if my child client turns 21 after I file the application for SIJS?

Fortunately, an "age-out" provision (referred to as "transition protection") included in the 2008 TVPRA rectifies this issue. As of December 23, 2008 (date of TVPRA enactment), a child who is under 21 years old at the time of filing her SIJS petition (Form I-360) may not later be denied on the basis of age.¹⁵

Is SIJS permanent immigration relief?

No. Obtaining SIJ status is not an end in itself. Rather, being classified as a "Special Immigrant Juvenile" enables a child to immediately apply to become a lawful permanent resident (LPR) of the United States. It is this complete process - SIJ status and then eventual lawful permanent residency - that is referred to as a "remedy" or form of relief for an undocumented child.

To summarize, the process for gaining LPR status through SIJS entails several steps with both state law and immigration law components:

1. Obtain a SIJS predicate order in state juvenile court.

2. File a petition with USCIS for Special Immigrant Juvenile Status.
3. Once SIJ status is granted, apply for legal permanent resident status.

How should I evaluate my case for SIJS and determine eligibility?

In addition to the above legal requirements for special immigrant juvenile status, there are numerous factors that must be considered when evaluating whether the client is in fact eligible for SIJS. It would be unfortunate to take a child through the lengthy and complicated application process of SIJS only to discover at the end that the child is in fact inadmissible and therefore ineligible for the final step of adjustment to lawful permanent residency immigration status. In addition, if a child is applying affirmatively for SIJ status, a denial of her application could put her at risk for possible detention and/or removal.

Further, even if a child is eligible for SIJS, such status may not be in the child's best interest. SIJS can offer a pathway to permanent lawful immigration status for children who may have few other viable options for security and stability. However, by definition, SIJS-eligible children have endured maltreatment or other traumatic experiences and the process of evaluating and preparing their cases must take the child's trauma into account.

A careful evaluation of the risks and benefits of SIJS for the child is required so that a thoughtful decision can be made about whether to initiate the SIJS process.

What are the benefits of SIJS?

Most importantly, it provides the basis for your client to apply for adjustment of status to lawful permanent resident (LPR). A person with LPR status can live and work permanently in the United States, travel outside of the United States, is eligible for certain public benefits, and can ultimately apply for U.S. citizenship.

A child who files for legal permanent status with USCIS is eligible for a work permit during the time it takes USCIS to decide the application. Your client may not be legally allowed to work under state and federal labor laws depending on your client's age. A work authorization card however can also serve as a valid form of identification. In addition, if the application is backlogged, your client may become

eligible to work.

Your client is also eligible (contingent on funding) for Title IV and other programs and states can seek reimbursement for foster care funds.

What are the drawbacks to SIJS?

A child who immigrates as an SIJ ceases to be a "child" of her parents for immigration purposes. That means that the parents cannot receive lawful status through the child. Even if the child becomes a United States citizen, she cannot file for her parents when she reaches 21.¹⁶ If the child wants to use her immigration status to file for a parent, SIJ status might not be the best option for your child client.

What about children who are not in removal proceedings?

Children who are not in removal proceedings must carefully consider the potential risks and benefits of filing a SIJS petition. The application will bring the child to the attention of USCIS, which may lead to the initiation of removal proceedings against the child should the petition be denied. If there are strong reasons to believe that the application may be denied - for example, if the child has a substantial criminal record - the risk of applying for SIJS may be too great. Yet at the same time, remaining without lawful status in the United States and facing an unstable and precarious existence may have severe consequences for the child. The child's decision to apply affirmatively must be made carefully; you must make certain that she has a full understanding of the risks involved.

How does SIJS compare to asylum?

In evaluating potential remedies, it is important to understand how SIJS overlaps with, and differs from, asylum. Preparing both types of cases will entail discussing and documenting experiences that were traumatic for the child. However, there are also important distinctions.

A successful asylum claim is based on conduct by the government or an entity the government failed to control. In SIJS, the harmful conduct was by the child's own parent(s). Thus, a child applying for SIJS must be prepared to make such allegations against her parent(s), both on paper and in person, both in state court and before immigration authorities. Some children, even those badly mistreated by parents, may be reluctant to make such allegations, at least initially. Moreover, state court papers will generally be served upon the parent(s), if living. You should explain this to SIJS clients early on in the

process.

Children granted SIJS status will never be permitted to petition for any immigration benefit on behalf of their parents.¹⁷ Plainly put, a child with SIJS who becomes an LPR and later a U.S. citizen cannot file a petition for immigration status on behalf of either parent. Asylees who become LPRs (and USCIs) can later petition for certain family members to immigrate to the United States.

A child granted asylum can apply for LPR status after one year, and if successful, may apply to naturalize four years after her LPR status is granted.¹⁸ In comparison, a child may apply for LPR status immediately upon being granted SIJS.

Asylum is a discretionary remedy. In contrast, the SIJS statute (with the exception of express consent by USCIS) does not provide for a large discretionary role in adjudicating Form I-360. Thus, if a child meets the eligibility requirements for SIJS, her petition should be granted.

NOTE: Adjustment of status, however, always entails discretion. Thus, a child granted SIJ status may ultimately be denied adjustment of status based on negative factors in her case, such as criminal or other activities.

What if my client is inadmissible?

In general, applicants for LPR status bear the burden of showing they are "admissible" and that they are not "inadmissible" for any of the reasons set forth in the INA, at 8 U.S.C. § 1255.

Are there any exceptions if my client is subject to a ground of inadmissibility?

Yes. Children with SIJ status are exempt from several of the statutory bars to adjustment of status.¹⁹ For example, many SIJS-eligible children admit to having entered the United States without inspection (EWI). Entry without inspection usually renders a person inadmissible and bars adjustment of status. However, children with SIJS are exempt from that particular bar. Likewise, unauthorized employment in the United States is usually a bar to adjustment, but not for children who are granted SIJS.

SIJS applicants are exempt from the following grounds (not a complete list) and no waiver is necessary if: the child is a public charge; lacks a valid entry document; is working without

authorization; is present without admission or parole (entry without inspection); engaged in document fraud and misrepresentation, including false claim to U.S. citizenship; or is a stowaway.

What if my client has a ground of inadmissibility that is not exempt?

A waiver may be available. There are a few inadmissibility grounds that are still applicable to children with SIJS²⁰ but for which they may apply for a discretionary waiver based on "humanitarian purposes, family unity" or "the public interest." Examples of grounds that would require a waiver include HIV-positive applicants, applicants who have a drug addiction, or applicants who have a mental or physical disorder that poses a risk to people or property.

Practice Pointer:

The waiver is extremely broad and the standard is the same as that for refugees.²¹ There is no requirement that the applicant show "extreme hardship" to U.S. citizen or LPR relatives as required with other waivers.

What if my client has committed a crime?

Adult crimes

SIJS applicants may be inadmissible if they have been convicted of any number of adult offenses, e.g., drug offenses or crimes of moral turpitude. While it may be less common for children to be charged as adults, it is still possible.

Juvenile Delinquency Crimes

In general, a juvenile delinquency disposition is not considered a "conviction" for immigration purposes. However, some juvenile delinquency dispositions may denote an inadmissibility ground for which the child will need a waiver. For example, (depending on the circumstances), a drug offense may not be a bar to adjusting status under SIJS; however, "drug addicts" and "drug abusers" need to file a waiver of inadmissibility. Please refer to the KIND manual chapter on crimes and juvenile delinquency for more discussion of this issue.

What if there is "reason to believe" my client has been involved in drug trafficking?

A noncitizen is inadmissible if immigration authorities have probative and substantial "reason to believe" that she has ever trafficked drugs or assisted a drug trafficker in trafficking activities. INA § 212(a)(2)(C). A conviction is not necessary. For example, a delinquency adjudication or substantial underlying evidence showing a sale or a related drug trafficking offense may result in a child becoming inadmissible and can be a permanent bar to obtaining lawful status despite significant equities. Drug trafficking activity is a very serious ground that applies to juveniles as well as adults and cannot be waived in an application for SIJS status.

What happens in the state juvenile court proceedings?

In the state court phase of an SIJS case, a child must first enter the jurisdiction of the state juvenile court and then obtain the SIJS predicate order. You should look to state case law in the child's jurisdiction for precedent supporting issuance of an SIJS predicate order, and dependency and custody determinations in connection with SIJS. Generally, to the greatest extent possible, you will want to demonstrate that the particular facts of the client's case fit squarely within the mainstream of the state's case law on the standards for abuse, neglect, abandonment, and related concepts.

How does a child become subject to the jurisdiction of a state court?

There are several different paths for obtaining state court jurisdiction over your child client to meet this eligibility requirement for SIJS. For example, if the child already has an open dependency or delinquency case, no action is needed because the child is already under the court's jurisdiction. Some other examples of state court jurisdiction over a child include:

State foster care

SIJS may be available to a child who is in state-funded foster care or in some other type of state-sponsored care or custody, arranged through a state court, agency, department, or contractor. State law may provide for state foster care placements for the protection of children in circumstances including abuse, neglect, abandonment, or other instances of maltreatment or crisis. In most states, an appropriate state or county agency (such as Child Protective Services or a Department of Children and Family Services) is responsible for initiating child protective proceedings that result in foster care placements; in some states, a private individual is permitted to initiate such a proceeding. In some localities, child protective workers are trained to identify children who may be SIJS eligible.

Guardianship

If a child has a caretaker other than a parent, that caretaker may follow the state's procedure for being appointed guardian or custodian of the child. This is another way for a child to enter state court proceedings and to be committed to and placed in the custody of an individual appointed by the state court for SIJS purposes. This may be an option for children released from Office of Refugee Resettlement (ORR) custody to the care of a sponsor, as well as to children who have not been in ORR custody.

Adoption

Adoption by a non-parent caretaker is another circumstance in which a child may be able to come under the jurisdiction of a juvenile court. Again, like a guardianship, it is a scenario in which the court may place the child in the custody of an individual - here, the prospective adoptive parent - and thus be in a position to issue an SIJS predicate order if the parental reunification is non-viable due to abuse, abandonment, or neglect, or similar basis under state law.²²

Delinquency

A child in a delinquency proceeding (or an equivalent state juvenile law proceeding) may be committed to or placed in the custody of an appropriate state agency. Typically, when a delinquency judge sends a child to an out-of-home placement, the judge is required to order family reunification services and eventually to determine whether the child will return to her parents, or go on to an alternative permanent placement. Although delinquency proceedings are most often initiated after a child's arrest, rather than after a report of child maltreatment, the delinquency court must factor in to its decisions the child's best interests - which may include issuing a SIJS predicate order. Indeed, under the law of some states, it may be possible to convert a delinquency proceeding to a proceeding focused on child protection if it appears that the child was abandoned or subjected to abuse, neglect, or other maltreatment.

How do I move for the SIJS predicate order in state juvenile court?

State law, local practice, and the needs of the case will determine at which stage of the proceedings you can and should file a motion for this order.

Your motion for an SIJS predicate order should be supported by documentary evidence. You may want to use an attorney affirmation and attached exhibits to help the juvenile court understand the child's age, living situation, family history, the abuse, abandonment or neglect she has suffered and (to the extent necessary) her immigration situation. For any document not in English, you should attach a certified translation.

Along with the motion, you should submit a proposed SIJS predicate order to the judge containing language that is as close as possible to the SIJS statutory and regulatory requirements.

What type of evidence should be filed in support of the request for a predicate order?

The list below is a suggestion as to what supporting evidence may be helpful - such evidence is not necessarily required. You will want to balance the value of each piece of evidence with the time and effort it will take to secure such evidence.

- Client's birth certificate.
- Death certificate(s) for parent(s), with translation if applicable.
- If the child was adopted before making the motion, proof of adoption.
- If the sponsor is petitioning for guardianship, documentation of the child's release from immigration custody to a sponsor (ORR Division of Children's Services (DCS) Interim Notification to the Office of the Immigration Judge is suitable).
- Proof of current school enrollment (e.g., letter from an administrator stating enrollment date and status; school identification; report card, if strong).
- Medical or treatment records showing a parent's history of substance abuse and/or noncompliance with rehabilitation.
- A medical expert's evaluation to show that scars or other physical conditions are consistent with the child's explanation of how she was injured.
- A psychiatric or other expert report explaining how your client's behavior, affect, etc. is related to previous maltreatment.
- Police reports of incidents involving maltreatment of the child.
- Affidavits of relatives, friends, neighbors, teachers, priests or others in the child's country of origin describing the circumstances of the child's maltreatment. Affidavits must be based on personal knowledge; use of detail may enhance credibility and usefulness.
- Although not required, in certain cases, it may be advisable for the client to submit an affidavit. Over a series of interviews and using her own words, you should help the child assemble the facts of her life into a coherent, persuasive narrative supporting the SIJS findings you will be requesting from the juvenile court. You should review the statement with the client multiple times to ensure accuracy.

You should be sure to follow court requirements for submitting such documents and/or admitting them into evidence (e.g., notarization, translation, etc.). As with any evidentiary showing, the goal is to provide the juvenile court with adequate support for each element of each conclusion you are asking

the court to make, pursuant to the state's legal standards. As an example of the elements of a claim, and the variety of evidence that may be used in support of each element, consider the following case study.

Case Study: Below is an example of the utility of additional supporting documentation in support of a child's case.

Martin, age 14, wants to apply for SIJS on the basis of recurring physical abuse by his only living parent, an alcoholic father. In the U.S. state where Martin now lives, a parent's substance abuse may give rise to a finding of neglect if: (i) it impairs the parent's ability to care for the child, (ii) it exposes the child to severe harm or a risk thereof, and (iii) if the parent is not pursuing in good faith a course of substance abuse treatment. In preparing to apply for an SIJS predicate order making a finding of neglect, Martin's lawyer learns the following:

Martin was abused in his country of origin, where his father still lives. Most of Martin's injuries were bruises, welts and cuts that have since healed, and he never received any medical attention for them. However, in many jurisdictions, the lack of medical attention is in no way fatal to a claim that a child was physically abused. Martin's own affidavit contains a detailed account of the nature and frequency of the beatings his father inflicted, and states that his father angrily denied having a drinking problem.

Martin's father was once hospitalized after a collapse, and a relative was able to obtain a hospital record reflecting a diagnosis of cirrhosis caused by chronic alcohol abuse and recommending that the father stop drinking. The father's next door neighbor is willing to attest in writing that he witnessed the father's frequent and undiminished public drunkenness, saw Martin left unattended for days at a time, saw Martin with unexplained bruises and cuts on his face and arms, and got into shouting matches with Martin's father after suggesting that he should quit drinking.

Although Martin was reluctant to describe his feelings in interviews with his lawyer, he agreed to be evaluated by a psychiatrist to support his case. The psychiatrist learned that Martin still had recurring nightmares about his father's drunken rages. The psychiatrist provided an expert opinion linking Martin's nightmares and withdrawn behavior to his long-term exposure to actual and threatened violence.

If the juvenile court grants the motion for an SIJS predicate order, the judge may issue one or two orders, depending on local practice and the method by which the matter came before the juvenile court. For example, in the context of a guardianship proceeding, an order appointing a guardian is separate from the SIJS predicate order. When you receive the order(s), you should be sure to obtain

at least two originals or certified copies of the orders. (In some states, the court applies a raised seal). One set is for the client; you should keep the other, since USCIS may ask to see the order(s) at the interview.

What should I include in a sample predicate order I provide to the state court?

1. The above-named child, NAME, is under 21 years of age.
2. NAME, is unmarried.
3. NAME, is dependent upon the juvenile court (e.g., Springfield County Family Court).
4. NAME's reunification with his or her parents is not viable due to the fact that they have neglected, abused and/or abandoned him or in the following ways: the child's father has abandoned the child, in that he has not had any contact with the child since the child was two years old, and he has never provided any material, financial, or emotional support for the child; the child's mother neglected him, in that she failed to take any action to protect the child from regular beatings and physical abuse by her paramour in Nicaragua.
5. It is not in the best interests of the above-named child, NAME, to be returned to his country of origin, Nicaragua.

Child Practice Pointer:

Confirm that the spelling of the child's name and the child's date of birth match the birth certificate. If the child has been known by other names or other spellings (including in ICE records), confer with your KIND pro bono coordinator in advance on how to handle this.

Are there any deadlines or timelines I should be concerned about?

Yes. Although the outside deadline for filing an SIJS petition with USCIS is the child's 21st birthday, a much earlier deadline may apply under state law for fulfilling the state law prerequisites to a SIJS filing.

In many states, a person is no longer defined as a "child" after her 18th birthday and may have fewer available options for court protection under state law. It is crucial to comply with state law and practice to ensure that the client is not time-barred from applying for SIJS.

What is the immigration and adjudication process for SIJS?

Once a child receives an SIJS predicate order from the state court, the next step is to apply for SIJS before USCIS. The child applies for SIJS on Form I-360 and includes a copy of the predicate order as supporting evidence. See below for further details on submitting an SIJS petition.

It is important to understand that even if an SIJS petition is granted, thereby conferring on the child status as a "special immigrant juvenile," this alone does not confer a right to live permanently and work legally in the United States. Rather, upon approval of the I-360, a child must apply to adjust her status to that of a lawful permanent resident. Note: Often the I-360 petition and application to adjust status I-485 are filed at the same time. However, USCIS will not adjudicate the I-485 until the underlying petition is approved.

What should I consider in a potential SIJS case?

Children formerly in ORR custody

A few matters bear special mention with respect to children previously held in ORR custody. First, it is especially important to become familiar with the contents of the child's ORR file. The file may yield insight into the child's family background, contacts (or lack thereof) with family members while in custody, and medical or psychological findings, among other useful information. Second, you should make a point to meet early on with the child's sponsor to discuss any significant or pertinent background information.

Meeting with your client

Your early meetings with the child will lay the foundation for a successful attorney-client relationship. Among other things, this entails clarifying the respective roles of you and of the child, and explaining to the child the vital importance of confidentiality and truthfulness. By definition, children applying for SIJS often lack responsible adult supervision in their lives, so you may want to emphasize some ground rules such as having the child agree to promptly update you on any changes in contact information or life circumstances.

Working with sponsors or caseworkers

In an SIJS case, you may also have an important relationship with a third party: the child's sponsor or agency caseworker. You should make clear to all that your undivided duty of loyalty is to the child, not to the sponsor or caseworker. You can do this without alienating the potentially helpful third party. Local practice and the scope of the agency's duties will help determine the nature of your dealings with the caseworker. In working with sponsors, many variables are in play:

- How close and trusting is the relationship between the child and the sponsor?
- How well did the two know each other before the child came to live with the sponsor?
- How much (if anything) does the sponsor know (first-hand, or from the client, or from others) about the facts underlying the client's claim for relief?
- How much support is the sponsor able and willing to contribute to the child's well being and to her immigration case?
- Does the sponsor have legal immigration status? If not, he or she may still be qualified to act as a legal guardian, but he or she may be (understandably) unwilling to attend immigration court.

The range of possible answers is wide, so err on the side of caution in getting to know the situation. In working with sponsors, observe several points:

- You will want to hold most of the client meetings without the sponsor present to ensure confidentiality and promote an open dialogue with the child. Explain to both the sponsor and child why this is necessary. You should take care not to risk a waiver of privilege or impair the child's trust by disclosing information to the sponsor without the child's permission.
- Even if the child's and the sponsor's interests appear perfectly aligned, you should not assume that they are or will remain so. Sponsor-child relationships have been known to turn sour for any number of reasons - including child abuse or exploitation by the sponsor him or herself. Again, you should use good judgment about disclosing anything (e.g., the work product or opinions) to the sponsor. The relationship is generally not one of privilege.
- You should remind the sponsor that you are not the sponsor's lawyer and that the sponsor is free to retain his or her own lawyer for representation in the state court proceedings or consultation on involvement in the child's removal proceedings - particularly if the sponsor is undocumented. (In some family court proceedings, the state may afford representation to a

person in the sponsor's posture at no charge.)

- At the same time, the sponsor may be able to provide contacts in the home country and information unknown to the child or corroborate facts offered by the child. The sponsor may also be a major source of emotional, financial, and logistical support to the child during the course of what may be a difficult and emotional case.

What happens if my client has committed a crime?

A juvenile delinquency or adult criminal record may damage or derail the client's case for SIJS. Above all, law-breaking conduct will have not only juvenile or criminal justice consequences but also serious immigration consequences. Please refer to the chapter of the KIND manual on crimes and delinquency.

You should make clear to the child that during her pursuit of immigration relief, DHS will conduct a complete background check. In addition to the damage the law-breaking conduct may create, the child's failure to disclose any arrests beforehand will seriously damage her credibility. Before you file any immigration applications, you should question the child comprehensively and thoroughly, asking the same question in several different ways in order to get accurate facts. Ask if the child has ever been arrested, issued a ticket or summons, including from transit or motor vehicles authorities, stopped by the police, placed in a police car, handcuffed or fingerprinted, taken to a police station or court, placed in delinquency proceedings, questioned by a police officer, or required to pay a fine.

After this initial questioning, you should encourage the child to contact you immediately if the child has any contact with law enforcement - particularly before she pleads guilty to a delinquency offense or adult crime - so that you can best address the situation. You should check in on this important issue at each client meeting.

What if my client moves while in removal proceedings or after filing an affirmative application?

Children in removal proceedings and/or sponsors must inform the immigration court of any change in address or telephone number within five days after the change takes place. This should be done using form EOIR-33/IC.

If the client is not in proceedings but has a pending immigration application, she must notify USCIS within 10 days of any change of address using form AR-11. In either case, you need to be apprised of the child's whereabouts and must be able to contact her at all times.

Should my client be enrolled in school?

Although not required for SIJS, USCIS and the judges of both the juvenile court and immigration court generally look on school attendance favorably. Many states mandate school attendance for children up to a certain age. School achievement may help establish that it is in the child's best interest not to return to her country of origin. No state may bar a student from public schools on the basis of immigration status.

How do I prove my client's age and identity?

The child should provide a certified copy of her birth certificate to USCIS at the SIJS I-360 interview (although an interview is not required in all cases). Obtaining a birth certificate can take a long time, so you should start the process immediately. A foster care agency worker (if applicable) and family or friends in the home country may be able to help. If not, ask the child (or her sponsor) to inquire at the local consulate of her country of origin.²³ (Note: This is not advisable if the child is also seeking asylum). The consulate may have a process for helping to obtain documents, although some consulates ask for parental consent on behalf of children under 18. Consult with KIND about alternatives if this is the case. Another possibility is to directly contact the appropriate agency, such as the civil registry, in the state where the child was born.²⁴

If you are unable to obtain a birth certificate, the immigration regulations permit the use of a passport or official identity documents such as a cartilla or cedula.²⁵ The Legal Aid Society offers the following guidance:

When attempting to obtain birth certificates, keep a detailed record of all attempts/activities in case it is necessary to provide proof of your efforts to USCIS. . . .Secondary evidence of a child's age may include a juvenile court order, doctor's evaluation, psychologist evaluation, dental exam, school records, affidavits from someone who has known the applicant since birth, etc. To use secondary evidence you must obtain a letter from the country of origin stating that a birth certificate is unobtainable. Foreign consulates may be able to help with this letter. (8 CFR 103.2(b)(2)) Once again, you must document all steps taken in order to convince USCIS that diligent efforts were made. If time constraints require you to file the SIJS application packet prior to getting proof of age, indicate in the letter to USCIS that you are actively trying to obtain this

evidence. Make sure to include language from the CFR and a declaration from the child attesting to his or her age.²⁶

A passport is an acceptable form of identification at the USCIS Application Support Centers (ASCs) where adjustment-of-status applicants are fingerprinted. In some local USCIS offices, the USCIS officer will also stamp the child's passport after approving her I-485 as proof of status that can be used during the months the child is waiting the arrival of her "green card."

The child should also obtain death certificates for deceased parents and documentation of adoption as applicable. Again, you should start with the consulate and/or local authorities and keep records in case you must prove to USCIS efforts to obtain the documents (unless the child is also seeking asylum).

What happens if my client is already in removal proceedings and wants to file an SIJS application?

USCIS is the only government entity that has jurisdiction to adjudicate the SIJS-based I-360 petition. Further, if the child is in removal proceedings, the immigration judge (IJ) is the only person with jurisdiction to adjudicate the I-485 application.²⁷ Therefore, a child in removal proceedings who has an I-360 pending (or will submit an I-360) has several options.

First, she could ask the IJ for a continuance(s) of the removal proceedings to allow USCIS to adjudicate the I-360. Once the I-360 is approved, the IJ would then proceed with adjudicating the I-485.

NOTE: Like all I-485 applications filed before the Executive Office of Immigration Review (EOIR), a copy of the adjustment application must be filed with the Texas Service Center to comply with biometrics requirements.

Second, the child could ask the IJ - with the ICE trial attorney's agreement - to administratively close the removal proceedings until the I-360 is adjudicated. This prevents the child from having to repeatedly return to court while USCIS is still considering the child's petition. Once approved, removal proceedings would move forward and the IJ would adjudicate the I-485.

The child could ask the IJ to terminate the removal proceedings before EOIR to allow the child to complete her entire immigration process (including their filing and adjudication of I-360 and I-485)

before USCIS. In this case, the child could apply for an EAD/work permit while the I-485 is pending. This is opposed to adjusting before the IJ where the child must first wait for I-360 approval before filing the I-485 and work authorization request. Case termination is also beneficial to the child as the child would no longer be in active removal proceedings.

Remember, local court practices will vary.

What if my client is not in removal proceedings?

Children who are not in removal proceedings will have to file an I-360 petition with USCIS. Typically the package will include a petition for adjustment of status, I-485, and other supporting materials. Make sure to consult with your KIND pro bono coordinator regarding current filing procedures.

What are the general rules for filling out immigration forms?

Local practices of both USCIS and the immigration court vary (and may change periodically), so consult in advance of filing with your KIND pro bono coordinator.

- When preparing immigration forms, allow sufficient time for your KIND pro bono coordinator to review the draft before it is signed and submitted.
- Fill in "None" or "n/a" to questions not applicable to the client, instead of leaving blanks.
- If the space on the form is insufficient for your answer, prepare a supplementary page with the date, child's full name, A-number, and question and page number.
- Explain to the child (and guardian, if applicable) what it means to sign under oath.
- Children 14 and older must sign their own forms; children under 14 may have a guardian sign instead.
- When mailing forms, always use a method that provides a receipt (e.g., certified mail).
- Two-hole punch the top of the applications.
- Never mail an original birth certificate, passport, juvenile court order or certificate of disposition. Bring the originals to interviews.

What should be included in the I-360 petition package?

The original I-360 petition package will contain:

- **Cover letter**

In the cover letter, you may want to include a brief case summary in order to give USCIS context for the case. The letter should concisely explain the basis for the child's claim and should itemize the enclosed documents. Especially if there will be no I-360 interview, this will be the one chance to present the facts. However, you should be certain the information in the case summary is consistent with the facts in the rest of the A-file, or provide an explanation for any inconsistencies.

- **Original signed I-360.**

- **Original signed G-28.**

- Copy (not original) of **birth certificate** and its English translation (or, if the attorney absolutely cannot get a birth certificate, other acceptable proof of age as discussed above).
- Certified copy (not original) of the juvenile court's SIJS predicate order(s).
- No fee is required for the submission of the I-360 (You may want to highlight this fact in the cover letter).

Child Practice Pointer:

Form I-360 is designed for several purposes, so parts of the form do not apply to Special Immigrant Juveniles. Some pointers:

- In the lower right corner of page one, check the "attorney or representative" box and fill in license number.
- In part four, you need not designate a consulate for notification, nor give a foreign address if the child doesn't have one.
- In part four, if you answer "yes" to the third and fourth questions, you should attach a

supplementary page to explain.

- Both you and the child must sign the form.

How should I prepare for the interview with USCIS?

Whether or not the child is required to attend an I-360 interview depends on what USCIS district is adjudicating the petition.²⁸ Some USCIS districts approve I-360s on paper alone; others require an interview. If the child is pursuing SIJS affirmatively, she usually will be called for just one adjustment of status interview in which the USCIS officer will adjudicate the I-360 and the I-485 together.

Any time you receive a notice from USCIS, you should discuss it with your KIND pro bono coordinator and schedule a preparation session with the child. Review everything stated in the application package with the child. If there are changed circumstances or errors in the application, discuss with KIND how to amend the application. If the child has been working in the United States without authorization, it is best that she not be working at the time of the interview. For more on the preparation and interview, refer to the section below on the adjustment of status interview.

For an I-360 interview, be particularly aware that the USCIS officer may want to determine whether the petition was filed in good faith and may explore whether the child obtained the juvenile court order primarily for immigration purposes rather than for protection from abuse, neglect, or abandonment, or similar basis under state law.²⁹ The petition will be denied if USCIS feels that no abuse, abandonment, or neglect took place and that the child is simply trying to qualify for immigration relief.

The child must be ready to answer questions on how and when she entered the United States, any contacts with the parent(s) since arriving in the United States, circumstances of siblings still in the country of origin, etc.

How am I notified of USCIS's decision regarding my client's petition and application?

If you do not receive a written decision at the end of the interview, ask the USCIS officer when and how he or she will issue a decision. If you have an I-360 receipt number, you can check the case status on the USCIS website. If the local USCIS office adjudicates I-360s without interviews, you should discuss with your KIND pro bono coordinator how you could expect to receive a decision.

Current law requires USCIS to adjudicate and decide the I-360 petition within 180 days after the application is filed.³⁰ However, the statute does not provide any remedy if the deadline is not met. Consult your KIND pro bono coordinator if this happens.

If the child is still in removal proceedings and receives an I-360 approval, you should prepare and file an I-485 adjustment of status application packet (which will include a copy of the I-360 approval). Remind the child that because her request to adjust status will be based on the grant of SIJS, the child must remain eligible for SIJS to be able to adjust (e.g., the child does not get married or commit a serious crime).

The denial of the I-360 petition can be appealed to the Administrative Appeals Office (AAO), part of USCIS.

How do I help my client apply for lawful permanent resident status?

The entity that will adjudicate the I-485 will be determined by whether or not the child is in removal proceedings. If the child is in removal proceedings, her I-485 package will be filed before the court. As with all other I-485 applications before the court, the child is required to submit a copy of the I-485 application and the fee or immigration judge-issued fee waiver to the USCIS Texas Service Center. This is procedurally required so that the child will receive an appointment to have her biometrics taken.

If the child is not in proceedings, or has been charged as an arriving alien on her NTA, the attorney can file the I-360 and I-485 together with USCIS. In any case, however, the I-485 cannot be adjudicated until the I-360 has been approved.

It is important to plan in advance for the adjustment of status stage of the process because several components require some lead time - including obtaining delinquency records, if necessary, and a USCIS-approved medical examination. Note that the I-485 includes a long list of questions about the child's conduct and history. Any unfavorable answers must be explained on a separate page headed with the child's name and A-number. As stated in the instructions, a "yes" answer is not an automatic disqualifier, but you should discuss the explanations with your KIND pro bono coordinator.

What should be included in the I-485 adjustment of status application package?

The following items should be included in an application for adjustment of status. For a full and complete list, please consult the USCIS website and your KIND pro bono coordinator:

- **Form I-485.**
- **Copy of I-360 approval** (if the adjustment application is being filed separately from the I-360 petition).
- **Filing fee (or fee waiver)** including biometrics fee.
 - If the child is in removal proceedings and is filing the application in court, she will have to "fee in" the application. This means that you submit the fee to the USCIS Texas Service Center in advance of filing the I-485 with the court. By filing this packet, USCIS also schedules the child for a biometrics appointment. When you get the fee receipt, you file a copy of the fee receipt with the court along with the other adjustment materials. If you want an I-485 fee waiver for a client in proceedings, you need to file a motion with the IJ and get the order granting the fee waiver, and then file that with the Texas Service Center.
- **Form G-325A** for any applicant 14 or over.
 - In the required chronology of the client's former addresses, you should try not to leave any time gaps. Submit all four copies.
 - If the child is in removal proceedings, the original signed G-325A goes to the ICE attorney so he or she can use it to conduct background checks.
- **Form I-693** medical report.
 - The examining doctor or "civil surgeon" will give this to the child in a sealed envelope after completing the form. You can help the child get a list of local civil surgeons from USCIS's website. Only a designated civil surgeon can complete the form. The child should ask about fees in advance of making an appointment, as they can vary widely. The child should also bring photo ID and records of any past immunizations. The list of required immunizations is extensive, and if the civil surgeon finds that the child needs follow-up visits, this may take a while to accomplish. Further, the completed form will be valid for a specific period of time. In addition to the sealed original, the child should ask the doctor for an extra copy of the form for you so you can review it for any concerns that may require a waiver of inadmissibility.
- **Certified copies of records of disposition**, if the child has any record of arrests, summons or

tickets. You can obtain these records from the relevant criminal court or tribunal.

- **Optional for initial filing: Form I-601**, Application for Waiver of Ground of Inadmissibility.
 - If a child has any potential grounds of inadmissibility for which she will be required to submit a waiver, this is done through Form I-601 along with the relevant fee and any supporting documents such as affidavits and letters of recommendation.

NOTE: Most practitioners do not submit the I-601 waiver with the initial packet but instead wait for USCIS or the IJ to inform the child of the grounds for which she will be required to submit a waiver. In other words, you don't want to concede that the child is inadmissible for any grounds beyond what the government has deemed applicable.

- **Optional: Form I-765**, if the client wishes to apply for permission to work while the application is pending.

NOTE: If you are filing the I-485 in court, you will file the I-765 separately with a service center, depending on the child's residence, only after the I-485 is on file with the court.

What can I expect at the biometrics appointment?

USCIS may send notices for the child's biometrics appointment and/or interview to either you or the client, so both should be watching for their arrival. Lead time may be short, so if you will be away from the office, you should make sure someone can handle the matter in your absence. If the notice has not arrived about eight weeks after filing the application, check with your KIND pro bono coordinator.

The biometrics appointment will entail the client's being fingerprinted and photographed at an Application Support Center (ASC). The child must bring photo identification (ideally a passport but other forms, such as a school identification card, may also be accepted) to the appointment, and must obtain a stamped copy of the appointment notice, as proof of attending the appointment.

NOTE: It may be advisable to fill out the application information worksheet for the child to take to the appointment to avoid creating inadvertent biographical inconsistencies in her case.

The I-485 cannot be approved until the background check is completed, which may take two months or more.

How should I prepare my client for the adjustment of status interview?

Before the interview, you should review the key facts of your client's case (date of birth, date of entry, etc.). Depending on whether the I-485 was filed affirmatively or defensively, the interview will take place before the USCIS officer or an immigration judge. Schedule preparation time with your client and practice a mock interview or hearing. Among other things, be sure to cover the following:

- Remind the child that she will be questioned under oath.
- Make sure the child is familiar with the complete contents of the application package. Confirm that all statements in the package remain true and accurate. The child may be asked at the interview to affirm her understanding of the application papers.
- If adjusting before USCIS, the child must bring an interpreter. If adjusting in immigration court, an interpreter will be provided upon request.
- The child should give clear and succinct verbal answers while looking at the interviewer or judge, avoid volunteering irrelevant information, and be polite.
- In cases where the child is applying for adjustment of status in court, make sure the child is well aware of the fact that the ICE trial attorney will be cross-examining her and make sure to practice ahead of time so that the child is comfortable with the process.
- The child may be questioned about anything relating to the application, even if not on the form.
- Particularly, be sure the child is prepared to answer questions about:
 - how she traveled to the United States and crossed the border (You should warn the child about not inadvertently implicating caretakers in alien smuggling if indeed they helped to bring the child to the United States)
 - illegal activity, whether or not shown in the record, including gambling and drug use
 - gang membership, contacts or associations
 - contacts with parents while in the United States
 - school attendance and future plans

You should specifically tell the child to arrive for the interview well rested, properly dressed (no jeans),

and on time. In some cases, the child may have to wait several hours to be called for her interview or hearing, so you may want to tell the child to eat beforehand and bring along school work or something to read.

If USCIS is adjudicating the I-485, you may receive a decision at the interview or by mail. If the IJ is adjudicating the I-485, you will receive a decision at the end of the merits hearing; in rare cases the IJ may mail out a decision.

What discretionary factors does the adjudicator consider?

Although juvenile delinquency dispositions are not grounds of inadmissibility for children and do not bar them from adjustment of status, they may play a role in the discretionary portion of an adjustment of status adjudication. In other words, the government grants adjustment of status in its discretion and in doing so, may take into consideration numerous factors - including past juvenile crimes. This is particularly relevant when a child has been convicted of a sexual offense or an offense related to gang activity. While a juvenile crime may not bar the child from adjusting her status, it still can be taken into consideration in the overall decision. In that case, it must be mitigated by positive equities.

Any history of criminal conduct must be disclosed in connection with the application. A criminal record can make the client inadmissible and therefore ineligible to adjust status. Form I-485 also asks (and the adjudicator may ask) about criminal conduct for which the applicant was not arrested. An admission of such conduct can result in denial of the application, so you should make sure to determine how the child will respond if asked. Through a background check, USCIS (and potentially Immigrations and Customs Enforcement (ICE) and the immigration judge) will be aware of the child's entire criminal history, so the failure to disclose any arrest will only magnify it. Drug-related offenses receive special scrutiny. You should explain to the child that it is in her interest to tell you everything about past criminal conduct so that together you and the child can evaluate the risks of proceeding with the application, and/or disclose the information in a way that contextualizes it.

If the child has ever been cited, even for minor violations, you will need to obtain original certificates of disposition or certificates of dismissal. This applies to any arrests or tickets or summonses for things as minor as fare evasion on public transportation. Depending upon the state laws, you may need to file a petition with the juvenile court for permission to obtain and release these records. You should make sure the child understands that ignoring such tickets or summonses only worsens the problem; typically, they will remain on the child's record and may result in bench warrants. It is hoped that the dispositions of any charges will be dismissal or payment of a small fine. If the child has a

juvenile delinquency or criminal history, you must confer with your KIND pro bono coordinator far in advance of an interview or other proceeding to obtain expert advice on the immigration consequences of the criminal matters.

What proof will my client have of her LPR Status?

It will depend on what agency grants the status to your client. USCIS will issue an approval order. In contrast, an immigration judge will sign an order indicating that your client has been granted legal permanent resident status.

USCIS grant

If USCIS grants the child's adjustment of status, you should receive an approval notice in person or by mail. The child's LPR card (commonly referred to as a "green card") should arrive by mail soon afterwards.

Immigration judge order

If an immigration judge grants the child's adjustment of status, the child's immigration court order serves as immediate proof of her LPR status. The child will, however, need to visit the local USCIS office to trigger processing of her LPR card. In most locations, the mechanism for doing this is InfoPass, the USCIS online appointment scheduler accessible through the USCIS homepage. To make an appointment, you must enter some basic information about the child and choose an appointment date and time to attend with the child. The child must bring the original IJ's decision granting adjustment of status. If the child has a passport, (depending on the jurisdiction), she may have it stamped at the InfoPass appointment to indicate that she is an LPR. Employers should accept the passport stamp as the child's authorization to work. The actual "green card" will arrive by mail several weeks or months later. If it is not received within a reasonable time, the client should contact you for follow up.

Is lawful permanent resident status permanent?

It can be revoked. Unlike citizenship, lawful permanent residency can be terminated on certain grounds. In particular, the child needs to be aware of two issues in particular:

- **Criminal conduct.** Certain criminal convictions may result in termination of LPR status and removal. A background check may be run when an LPR returns to the United States after an absence or renews her green card; any arrests will be discovered.
- **Absence from the United States.** An LPR can be deemed to have abandoned LPR status by not maintaining continuous U.S. residence. Absences for more than 90 days at a time, or more than 180 days total per year, can trigger this finding.

What are the benefits of lawful permanent status?

An LPR is entitled to obtain a Social Security number.³¹ The child may apply through the local Social Security office even before receiving the green card, as long as she has proof of her LPR status. After five years in LPR status, the client may be eligible to apply for naturalization, and should consult an attorney in connection with that step.

Citations

¹The statutory authority for SIJS is found at INA 101(a)(27)(J). SIJS regulations are found at 8 CFR 204.11 but have not yet been amended to reflect statutory changes made by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 (nor do the regulations reflect previous statutory changes enacted in 1997).

²8 C.F.R. § 204.11(a).

³INA § 101(a)(27)(J); see also Deborah Lee, et al., Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, (Feb. 19, 2009), (clarifying that the Trafficking Victims Protection Reauthorization Act of 2008 expanded the definition of special immigrant juvenile to include children who were eligible for long term foster care regardless if the child is or has ever been placed in long term foster care).

⁴INA § 101(a)(27)(J)

⁵8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(3).

⁶8 C.F.R. § 204.11(c)(1), (2).

⁷8 C.F.R. § 204.11 (c)(3).

⁸This premise was previously supported by the USCIS Administrative Appeals Unit (AAU) case, *In re Menjivar*, Case No. A70 117 167, at 4 (A.A.U. Dec. 27, 1994)(stating, "[t]he acceptance of jurisdiction over the custody of a child by a juvenile court, when the child's parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or . . . in a guardianship situation") . In *Menjivar*, a child was placed in the custody of a guardian and the initial instinct of legacy INS was to conclude that the child was no longer dependent on the juvenile court as a result. However, because it was under the direction of the court in which the child was ordered into the guardianship situation, the AAU found that the child still qualified as dependent on the juvenile court.

⁹You should not rely on the language in *Menjivar* that says no "specific statement" on dependency is

required. *Id.*

¹⁰8 U.S.C. § 1101(a)(27)(J)(i).

¹¹8 U.S.C. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(c).

¹²8 USC 1101(a)(27)(J)(iii), as modified by TVPRA § 235(d)(1)(B)(i).

¹³USCIS Neufeld Memo, March 24, 2009, *supra*.

¹⁴TVPRA 234(d)(1).

¹⁵TVPRA (2008) § 235 (d)(6). See also USCIS Memo, Neufeld, "Trafficking Victims Protection Reauthorization Act of 2008; Special Immigrant Status Provisions," (March 24, 2009), HQOPS 70/8.5. Note that although the statute characterizes this provision as a "transition rule," it is unclear at present, which, if any, aspects are "transitional."

¹⁶There is not a mechanism for SIJS-eligible children to apply for siblings as derivatives (this is unlike, for example, the U visa). However, after a child granted SIJS becomes a U.S. citizen and turns 21, she could file a family-based petition for a sibling. This sibling might be able to later petition for the parent-in-common of the siblings; this might amount to a benefit conferred indirectly to a parent by a child granted SIJS - although through the petitioner sibling, again not directly.

¹⁷INA § 101(a)(27)(J) (iii)(II).

¹⁸Asylees have their grant of legal permanent residence backdated one year, so that they only need to wait an additional four years before applying for citizenship.

¹⁹See 8 USC § 1255(c)(2), 1255(h)(2).

²⁰8 USC § 1242.

²¹See INA 209(c).

²²Note: In adoption situations, the timing and age of the child affects a child's immigration options. For example, if the child is under 16 years old at the time of adjustment based on SIJS and adopted by a United States citizen (with additional qualifications), the child will gain automatic U.S. citizenship.

²³See http://www.embassyworld.com/embassy/inside_usa.htm

²⁴See, e.g. Department of State's Foreign Affairs Manual.

²⁵8 CFR 204.11(d), 204.1(g)(2).

²⁶The Legal Aid Society, Special Immigrant Juvenile Status (March 4, 2008) at 9.

²⁷The one exception to this rule is a child charged as an arriving alien on the NTA (they entered with inspection); in that case, only USCIS has jurisdiction to adjudicate the I-485.

²⁸The interview notice sometimes says that the interview is for adjustment of status, even if your client has not yet filed Form I-485.

²⁹See the discussions of express consent in USCIS Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions, ("Yates Memo"), William R. Yates, Associate Director for Operations, USCIS, May 24, 2004.

³⁰See TVPRA 235(d)(2)

³¹Technically, a client with only a work permit is also allowed to apply for a SSN.

Chapter 5: Asylum and Related Relief

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

How can unaccompanied children qualify for asylum?

Asylum is a form of protection and relief from removal available to unaccompanied children who have suffered persecution in their home country and fear returning to their home country because of such persecution.

U.S. law,¹ as well as international law, provides individuals fleeing persecution the right to seek asylum.² Asylum is a fundamental right rooted in both domestic and international law.

Many attorneys are familiar with the basic concepts of asylum and may even have represented an adult client in an asylum proceeding. However, it is important to understand that children's asylum claims are different in many ways, and attorneys must be aware of such differences when proceeding with the representation of children.

Eligibility

To qualify for asylum, the applicant must prove that she meets the U.S. definition of a refugee, merits a favorable exercise of discretion, and is not statutorily barred from being recognized as a refugee and being granted asylum in the United States.

What are the particular considerations for children seeking asylum?

The Homeland Security Act of 2002 defines an unaccompanied alien child as a person under 18 years of age, who has no lawful immigration status in the United States, and who either has no parent

or legal guardian in the United States or has no parent or legal guardian in the United States who is available to provide care and physical custody.³

The U.S. government recognizes that unaccompanied children require special procedural and substantive considerations when applying for asylum. In 1998, legacy INS issued Guidelines for Children's Asylum Claims.⁴ These guidelines outline procedural as well as substantive considerations for adjudicators reviewing child asylum claims. You should review these guidelines when preparing to file an asylum application on behalf of a child.

What are the eligibility requirements for asylum?

Gaining asylum in the United States, for adults and children alike, requires that the applicant meet four general requirements:

- The applicant must be present in the United States.⁵
- The applicant must prove that she meets the legal definition of a "refugee."⁶
- The applicant must prove that she is not statutorily barred from receiving asylum.
- The applicant must demonstrate that she merits a grant of asylum as an exercise of the adjudicator's discretion⁷

Who has the initial burden of establishing asylum eligibility?

The burden of proof is on the child to establish her claim for asylum.⁸ However, to meet this burden, the child need only establish that there is a "reasonable possibility" of persecution.⁹

Child Practice Pointer:

Domestic and international policies recommend that adjudicators be mindful of a child's maturity level when assessing a child's credibility and fear of persecution. For example, U.S. asylum officers are encouraged to take into consideration the effects of the child's age, maturity, ability to recall events, and potentially limited knowledge of the asylum process when assessing the child's eligibility.¹⁰

In addition, the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status states that children's testimony should be given a liberal

"benefit of the doubt" with respect to evaluating a child's alleged fear of persecution.¹¹

Who is a refugee?

In order to be granted asylum in the United States, the child must establish that she meets the definition of a refugee, irrespective of age.¹² A refugee is defined under INA § 101(a)(42)(A) as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

It should be noted that the statute provides the basic definition and legal requirements for asylum; in order to fully understand these requirements, it is critical that you become familiar with the asylum regulations, codified at 8 C.F.R. § 208.

Children cannot include their parents as derivatives on their asylum application.¹³

How does an applicant prove persecution?

To be eligible for asylum, your child client must prove that she has suffered past persecution or has a well-founded fear of future persecution. Note that past persecution and a well-founded fear of future persecution are independent bases for asylum.¹⁴ Thus, if a child is able to prove either basis, the child will meet that element of the refugee definition.

Proving persecution requires a careful and thorough fact-based case analysis. It is your job to argue that the child's past trauma and history (as well as potential for future trauma) does in fact rise to the level of persecution.

What does it mean to suffer from past persecution?

While no exact definition of persecution exists, the administrative agency responsible for reviewing an immigration judge's interpretation of the refugee definition, the Board of Immigration Appeals (BIA), has defined persecution as, "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim."¹⁵ Further,

federal circuit courts and the BIA have described persecution as "the infliction of harm or suffering upon those who differ in a way that is regarded as offensive."¹⁶

Generally speaking, threats to life or freedom are uniformly found to be persecution. Further physical abuse even when not life threatening is considered persecution. A finding of persecution does not necessarily require that the child suffer bodily harm or a threat to life or freedom.¹⁷

Further, actions that individually do not constitute persecution may cumulatively rise to the level of persecution. Such examples include:

- Relegation to substandard living conditions.
- Denial of a passport or travel documents.
- Constant surveillance.
- Interference in the child's private life, invasion of privacy.
- Impeding or barring access to school or institutions of higher learning.

Actions that are unfair, unjust, or even unlawful, including mere harassment or discrimination, may not rise to the level of persecution.¹⁸ In general, the BIA does not consider harsh conditions shared by many, or general civil strife, anarchy, or criminal punishment for violating laws (such as exit laws or military conscription) persecution.¹⁹ However, a fear of general violence does not necessarily negate a particular fear of persecution based on a protected ground.²⁰

Is the government the only agent who can inflict persecution?

No. The asylum seeker must prove that the persecution was inflicted by the government or by a group that the government was unable or unwilling to control.

For example, in the case of gang-based asylum, often it is a gang that is the persecutor, not the government. However, because the government is unable to control the gang or protect citizens from gang violence, such persecution may still qualify for protection.

Child Practice Pointer:

For a child asylum seeker, the harm a child fears or suffered may be relatively less than an adult and

still qualify as persecution.²¹ Further, several federal circuit courts of appeals have recognized that certain events, when perceived or endured by a child applicant, particularly when harm is caused to the child's family, may rise to the level of persecution:

- *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006)(finding that where the applicant "was a child at the time of massacres and thus necessarily dependent on both his family and his community . . . This combination of circumstances [displacement - initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community").
- *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008)(holding that the adjudicator should have considered the "cumulative significance" of events to the applicant that occurred when he was between the ages of eight and thirteen. The applicant was subjected to regular "discrimination and harassment [that] pervaded his neighborhood." Such harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as Jewish, being called slurs, and being physically abused in his neighborhood).
- *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)(while finding that persecution did not take place, the court stated, "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted...There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult").
- *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007) (finding that a "child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting . . . [I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child." In the case of Hernandez-Ortiz, two brothers aged seven and nine fled to Mexico due to the Guatemalan army's arrival at their village, the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army).
- Reinhardt, J. concurring opinion in *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994)(stating that the effects of losing one's family as a child can constitute serious harm. "The fact that she did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution. For example, when a young girl loses her

father, mother and brother - sees her family effectively destroyed - she plainly suffers severe emotional and developmental injury").

Under international law, specifically the United Nations' Convention on the Rights of the Child,²² the violation of the fundamental rights of children may rise to the level of persecution. Such rights include the right to be registered with authorities upon birth and to acquire a nationality (Art. 7.1), to remain with one's family (Art. 9.1), to receive an education (Art. 28), and to be protected from economic exploitation (Art. 32).

Is proving a child suffered past persecution enough to be granted asylum?

It depends. If the child proves she has suffered past persecution, there is a rebuttable presumption that the child's life or freedom would be threatened in the future on the same basis.²³ As a result, the burden shifts to the government to show:

- There has been a fundamental **change in circumstances** such that the child no longer has a well-founded fear on the basis of a protected ground²⁴ ; or
- The child could avoid persecution by **relocating to another part of the country**, and that it would be **reasonable** to expect the child to do so.²⁵

Relevant factors when determining the reasonableness of internal relocation include, but are not limited to, whether the child would face other serious harm; ongoing civil strife; administrative, economic or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social/familial ties.²⁶

If the child has established past persecution, or the persecutor whom the child fears is the government or is government-sponsored, there is a presumption that internal relocation would not be reasonable.

However, if the child has not established past persecution, or the persecution she fears is not by the government or government-sponsored, the child bears the burden of proving that internal relocation would not be reasonable.²⁷

Finally, if the government rebuts the presumption of a well-founded fear, and proves that the child lacks a basis for present or future persecution, a child may still be granted asylum if: (1) the severity

of the past persecution was such that there are compelling reasons for her to be unwilling or unable to return to her home country; or (2) there is a reasonable possibility that she may suffer other serious harm if returned.²⁸

Child Practice Pointer:

An unaccompanied child may have special factors associated with her situation that makes relocation unreasonable. For example, if the child's family is located in her hometown, no one would be able to take care of the child should she relocate to another part of the country.

If my client has not suffered past persecution, is she still eligible for asylum?

Yes, if you can establish that your client has a well-founded fear of future persecution then your client is still eligible for asylum. A child who has not suffered persecution in the past may still establish her eligibility for asylum based on a well-founded fear of persecution in the future.

- It is not necessary to prove that it is more likely than not that the person will be persecuted.
- The U.S. Supreme Court recognized that even a ten percent chance of persecution would satisfy the well-founded fear requirement.²⁹

What are the requirements for establishing a well-founded fear of persecution?

In *Matter of Mogharrabi*, the BIA laid out a four-part test for establishing asylum eligibility based on a **well-founded fear**:³⁰

1. The applicant possesses a belief or characteristic that a persecutor seeks to repress in others by means of punishment of some sort.
2. The persecutor is already aware, or could become aware, that the respondent possesses this belief or characteristic.
3. The persecutor has the capacity to punish the respondent.

4. The persecutor has the inclination to punish the respondent.³¹

How does the child establish a well-founded fear?

A child must establish that her fear is both subjectively real and objectively reasonable.³² The subjective requirement goes directly to the applicant's state of mind. The child must show that she fears returning to her country of origin and that this fear is genuine.³³

To meet the objective requirement, the child must demonstrate that, given the evidence presented, a reasonable person in similar circumstances would experience a fear of persecution.³⁴

In addition, it is not necessary to establish that there is a reasonable possibility that the child would be singled out individually for persecution as long as the child can establish (1) that there is a pattern or practice of persecution of a group of persons similarly situated to the child (on account of a protected ground); and (2) that her inclusion in, and identification with, that group is such that her fear is reasonable.³⁵

Child Practice Pointer:

It may be more difficult for children to demonstrate both the objective and subjective requirement because a child may not be able to articulate her own fear or know she should be afraid.³⁶

The UNHCR Handbook suggests that children under the age of 16 may lack maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.³⁷ "Minors under 16 years of age . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult."³⁸ Further, a child's subjective fear should be evaluated within the context of the child's situation or her personal, family, and cultural background.³⁹

A well-founded fear of persecution may be supported by mistreatment of a child's family in the home country. The First Circuit concluded that evidence of mistreatment of one's family is probative of a threat to the applicant.⁴⁰ Conversely, if the child's family does not relocate and is not harmed, the likelihood of an objectively reasonable fear may be reduced. The failure to relocate may nonetheless be overcome when it is due to a parent's conflict of interest rather than a decreased threat to the child.

The circumstances of a child's arrival in the United States may provide evidence as to whether the child has a well-founded fear of persecution. If the child arrives in the company of other asylum seekers (including family members) who have been found to have a well-founded fear of persecution, this may help to establish that the child's fear is well-founded.⁴¹

What else is needed to establish persecution?

In addition to demonstrating that the harm a child has suffered amounts to persecution, the **applicant must also show that such persecution is on account of** one of five protected grounds: her race, religion, nationality, membership in a particular social group, or political opinion. This requirement is often referred to as the nexus requirement.

What if my client is also being persecuted for a reason that is not a protected ground?

The evidence may demonstrate that there are multiple reasons why the persecutor harmed or seeks to harm the child. When the persecutor has mixed motives for harming the child, the child does not need to prove that the persecution was perpetrated solely on account of a protected ground.⁴² However, with the passage of the REAL ID Act of 2005,⁴³ INA § 208(b)(1)(B)(i) was amended to state that asylum applicants must demonstrate that one of the enumerated grounds was, or will be, "at least one central reason" for their persecution.⁴⁴

When the child is unable to identify all relevant motives, a nexus can still be found if the objective circumstances support the child's claim that at least one central reason for the past or future persecution is a protected ground.⁴⁵

How do I prove that persecution is on account of one of the five protected grounds?

There are five grounds upon which a claim to asylum may be made. The burden is on the child to establish that she belongs to the protected group on account of which she has suffered or fears suffering persecution. Because children may lack, or have limited access to, evidence that helps to establish their relationship to one of the protected grounds, testimony alone can be sufficient to

establish a claim where the applicant credibly testifies that she is unable to procure documents.⁴⁶

The grounds of membership in a particular social group and political opinion tend to be broader categories that often require more factual development and provide for somewhat greater leeway in their definitions.

The five enumerated grounds for asylum are:

1. **Race.** Race should be interpreted in a broad sense that includes, "all kinds of ethnic groups that are referred to as 'races' in common usage."⁴⁷
2. **Religion.** Religious persecution includes the "prohibition of membership in a particular religious community, of worship in private or in public, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community."⁴⁸ Note that an applicant may be persecuted on account of her religion even though she may not in fact be particularly religious. The case law on religious-based persecution is rich and diverse. Given establishing a new social group claim before the BIA is challenging, you should explore the possibility of creatively crafting religious-based arguments instead. For example, an applicant fleeing domestic violence has made a successful asylum claim based on religious-based persecution.⁴⁹
3. **Nationality.** Nationality includes citizenship, as well as "membership in an ethnic or linguistic group."⁵⁰
4. **Membership in a Particular Social Group.** This category is the broadest and most undefined of the given protected grounds for asylum. This is where some of the most creative lawyering on protecting non-conventional refugee claims has been developed. While this category is open to broad interpretation, there are certain criteria you must establish for your client to prevail on a social group claim. The UNHCR Handbook defines "particular social group" as "persons of similar background, habit or social status."⁵¹ Such characteristics can include age, geographic location, class or ethnic background, family ties, and sexual orientation.

Under U.S. law, you must show that a child's persecution based on membership in a particular social group meets a two-part test.

1. First, the BIA held, in the seminal social group case *Matter of Acosta* that members of a particular social group must "share a common immutable characteristic...[which]... the

members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."⁵² Some examples of such characteristics include sexual orientation, age, color, familial ties, and shared past experiences. Social group claims often overlap with one or more of the other protected grounds. However, if a group is large or amorphous it is less likely to qualify as a particular social group;⁵³ and

2. Second, the BIA has recently taken the position that a social group must be "socially visible"⁵⁴ - meaning recognizable and distinct.⁵⁵
5. **Political Opinion.** To have a political opinion for purposes of asylum, it is not necessary for the child to necessarily be involved in politics or be a member of a political party. Political opinion may include non-political activities, beliefs or associations that have a political context or effect. The persecution must be based on the victim's political opinion, not the persecutor's political opinion.⁵⁶ However, the victim does not have to profess an actual opinion; a political opinion may be imputed to the victim.⁵⁷

When a child claims persecution or a well-founded fear of persecution on the basis of political opinion, the age and maturity of the child must be taken into account. A young child may be unable to articulate her political opinion. However, age alone does not prevent a child from holding political opinions for which she may have been or will be persecuted.⁵⁸ It is also possible that a child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.⁵⁹

What are some legal arguments for children seeking asylum?

Lawyers have been the most successful in winning asylum for children by arguing that their child client belongs to a particular social group worthy of refugee protection. The following are examples of the types of social groups that have been successful for child applicants.

Gang-based persecution

Asylum claims based on gang persecution, harassment, recruitment, and victimization are common, especially among children from Central America. However, the success of these claims in immigration courts across the country has varied. In addition, many federal circuits have refused to recognize individuals fleeing gang persecution as constituting a particular social group.

On July 30, 2008, the BIA published two decisions affecting gang-persecution asylum claims: [Matter of E-A-G](#)⁶⁰

, and [Matter of S-E-G](#).⁶¹ These two cases now mark the standard in gang-based asylum, establishing that a particular social group must have **social visibility** in which "the shared characteristic of the group should generally be recognizable by others in the community." Based on this reasoning, the BIA found that those fleeing gang recruitment and/or gang violence do not constitute a particular social group as they lack social visibility.

For a gang-based claim to prevail, your child client must show **two** criteria to meet the social group definition:

1. First, the child must show that she belongs to a social group as defined by the BIA in *Matter of Acosta*.⁶² Specifically, the child must be a member of a group that has a common immutable characteristic which the child is unable to change, or should not be required to change because it is fundamental to the child's identity or conscience; and
2. Second, that the group is socially visible as defined by the BIA in the decisions *Matter of E-A-G* and *Matter of S-E-G*.

Gang-based asylum claims can still be successful, if the argument is carefully crafted. You will have to use creativity and distinguish the specific facts of the child's claim from the underlying facts in the BIA decisions of *Matter of S-E-G* and *Matter of E-A-G*.

In a case in the Sixth Circuit, *Urbina-Mejia v. Holder*⁶³, the court held that while being a member of a gang may not be considered to be a social group, being a former gang member is a trait that an asylum applicant cannot simply "cast off." Advocates are also finding success by shifting the protected ground from particular social group to that of persecution based on account of religion or political opinion.

Domestic violence

Both children and adults may claim asylum based on domestic violence although the law regarding domestic violence-based claims is still unsettled. In 1995, legacy INS issued the INS Gender Guidelines to assist asylum officers in their determinations of gender-based asylum claims, including such issues as domestic violence, rape, sexual violence, female genital mutilation, and honor killings - issues which have a greater tendency to take place in the private realm, as opposed to the public. In issuing the Guidelines, the INS recognized that under certain circumstances, persecution that occurs in the private realm is a basis for asylum.

Further, in 1996, an immigration judge granted asylum to Rodi Alvarado, a Guatemalan woman who had fled years of significant abuse and domestic violence at the hands of her husband. She had tried

numerous times to escape him and to obtain help from the authorities - all to no avail. In granting asylum to Alvarado, the immigration judge found that she had suffered persecution on account of her actual and imputed political opinion, as well as membership in a particular social group. The INS appealed the grant of asylum, and the BIA overturned the immigration judge's decision, stating that the respondent had failed to demonstrate that the persecution she suffered was on account of a protected ground.⁶⁴ Alvarado subsequently appealed the BIA's decision and in 2008, the Attorney General certified the case and ordered the BIA to reconsider it.

Meanwhile, as the result of a request from Alvarado's attorneys in a joint motion with DHS, the BIA remanded the case back to the immigration judge in order for Alvarado to present evidence regarding the social visibility of her proposed social group, in light of recent case law (*Matter of E-A-G-* and *Matter of S-E-G-*).

In late 2009, Alvarado was finally granted asylum based on membership in a social group consisting of "married women in Guatemala who are unable to leave the relationship", after a fourteen year legal battle.⁶⁵

While the *Matter of R-A-* was pending, in 2000 the federal government proposed regulations to address adjudicating gender-based asylum claims and the social group nexus.⁶⁶

In 2009, the Obama administration opened the way for foreign women who are victims of severe domestic beatings and sexual abuse to receive asylum in the United States.⁶⁷ The Administration laid out its position in an immigration appeals case in which a Mexican woman, identified as "L.R.", had been repeatedly raped at gunpoint by her husband, whom she feared would murder her should she return to her home country. The administration presented a narrow set of circumstances in which an abused woman may qualify for asylum if (1) the abused woman could demonstrate that women are viewed as subordinate by their abuser, and that (2) domestic abuse is widely tolerated in the applicant's country. Under such circumstances, victims of severe physical or sexual abuse could be deemed to qualify as a particular social group.⁶⁸

Female genital mutilation

Female genital mutilation (FGM) "is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia, performed on girls and women primarily in Africa and Asia."⁶⁹ Evidence of FGM may serve as the basis for an asylum claim, withholding of removal, or a claim under the Convention Against Torture (CAT).⁷⁰

Specifically, most federal circuits and the BIA recognize FGM as a form of persecution.⁷¹ The BIA, for example, has characterized FGM as a form of "sexual oppression ... to ensure male dominance and

exploitation," practiced in order to "overcome sexual characteristics of young women . . . who have not been, and do not wish to be, subjected to FGM."⁷²

Alternatively, asylum claims may be based on a well-founded fear of persecution based on the fear that a daughter will suffer FGM upon arrival at the applicant's home country.⁷³ Often in these claims, the child's mother was previously subjected to the experience, and a strong case can be made based on the mother's mental and physical reaction to the procedure.

Gender alone does not constitute a social group and is not sufficient to establish asylum status. However, a narrowly tailored social group, such as "women opposed to FGM who belong to an ethnic group that practices FGM" has been successful.⁷⁴

In cases involving FGM, a person subjected to the practice can claim past persecution as well as a well-founded fear of future persecution because FGM has been deemed a continuing harm. While the continuing harm principal has been tested, current case law holds that despite the permanent and irreversible nature of FGM, the harm of the act can be considered ongoing due to continued physical and psychological issues and is therefore a continuing form of harm.⁷⁵

Note that although the FGM may rise to the level of persecution, in order to qualify for asylum, the applicant must still prove a prima facie case, specifically that the applicant has a well-founded fear of persecution in her home country on account of race, religion, nationality, membership in a social group, or political opinion.⁷⁶

Street children

Although a child may be forced to live on the streets for a number of reasons, many street children are unable to live at home due to violence or abuse. Their stories are among the most compelling because individuals responsible for the child's well-being have abused or neglected the child.

Advocates have had varying degrees of success with arguing street children are refugees and eligible for asylum in the United States. The asylum claims are typically based on the child's membership in a particular social group, e.g., the social group of "Honduran street children." Street child claims are sometimes coupled with asylum claims based on the child's membership in a family, and abuse the child has suffered as a result of being part of that family. For example, a child may have suffered past persecution based on her membership in a family in the form of domestic violence. That persecution may have led the child to live on the streets, or it may be the reason the child cannot return home. As a result, if the child were returned to her home country, she would be forced to live a life on the streets.

In most jurisdictions, no binding precedent exists that would prohibit an immigration judge or asylum officer from granting an asylum claim based on a street child social group. The only exception is the Third Circuit where there is unfavorable precedent. The Third Circuit Court of Appeals in *Escobar v. Gonzales* held that Honduran street children do not constitute a particular social group.⁷⁷ The court reasoned that "[p]overty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected group within the scope of the Immigration and Naturalization Act."

The BIA has not yet issued a published opinion on street child asylum claims. The BIA has, however, issued two unpublished decisions finding that street children can constitute a social group.⁷⁸ The BIA decisions, as well as numerous immigration judge decisions (not published) can be submitted when briefing the issue. Although not binding, the decisions may serve as persuasive authority.⁷⁹

What are the legal bars to being granted asylum?

Bars to asylum can be grouped into two categories. First, there are bars to asylum applicants that deal with when an asylum applicant should not be permitted to access the asylum process because the person is eligible for some type of protection in a third country, has already applied for asylum, or missed a filing deadline. The second class of bars are actions the asylum applicant has committed prior to being granted asylum that deem the applicant "unworthy" of being granted asylum protection. Actions include criminal conduct, terrorism, or the persecution of others.

Bars to accessing the asylum adjudication process:

Firm resettlement

An applicant who was firmly resettled in another country prior to arriving in the United States is not eligible for asylum.⁸⁰ For an applicant to be deemed "firmly resettled" means the applicant received an offer of some part of permanent status from another country.

An applicant is not firmly resettled if the applicant establishes that:

- The applicant's entry into that country was a necessary result of this flight from persecution, and she remained there only long enough to arrange continued travel, and did not establish significant ties to that country; OR
- The conditions of such permanent status are so "substantially and consciously restricted" that

she cannot be said to have actually resettled (i.e., housing/employment available, right to hold property, right to travel, right to education or public assistance, right to naturalize, etc.).⁸¹ In other words, an applicant who merely "passes through" a country on her way to the United States, or even temporarily resides in another country in preparation for continued travel to the United States (e.g., to earn money for a plane ticket), will not be considered to be firmly resettled.

Child Practice Pointer:

In interpreting whether a child is firmly resettled, asylum officers will consider that a child's status in a third country is generally the same as her parents' status. The BIA has long held that a parent's firm resettlement status is imputed to his or her children - thus, if the parents were firmly resettled, their status will be imputed to the child.⁸²

Firm resettlement is not a bar to withholding of removal. If an unaccompanied child has a firm resettlement issue, she may still pursue withholding of removal relief.

Safe third country

Generally, if an asylum seeker can be removed to a safe third country pursuant to a bilateral agreement, the child is ineligible to apply for asylum.⁸³ Currently, Canada is the only country with which the United States has a safe third country agreement. This means if an applicant applying in the United States for asylum passed through Canada prior to arriving in the United States, the applicant must apply in Canada for asylum.

Child Practice Pointer:

The Trafficking Victims Protection Reauthorization Act of 2008 provides an explicit exception for unaccompanied children. They are not barred from seeking asylum even if there is a safe third country agreement.⁸⁴

One-year filing deadline

The one-year filing deadline does not apply to unaccompanied minor principal applicants.⁸⁵ The one-year filing deadline does apply to minor principal applicants who are living with a parent or legal guardian and for adult principal applicants.

Keep in mind that, to meet the definition of an unaccompanied alien child, the child cannot have lawful immigration status. If a child is not living with a parent or legal guardian but is in lawful status, the child is not considered an unaccompanied child and therefore is not categorically exempt from the one year filing deadline.⁸⁶

Previous asylum application

If a child has filed a previous asylum application and has been denied asylum, this person may not re-apply for asylum unless there is a change in circumstances affecting eligibility.⁸⁷

Prior actions barring a grant of asylum

- **Persecution of others**

An alien who has persecuted others on account of a protected ground is not eligible for asylum.⁸⁸ The U.S. Supreme Court in March 2009 reversed the denial of asylum and withholding of removal for a person who was compelled under threat of death or torture to participate in acts of persecution, holding that the BIA and Fifth Circuit erred in presuming that the coercion was immaterial.⁸⁹ The Court remanded the case to the BIA to address where, under the INA, motivation or intent in assisting in the persecution of others is material for persecutor-bar purposes. The outcome of this case will be relevant for those children who were forced under duress or threat of death to commit acts of persecution and who are now seeking asylum in the United States.

- **Serious crimes**

Particularly serious crime/aggravated felony

NOTE: If a child is under age 16, or was tried as a juvenile (may be age 16-18), a conviction of a particularly serious crime is not a bar to asylum.⁹⁰ However, such a conviction may be a basis for a denial or referral as a matter of discretion.

- **Serious nonpolitical crime**

A child for whom there are reasons to believe that she committed a serious nonpolitical crime outside the United States is not eligible for asylum.⁹¹

NOTE: You should pay particular attention to this bar if your client has a history - to any extent - as a child soldier in her home country (whether under duress or not).⁹²

- **Terrorism and threat to national security**

Threat to National Security: An alien for whom reasonable grounds exist for regarding her as a danger to the security of the United States is not eligible for asylum.⁹³

Terrorism: A child who has had some sort of involvement in terrorist activity, or for whom there are reasonable grounds to believe that she is engaged in, or likely to engage in terrorist activity, is not eligible for asylum unless the U.S. Attorney General determines that there are no reasonable grounds for regarding her as a danger to national security.⁹⁴ See additional

information on the material support bar found under the "additional resources" section.

What does the applicant need to show to merit a favorable exercise of discretion?

Asylum is discretionary. It is not a mandatory form of relief. As a result, even after a child has established that she is a refugee and eligible for asylum, the asylum officer or immigration judge must still exercise discretion in determining whether asylum should be granted.⁹⁵

This means that other outside factors, beyond the applicant's ability to qualify under the refugee definition, are taken into consideration. The BIA has stated that in exercising discretion, the danger of persecution should outweigh all but the most egregious adverse factors.⁹⁶

What are the benefits for a child granted asylum?

A child who is granted asylum receives the legal status of "asylee." There are a number of important benefits. An asylee is:

- Allowed to remain in the United States.
- May not be removed to the country of persecution.
- Allowed to work.
- Eligible for certain federal benefits.
- Allowed to travel abroad with the prior consent of the U.S. Attorney General (with a refugee travel document).

In addition:

- The spouse or child of an asylee, who accompanies the asylee or follows to join her, may also be granted derivative asylum.
- After one year in asylee status, an asylee may apply for lawful permanent residency and may eventually apply for citizenship.

- This status is important because a person with LPR status does not need additional work authorization, has greater legal protections, and is eligible for certain government jobs and educational loans. Five years after being granted LPR status, the individual is eligible to apply for U.S. citizenship.
- Once an asylee has been physically present in the United States for one year after the grant of asylum, the asylee may apply to adjust her status as long as she continues to meet the refugee definition, is not inadmissible,⁹⁷ and has not firmly resettled in another country.⁹⁸

What is withholding of removal?

A child who is denied asylum, or who is not eligible to apply for asylum may still be eligible for withholding of removal.⁹⁹ To qualify for withholding, the child must establish that her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰⁰

What is the burden of proof in a withholding of removal claim?

The analysis of the nexus requirement, the protected ground requirement, and the internal relocation requirement is the same for asylum and withholding of removal. However, the standard of proof required for withholding is higher than that for asylum. While asylum only requires the applicant to establish a "well-founded fear," an applicant for withholding must establish a "clear probability of persecution."¹⁰¹ This is a purely objective standard, which means that your client must demonstrate that it is more likely than not (i.e., 51 percent or higher likelihood) that her life or freedom would be threatened.¹⁰²

Unlike asylum, there is **no discretion** involved in a withholding of removal decision. An applicant who meets the eligibility requirements for withholding of removal, and is not subject to one of the mandatory bars, must be granted relief from removal.¹⁰³

What are the bars to being granted withholding of removal?

There are four bars to withholding of removal:

1. Persecution of others

An alien who has persecuted others on account of a protected ground is not eligible for withholding of removal.¹⁰⁴

In March 2009, the U.S. Supreme Court reversed the denial of asylum and withholding of removal for a person who was compelled under threat of death or torture to participate in acts of persecution, holding that the BIA and Fifth Circuit erred in presuming that the coercion was immaterial.¹⁰⁵ The Court remanded the case to the BIA to address where, under the INA, motivation or intent in assisting in the persecution of others is material for persecutor-bar purposes. The outcome of this case will be relevant for those children who were forced under duress or threat of death to commit acts of persecution and who are now seeking asylum in the United States.

2. Particularly serious crime/aggravated felony

An alien who has been convicted of a "particularly serious crime" is not eligible for withholding of removal.¹⁰⁶ In addition, an alien who has been convicted of an aggravated felony is considered to have been convicted of a particularly serious crime.¹⁰⁷

If a child is under age 16, or was tried as a juvenile (may be age 16-18), a conviction of a particularly serious crime is not a bar to withholding of removal.¹⁰⁸

3. Serious non-political crime

A child for whom there are reasons to believe that she committed a serious nonpolitical crime outside the United States is not eligible for withholding of removal.¹⁰⁹

NOTE: You should pay particular attention to this bar if your client has a history- to any extent - as a child soldier in her home country (whether under duress or not).¹¹⁰

4. Threat to national security

A child for whom reasonable grounds exist for regarding her as a danger to the security of the United States is not eligible for withholding of removal.¹¹¹

What does withholding of removal mean for my child client?

When a child is granted withholding of removal, a final order of removal is entered against her (and the execution of the order is simply "withheld.")¹¹² Those granted withholding have the ability to legally live and work in the United States. However, the additional benefits of withholding of removal are much more limited than those of asylum protection.

- **Withholding does not grant the applicant permanent legal status, or a means of obtaining legal status in the United States.**

Withholding of removal is a temporary status that can be revoked or terminated under certain circumstances (although in reality, those granted withholding of removal often remain in the United States for many years, if not indefinitely). Those granted withholding of removal can still be removed from the United States to a third country.¹¹³ In addition, withholding grantees can be removed to their home country if circumstances change, and their lives or freedom will no longer be threatened there.

- A child who has been granted withholding of removal does not have the right to petition for her spouse or children on that basis.
- **No travel document** will be issued to those granted withholding of removal, nor will they be given permission to re-enter should they depart the United States. Thus, a person granted withholding of removal may not leave the United States.

Child Practice Pointer:

You should seriously discuss the consequences of withholding of removal with your client. It has become more common in recent years for the government (Office of Chief Counsel) or the immigration judge to offer a grant of "withholding" instead of asylum as essentially a type of plea bargain. Before the child's hearing, you should fully discuss with the child the possibility of being granted withholding and to explain what it would mean for the child. For example, it is important that the child understand that she cannot leave the United States once withholding is granted. Understanding the child's goals and objectives will help better inform you as to the type of relief you should or should not pursue on the child's behalf.

What is protection under the Convention Against Torture (CAT)?

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the return of an individual to a country where there are substantial grounds to believe that she would be tortured.¹¹⁴ One of the advantages of CAT relief is that it can be requested even after a final order of removal has been issued. Further, the applicant does not need to prove that her torture would be on account of a protected ground (**no nexus requirement**).

There are two possible forms of relief under CAT: withholding of removal or deferral of removal.

1. Withholding of removal under CAT

Withholding of removal under CAT prevents the removal of the child to her home country if it is more likely than not that she will be tortured. This form of relief should not be confused with the withholding of removal form of relief discussed above, also known as "traditional withholding" under INA 241(b)(3)).

The mandatory bars to withholding under CAT are the same as the bars to traditional withholding of removal.

2. Deferral of removal under CAT

There are no bars to relief under deferral of removal under CAT. Thus, if the child is subject to one of the bars to withholding of removal, discussed above, the child can still be granted deferral of removal instead.¹¹⁵ This form of protection is more temporary and DHS is more likely to terminate it should circumstances change. Also, applicants granted deferral of removal under CAT may be detained.

What does an applicant need to prove to be granted CAT relief?

Any applicant who establishes that it is more likely than not that she will be tortured if returned to her country must be granted protection under CAT. Unlike asylum protection, protection under CAT is mandatory, not discretionary.

The standard of proof under CAT is much higher than asylum. The applicant must prove that it is "**more likely than not**" that she would be tortured if forced to return to the home country.¹¹⁶ Evidence to be considered includes evidence of past torture inflicted upon the applicant, evidence that the applicant could not relocate internally, evidence of gross, flagrant or mass violations of human rights within the country, and other relevant country conditions information.¹¹⁷

NOTE: Under regular withholding of removal, the applicant must prove that there is a nexus between her persecution and one of the five enumerated grounds. With withholding of removal under CAT or deferral of removal under CAT, **there is no nexus requirement.**

However, if the Secretary of State provides the U.S. Attorney General with assurances that she has obtained assurance from a specific country's government that the individual would not be tortured

there, and the Attorney General determines that such assurances are sufficiently reliable to allow the individual's removal to that country, the individual's application for protection under CAT will be denied.¹¹⁸

What actions constitute torture? ¹¹⁹

The BIA interprets the definition of torture as "an extreme form of cruel and inhuman treatment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment."¹²⁰ The definition of torture must include the following elements described below:

- **Severe physical or mental pain or suffering.** The act must cause severe physical or mental pain or suffering. Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment.¹²¹
- **Mental pain or suffering.** Mental pain or suffering must be prolonged and must result from one of the following:
 1. intentional infliction or threatened infliction of severe physical pain or suffering
 2. administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality
 3. threat of imminent death, or
 4. threat that another person will imminently be subjected to the above.
- **Intentionally inflicted.** The act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.¹²²

- **For an illicit or proscribed purpose.** The act must be committed for an illicit purpose. This includes any discriminatory purposes, as well as such purposes as obtaining information or a confession from the victim or a third person, punishing the victim for an act that she or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person.¹²³
- **By, or at the instigation of, or with the consent or acquiescence of a public official who has custody or physical control of the victim.** To constitute torture, an act must be directed against a person in the offender's custody or physical control.¹²⁴ In order for a public official to have "acquiesced" to torture, it is necessary that the public official be aware of the act prior to it being committed, and breach his or her legal responsibility to intervene to prevent it.¹²⁵
- **Not arising from lawful sanctions.** Pain and suffering arising only from, inherent in, or incidental to lawful sanctions, which include judicially imposed sanctions and other enforcement actions authorized by law, does not constitute torture.¹²⁶

What does relief under CAT mean for my child client?

The effects of withholding of removal are the same whether a child obtains it by proving that it is more likely than not that she will be tortured under CAT, or by proving a clear probability that her life or freedom would be threatened under "withholding of removal" (see above).

Further, in the case of deferral of removal under CAT, an order of removal is issued but deferred, and the child may not be removed to the country where she is more likely than not to be tortured until such time as the deferral is terminated.¹²⁷ However, the child may be removed to another country where she is not likely to be tortured.¹²⁸

- Deferral of removal does not grant the child legal status, nor does it guarantee that a detained individual will be released from custody.¹²⁹
- An individual granted CAT protection is not able to petition for family members
- A non-detained child granted deferral of removal may apply for work authorization and work lawfully in the United States
- She may also be required to report regularly to the Department of Homeland Security

Can CAT protection be terminated?

Yes. At any time, an order deferring removal may be reviewed and terminated by the immigration judge if it is determined that it is not likely that the child would be tortured upon return to her country.¹³⁰ DHS may initiate a termination hearing by filing a motion with the immigration court, which "shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would not be tortured in the country to which removal has been deferred and that was not presented at the previous hearing."¹³¹ A de novo determination is made, based on the original application and proceedings, as well as additional evidence presented, and the child once again bears the burden of establishing that it is more likely than not that she will be tortured if returned.¹³² A child may initiate termination of the deferral order by making a written request to the immigration court.¹³³ The deferral order may also be terminated by the U.S. Attorney General if she receives sufficiently reliable diplomatic assurances from the Secretary of State that the country's government will not torture the individual.¹³⁴

What are the nuts and bolts of applying for asylum?

An application for asylum requires a significant investment of time and resources. The preparation of a meritorious application can take weeks, if not months, to complete. The result, however, can provide a child with an opportunity to legally remain in the United States and enjoy a safe, stable, and more optimistic future.

A child may be with or without legal status when applying for asylum. Further, it does not matter how the child originally entered the United States (whether the child had lawful permission or not) or whether the child has continuously maintained legal status while in the United States - in all cases, the child has the right to apply for asylum protection.

A child can apply for asylum by filing an application with USCIS in a non-adversarial process.¹³⁵ A trained asylum officer in an asylum office interviews the child, and the process from beginning to end is relatively quick for the applicant. If successful, the child will be granted asylum and avoid being placed in removal proceedings.

Who is an unaccompanied alien child for USCIS?

For purposes of the USCIS asylum program, an unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal guardian (refers to a formal legal/judicial arrangement) in the United States who is available to provide care and physical custody. This definition encompasses separated minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members.

NOTE: A child who entered the United States with a parent or other adult guardian but who subsequently left the parent's or guardian's care is considered an unaccompanied minor.

What happens when an unaccompanied child subsequently reunites with a parent in the United States?

USCIS currently takes the position that if a child has reunited with a parent at the time of filing her asylum application, she will no longer be considered an unaccompanied child. Further, even if a child remains separated from a parent at the time of filing, USCIS will check again at the time of the asylum interview to ensure that the child has not yet reunited with a parent.

NOTE: Please consult your KIND pro bono coordinator for the most up to date information as to how both USCIS and EOIR are interpreting this issue.

What is the process?

An asylum officer (AO) at the USCIS Asylum Office hears the case, considers the evidence, and makes a decision on the application in a non-adversarial, interview setting. Asylum officers are bound by statutes, regulations, and BIA and federal court decisions. They also are required to follow the guidance set forth in the Asylum Officer Basic Training Manual and legacy INS Guidelines for Children's Asylum Claims.

If a child's affirmative asylum application is not approved by the asylum officer, and the child does not have legal status in the United States at the time of denial, the child's case will be referred to immigration court and removal proceedings will be initiated. The Asylum Office will issue a Notice to Appear (NTA), which is the charging document that places the child into removal proceedings. The charging document will also inform the child the date and time that the child must appear in

immigration court to answer the allegations in the NTA and seek any relief for which the child is eligible. Once in removal proceedings, the child can renew her asylum application as a defense from removal and an immigration judge will then rule on the asylum application.

Which cases will be heard before the USCIS Asylum Office? ¹³⁶

In the following scenarios, a child's initial asylum case will be heard before the USCIS Asylum Office if the child:

- Has never been in removal proceedings and will affirmatively apply for asylum under pre-existing procedures.
- Was placed in removal proceedings on or after March 23, 2009 and who seeks to file for asylum.
- Is in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted an asylum application (Form I-589) as a UAC.

NOTE: It is USCIS's position that an unaccompanied child whose case was referred to immigration court after having been affirmatively adjudicated by USCIS may not re-file with USCIS because USCIS has already had initial jurisdiction of the case.¹³⁷ Please consult your KIND pro bono coordinator for any recent updates. Procedures and regulations regarding the above are still under development.

If my child client is in removal proceedings, what is the process for applying for asylum under the TVPRA?

For unaccompanied children in removal proceedings under the TVPRA the following process applies:

- The child's removal proceedings should be suspended pending the decision of the asylum officer (in many jurisdictions, immigration judges will grant a continuance instead of administrative closure).
- While in court, ICE will give the child written instructions on how to file for asylum with USCIS. This UAC instruction sheet should then be included in the asylum package when the child

submits his or her application by mail to USCIS.

- The child will file the Form I-589 with the Nebraska Service Center (NSC) - although in certain extenuating circumstances (including if the child is in ORR custody), the local Asylum Office may consent to the child filing directly with that local office.

If the child's removal proceedings have not been terminated or administratively closed, the child may request multiple continuances over time: first to file the asylum application with USCIS; and second, to present a receipt for proof of filing, and to allow enough time for USCIS to adjudicate the application.

- If USCIS grants the asylum application, the parties may request that removal proceedings be terminated.

Does my child client have the "capacity" to apply for asylum?

Many complex issues are raised when a child applies for asylum without her parents' knowledge and/or consent. For unaccompanied children, this may often be the case, since the child has either been abandoned or lacks a parent who is capable of taking care of her.

NOTE: Should any of these issues arise, please consult your KIND pro bono coordinator for further guidance.

Generally, any noncitizen in the United States, without regard to immigration status, has the right to apply for asylum.¹³⁸ According to the USCIS Asylum Office however, "[u]nder certain circumstances . . . the issue may arise as to whether a child lacks the capacity to assert this right to apply for asylum. While there is no age-based restriction to applying for asylum, USCIS need not process . . . applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes."¹³⁹ This issue seems to emerge specifically when the child is applying for asylum against the expressed wishes of her parents.¹⁴⁰

Further, federal regulations governing asylum adjudications generally do not permit the disclosure of information to third parties regarding a child's asylum application due to confidentiality concerns.¹⁴¹

However, in the case of a young child who lacks the capacity to make immigration decisions, the

asylum officer must determine who has the legal authority to speak for the child. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, notification of the parent or legal guardian will not violate the asylum confidentiality provisions.

How do I prepare a successful asylum application?

The key to preparing a successful asylum application is to provide as much corroborating evidence as possible. However, you must also ensure that each piece of evidence serves a specific purpose or underlines a certain point in the case. Superfluous documentation only serves to annoy the asylum officer or immigration judge. Further, the trial attorney may move to strike the documents based on irrelevancy. You must be strategic in determining what is helpful and what is not. Thus, it is advisable to specifically point out to the asylum officer, judge, and trial attorney exactly why each piece of evidence is included. This can be done, for example, through an annotated table of contents.

How do I interview the child and establish trust?

Often you will not gain a comprehensive appreciation of the child's full asylum claim until you have spent a significant amount of time with the child. This may require numerous meetings, especially because children are often reluctant to divulge important details to unfamiliar adults. It may take time to establish a trusting relationship before the child feels comfortable telling you the substantive and often painful parts of her background.

Child Practice Pointer:

Before initiating the fact-finding phase of the client meeting, you should spend time talking to the child about non case-related topics to break the ice and establish rapport.

Furthermore, children often will not know or understand what information is most pertinent and significant to their case. It is your job to elicit the most important information, which can sometimes be a frustrating and time-consuming task. Thus, succeeding in getting a child to open up and discuss traumatic details is perhaps the most important step in preparing the asylum application. In addition, it encourages the child to become more comfortable speaking about her life and answering pointed questions. This is a necessary skill that the child must develop to prepare for her asylum interview and/or immigration court proceeding.

Child Practice Pointer:

When concluding an interview session during which the child has recounted traumatic and difficult

experiences, you should end the discussion by returning to neutral topics with which the interview began, such as school, sports, etc. This approach will help to restore the child's sense of security and normalcy at the conclusion of the interview.

NOTE: For more detailed guidance on how to work with children, please refer to the chapter in KIND's manual on how to represent a child in immigration court.

How do I work with the child to gather evidence?

There are certain pieces of evidence that may be difficult or time-consuming to obtain. Thus, it is important to start early when attempting to collect necessary evidence. Below are suggestions of documentation that may be helpful in assembling a child's asylum case:

- **Identity of the applicant:** birth certificate, baptismal certificate, national ID card, military service records, and/or passport.
- **Applicant's family members:** birth certificates, marriage certificates, divorce certificates, national ID cards, passports, and/or family photographs.
- **Persecution of the applicant:** medical records, psychological records; photographs establishing political involvement, religious participation, or involvement in a social group; affidavits, statements, or letters from witnesses; arrest or conviction records; ID or membership cards in a political, religious, or social group; newspaper articles that mention the applicant; and/or photographs of wounds or scars.
- **Applicant's journey to the United States:** photographs, receipts for transportation and hotels, and/or letters from witnesses.
- **Discretionary factors:** educational records in the United States; work records in the United States if employment authorization has been provided; certificates from local law enforcement authorities that the applicant has no criminal history; letters stating good moral character; ESL certificates; and/or documentation reflecting involvement in a religious or social organization in the United States.

Investigating the government's records

If your child client has come in contact with U.S. government officials you should investigate what

records the government possesses. Usually, if your client has not been placed in removal proceedings there will be no DHS documents available to request.

- **Form I-213.** If an immigration officer has interviewed your client there will be a I-213 in your client's A file. You should obtain and review the "Record of Deportable Alien" (Form I-213, Record of Sworn Statement) prior to the submission of the child's affidavit or the completion of the I-589 to avoid creating any inconsistencies with what is contained in the government's file. If your client is in removal proceedings the government trial attorney will look to Form I-213 for valuable information about the child, especially if the child has criminal issues.
- If there are discrepancies between your client's testimony and the information contained in the I-213, you will want to argue that the I-213 is inherently unreliable. In the U.S. Commission on International Religious Freedom study entitled "Report on Asylum Seekers in Expedited Removal," dated February 2005, the Commission concluded that the Record of Sworn Statements were "often incomplete and less than reliable."¹⁴²
- **Review the court record.** If the child is in removal proceedings, you should review the court's record file (referred to as the Record of Proceeding (ROP)). The ROP consists of written documents and the court recordings of all court hearings on the case. This file is different from what is in the government trial attorney's file. You should be aware of all documents and information that both the trial attorney and the immigration judge will rely on during the hearing. The procedure differs for each jurisdiction as to how to review the court's file. In many jurisdictions, you must file a Request to Review Record of Proceeding or Hearing Tape, or you may request to review both. A copy of this form can be obtained from the immigration court clerk. Upon filing this request, the immigration clerk will contact you to set up a date to review the court's file and/or listen to the tape recording of all events occurring prior to your entry into the case.
- **Request and review the child's ORR file.** Consult your KIND pro bono coordinator for the proper procedure).

What if my client does not have any corroborating evidence of the asylum claim?

In many cases, it will be difficult to present eyewitnesses in support of the child's claim. Such witnesses may still be in the child's home country, afraid to come forward, or no longer living. Further,

the child's application may lack direct evidence in support of her case - especially if she fled from home very quickly. This is not uncommon for asylum seekers, and the key is to learn how to work around it. If you cannot obtain specific pieces of evidence such as a birth certificate, etc., you should explain why such evidence is unavailable. This may be done in the child's affidavit, (e.g., "the rebels arrived and we fled in such a hurry that we did not have time to collect our important documents. We have never returned to our home although we have heard from neighbors that our entire village was burned down by the rebels").

The child's testimony alone may be sufficient to establish eligibility for asylum, as long as it is credible, detailed and persuasive.¹⁴³

The legal brief

While not required, a legal brief can be used to educate the asylum officer or immigration judge, tie together a comprehensive argument based on all of the evidence, and address any unique legal issues.

The decision as to whether or not to submit a legal brief is based on a number of factors. Some practitioners caution that it may be unadvisable to submit a brief early on in the application process because there can be months of delay between the time the asylum application is submitted and the actual interview or hearing. During the time after the application is submitted and before the hearing takes place, a traumatized child may reveal additional information and the legal theory of the case may shift as a result. Therefore, submitting a legal brief early in the case can cause unnecessary credibility problems and legal hurdles.

Usually legal briefs are most effective when they are submitted to address a novel legal issue in the case or to address an area where the law is unsettled. If the legal issues in your client's claim are straightforward, spend your time working on preparing your client's affidavit.

The client affidavit

A personal declaration, or affidavit, explains a child's story in the child's own voice. However, it is important to note that the use of declarations in children's asylum claims has the potential to provide credibility problems and may result in discrepancies between what is on paper and what the child testifies during the interview or later in court. For example if the case is first heard by an asylum officer, who takes many notes, and then is heard by an immigration judge and the notes or the testimony conflict with the written affidavit, your client may be deemed not credible. You should use caution in making sure that the child is comfortable with all information submitted in any affidavit and that the child will be able to recount the same information months later during the interview or hearing.

If the child has particular memory problems as a result of trauma, you may want to reconsider whether submitting a written affidavit is appropriate.

The best rule of thumb is to keep any affidavit narrow enough so that it provides value in support of the child's claim but general enough so that the child is not "locked in" to specific details and dates which she will then be forced to remember in an interview or on the witness stand.

In addition, when drafting your client's affidavit, it is important to keep the language and tone in the applicant's own voice. You should pay close attention to the vocabulary used and the way in which points are phrased or worded. While your role is to help the child verbalize her story in a clear and concise manner, it can quickly become apparent to the adjudicator that you wrote the affidavit. For example, it is highly unlikely that a child would use the word "persecution" in describing what happened to her.¹⁴⁴

Child Practice Pointer:

To get started with drafting the affidavit, you may want to ask your child client to write a letter or summarize on paper the significant events of her life and background. This will provide a good starting point and enable you to follow up with additional questions. Also, the child may feel less intimidated initially by writing these details down as opposed to talking about them with an unfamiliar adult.

Expert witnesses and affidavits

Expert witnesses are most useful when highlighting the conditions of the child's home country and the difficulties the child would face if forced to return. For cases involving traumatization of a child, the expert may want to include information regarding the lack of availability of counseling or medical services in the child's home country.

Psychological or mental health evaluation

When a child has suffered past trauma, it is helpful for the child to be evaluated by a mental health expert to give weight and credibility to the claim. For example, the existence of post-traumatic stress disorder may be at issue. An official diagnosis not only strengthens the client's story, but may also help explain why the child may have memory problems, has difficulty talking about various topics, or appears confused or devoid of emotion. Such explanations can be beneficial in rebutting a trial attorney's claim that the child's testimony or actions demonstrate a lack of credibility.

Background on the country conditions

Asylum officers and judges do not appreciate applications that include voluminous country reports

without any indication of the most relevant portions. In fact, the Immigration Court Practice Manual requires that the relevant portions of background documents be highlighted or marked in some way.¹⁴⁵ You should draw attention to the most pertinent points of documents through tabbing, highlighting, or ideally, including the exact page that you would like the officer or judge to review and include an explanation of why it is relevant in an annotated table of contents.

- **U.S. State Department Human Rights Report.** Great weight (depending on the federal circuit) is given to the information provided in this report. All asylum applications should include this report for the child's home country with relevant portions highlighted. If you feel that the report is inaccurate or biased (a common criticism), you may want to find an expert who is willing to testify on that point.
- **Other reports and documents** highlighting the child's claim from other well-known sources (e.g., the CIA, Amnesty International, Library of Congress, Congressional Research Service, Human Rights First, Human Rights Watch, United Nations agencies, etc).

Other pertinent evidence

Each asylum case is different and will often have claims requiring unique pieces of evidence. You must decide what is relevant and necessary, e.g., letters from family and friends in the child's home country that discuss the dangerous conditions occurring there since the child fled, documentary proof of police reports or medical reports if the child's claim refers to them, etc. Any document not written in English must be submitted with a certified translation (see below).

Copies and originals

USCIS requires that additional copies of the application and supporting documents be submitted along with the original. Refer to the USCIS Form I-589 instructions for specific requirements. In immigration court, the original Form I-589 must be filed with the immigration judge and a copy must be served on the trial attorney. In addition, a third copy must be submitted so that the court may serve the U.S. Department of State.

If requested, you should be prepared to present the originals of supporting documentation such as birth certificates, death certificates, police reports, and medical reports. DHS may send these documents for laboratory testing to determine their authenticity. However, never mail originals to USCIS or to the court with the asylum application. Send only copies until the originals are requested.

Using specific dates

It is less likely that children, especially young children, will remember specific dates. While sometimes

it is necessary to provide a specific date, there are many occasions when a date could be generalized such as, "when I was five years old" or "in the spring of 2000," or "the year my parents got divorced." This prevents children from having to recount specific dates which can become a potential credibility trap should the trial attorney or judge ask about it and the child is unable to provide the correct response.

Translations

An English translation and a certificate of translation certifying that the translation is true and correct must accompany any documents written in a language other than English. This includes birth certificates and other forms. As provided by the EOIR Immigration Court Practice Manual, the following language must be included in a certificate of translation:

CERTIFICATE OF TRANSLATION

I, _____, am competent to translate from
(name of translator)

_____ into English, and certify that the translation of
(language)

(names of documents)

is true and accurate to the best of my abilities.

(signature of translator) (typed/printed name of translator)

(address of translator)

(telephone number of translator)

Change of address

If your child client changes addresses, the child must notify USCIS within **10 days**. If the child is in removal proceedings, she must also notify the immigration court within **five days**. See USCIS form AR-11 and the appropriate EOIR form found in the EOIR Immigration Court Practice Manual. There can be serious immigration consequences for failure to notify DHS of a change of address.

Where do I file my client's initial asylum application?

Affirmative asylum applications are submitted via mail to the USCIS Service Center with jurisdiction over the place of residence. The instructions on the I-589 will clarify the address to which the application should be sent. Once received, the Service Center will forward the application to the nearest asylum office in the child's region and the child will receive an interview appointment notice. The child will also receive a separate notice from USCIS to schedule an appointment to have her fingerprints (biometrics) taken. Note that asylum applicants are not required to show picture identification for their biometrics appointment.

Child Practice Pointer:

Although not required, KIND recommends that any application be sent via overnight mail. At the very least, the asylum application should be sent via certified mail, allowing for some sort of tracking mechanism. The potential for lost or misplaced documents can be relatively high at USCIS and/or the immigration court. USCIS will confirm in writing its receipt of the application via Form I-797.

Where do I file my client's asylum application if the child is before an immigration judge?

Applications for non-UAC children who are in removal proceedings before the immigration judge should file a defensive asylum application with the immigration court.

However, UAC children who are in removal proceedings before the immigration judge should file their asylum application under the provisions of the TVPRA because the child is unaccompanied and therefore the asylum application should be sent to the USCIS Nebraska Service Center. Please see the specific filing instructions in TVPRA guidance issued by the USCIS Asylum Office.¹⁴⁷

If the child's case was referred to the immigration court from the Asylum Office, the child is allowed to re-file an entirely new application before the court or can simply make corrections or additions to the

already existing application.

In these referred cases, you should submit the application to the immigration court that has jurisdiction over the case. When the asylum application is initially filed with the court, USCIS automatically sets up an appointment for children over 14 years to have their fingerprints taken.

Asylum applications are filed in open court at a master calendar hearing.

Unless the judge has set specific rules for her court, all evidence and supporting documents must be submitted to the court at least 15 days before the individual merits hearing. If this deadline is missed, the immigration judge may refuse to consider the evidence. For detained cases, filing deadlines are set by the individual immigration court, so be sure to verify this with the immigration judge.

What is the work authorization "clock"?

Filing an asylum application will start a 180-day "clock" for the Asylum Office or immigration court to complete adjudication. This timeframe is important because if it takes longer than 180 days, the child is eligible to apply for work authorization (Form I-765). An applicant cannot receive a work authorization document (EAD) before 180 days have elapsed from the filing of her initial asylum application. Since it takes about 30 days for DHS to adjudicate the application, the child may file the work authorization application after 150 days have elapsed, but she will not be eligible to receive an EAD until after 180 days.

NOTE: The 180-day "clock" will stop for any delay caused by the asylum applicant. This includes requesting a continuance from the court, or rescheduling an Asylum Office interview. Once the clock is stopped, each subsequent day that passes will no longer count towards the 180-day wait time. The applicant must have the clock "restarted" in order to continue accumulating 180 days - which is often a very difficult task. In such situations, you must request that the clock be restarted - it's not done automatically.

While receiving an EAD for the purpose of seeking employment may be less relevant for children, an EAD often acts as a form of photo ID that may help the child obtain other benefits. It is recommended to apply for an EAD even if the child is technically not old enough to work or does not want to work.

The status of the child's work clock may be determined by calling the EOIR main information line at 1-800-898-7180. If you believe the child's clock is wrong, you should contact the local court administrator.

Can my client travel outside the United States while her application is pending?

It is not recommended because there is no guarantee that if your client leaves the United States she will be allowed back into the country to pursue her asylum claim even if she received permission to leave the United States prior to departure. Upon re-entry, the asylum applicant must be inspected by an immigration inspector from U.S. Customs and Border Protection (CBP) who will determine whether the asylum applicant will be allowed to reenter. If the child has any inadmissibility issues (most common are adult criminal convictions), she may be denied admission.

However, if your client has to leave the United States for extenuating circumstances, she must first obtain advance parole. Advance parole, which is filed using Form I-131, Application for Travel Document, allows certain aliens to return to the United States without a visa after traveling abroad. An asylum applicant who leaves the United States without first obtaining advance parole will be presumed to have abandoned her asylum application and it will be denied or terminated.

Most importantly, if the child returns to her country of claimed persecution, even after receiving advance parole, she will be presumed to have abandoned her request for asylum, unless she is able to show compelling reasons for her return.

What should I expect at the asylum interview?

The asylum interview takes place in a relatively informal setting in an USCIS office. The asylum officer will conduct the interview while seated behind a desk with you and the child sitting across from the officer. The interview is intended to take place in a non-adversarial manner.

The interview will generally last at least one hour and will be recorded by the asylum officer. First, the child will be asked to take an oath promising to tell the truth during the interview. The asylum officer will verify the child's identity and ask basic biographical questions. The asylum officer will then ask the child about the substantive parts of her claim and determine if any asylum bars apply. The officer is also looking for any inconsistencies between the child's testimony and the information on her I-589.

Asylum officers are instructed to present the child applicant with any adverse information and to provide her with an opportunity to explain or provide clarification. When adverse information is discovered after the interview, the asylum officers are instructed to consider scheduling a follow-up

interview to provide the child with an opportunity to correct or clarify the record.

A final decision will not be made at the asylum interview. You and the child will be asked to return to the Asylum Office to receive the decision in person. If you or the child resides at a significant distance from the office, the decision will be sent via regular mail within a few weeks.

It is important for both you and the child to understand that applying for asylum affirmatively carries with it certain risks. Specifically, a child without legal status will likely be put into removal proceedings if the asylum officer does not grant the application.

Can I file supporting materials once the application is filed with USCIS?

Yes. An applicant is permitted to amend or supplement an application at the time of the asylum interview or beforehand by submitting written notice or an erratum. For example, you may come across pertinent information after the time of the original submission that you would like to provide to the asylum officer. Alternatively, it may come to your attention that a mistake has inadvertently been made on the I-589, the affidavit, or elsewhere in the client's application. You have a duty to bring this mistake to the attention of the adjudicator so it may be corrected on the record.

What documents should I bring with my client to the interview?

The following documents, if available, should be brought to the interview:

- Form G-28, Notice of Entry of Appearance.
- A form of identification for the child, including any passport, travel or identification documents, and the Form I-94 Arrival-Departure Record (if your client received one).
- Originals of any birth certificates, marriage certificates, or other documents previously submitted with Form I-589.

- Copy of the asylum application in case the asylum office is missing any of the information.
- Any additional available items documenting the child's claim that have not already been submitted with the application.
- Certified translations of all documents not in English.
- If the non-UAC child is married or has children under 21 at the time of filing the application and are included as derivatives, they must also appear for the interview and bring any identity, travel, or other supporting documents they have in their possession. Again, only those who will be included as dependents in the asylum decision must attend the interview (this is only required for spouses or children living in the United States).

What are special considerations for children being interviewed?

The child's testimony

All asylum officers are provided with basic training in adjudicating children's asylum claims. Specifically, as discussed above, the "Guidelines for Children's Asylum Claims" (the "Guidelines")¹⁴⁸ provide asylum officers with child-sensitive interview procedures and guidance regarding the most common issues that may arise in these cases. This includes tailoring the interview to the child's age, stage of language development, background, and level of sophistication. For example, as stated in the Guidelines:

The child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma. Asylum Officers may have to build a rapport with the child to elicit claims and to enable the child to recount his or her fears and/or past experiences. Several steps described below may be helpful in building rapport with a child and encouraging communication. Keep in mind that, from the point of view of most applicants - including children - Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences, which give him or her good reasons to distrust persons in authority.

Evidence

A child cannot be expected to testify with the precision and accuracy of an adult. The UNHCR Handbook states that children's testimony should be given a liberal "benefit of the doubt" with respect

to evaluating a child's fear of persecution.¹⁴⁹ While, like adults, a child may rely solely on her own testimony to meet the burden of proof, certain easily verifiable facts central to the child's claim may require corroborating evidence.¹⁵⁰ As a result, a child through her attorney may be expected to produce such documentation or offer a reasonable explanation as to why such documentation is unavailable.

Can witnesses testify at the asylum interview?

Yes. A child may present witnesses to testify on her behalf. There are no restrictions on witnesses with regard to their number, age, their own asylum or immigration status, or the relationship to the child. It is recommended that a witness be presented if the witness can help corroborate the child's case or provide an expert opinion regarding the child's previous trauma.

Will USCIS provide an interpreter at the asylum interview for my client?

No. USCIS does not provide interpreters during the asylum interview, except in the case of hearing-impaired applicants, or if the child is in ORR custody at the time of the interview.¹⁵¹ You must bring an interpreter if the child does not speak English well enough to proceed with the interview. Even if your client can communicate in English, oftentimes the client will feel more comfortable discussing her claim in her native language, particularly as the child will already be nervous about the interview itself. In addition, your client will most likely be able to testify with greater specificity about her claim in her native language than in English. If you bring an interpreter to the interview, ideally you should have worked with this individual on multiple occasions and used this interpreter for a mock interview.

The interpreter must be fluent in English and must be at least 18 years old. The following persons cannot serve as an interpreter: the attorney or representative of record, a witness testifying on the client's behalf at the interview, or a representative or employee of the government of the client's home country.

What is my role in the asylum interview?

Your role is limited in an asylum interview. You may be present to ensure that the asylum officer conducts the interview in a fair and impartial manner and to clarify any issues or questions that arise should the officer ask for clarification. If allowed, you may question the client about important issues

or facts that the officer failed to address. You will also have time at the end of the interview to make a statement or add any additional information. This is an opportunity for you to summarize the client's claim and end the interview on a strong note. This is also a chance to draw attention to any important documents included in the application. In many cases, the officer has spent only a few minutes before the interview reviewing the child's file.

In addition, you have a right at any time during the interview to request a supervisory asylum officer to be present during the interview.

Lastly, Asylum Office guidelines also allow for the presence of a "trusted adult" to attend an asylum interview with the child to establish conditions in which the child feels safe, secure, and comfortable answering questions regarding her case. As appropriate, the trusted adult may provide clarification but generally does not interfere with the interview or in any way fulfill the role of an attorney. Both you and a trusted adult may accompany the child to an asylum interview.

Potential issues and areas of concern of which you should be alert for during the interview:

- You should bring any age, developmental, or trauma considerations to the asylum officer's attention before the interview begins - simply to ensure that the officer is aware of special considerations and conducts the interview accordingly
- It is appropriate that a child be able to take multiple breaks during the interview. If the child is uncomfortable or needs a brief recess, you should make such a request to the officer.
- You should listen intently to the way each question is worded and/or phrased. Particular language used by the officer may be unclear or confusing to a child. For example, the question "were you persecuted" could easily be rephrased to a similar question such as "were you hurt?" You should bring any such concerns to the officer's attention so that she may clarify the question.

Child Practice Pointer:

If the child requires particular accommodations, e.g., a child who is deeply traumatized, or two siblings who wish to have their cases heard jointly, you should contact the Asylum Office supervisor, before the interview so that the office can make any advance preparations necessary. You will want the asylum officer who will be hearing the case to be experienced in working with children.

What if my client can't make the scheduled interview date?

If it is necessary to reschedule the interview, a request letter must be mailed in advance to the asylum office, or else you must appear in person and complete a "Request to Reschedule Asylum Interview." The Asylum Office will reschedule an interview if it is the child's first request for rescheduling and the request is received prior to the interview date.

NOTE: A request to reschedule an interview will stop the child's work authorization "clock" (see above).

What about parents and legal guardians?

As will be the case in most situations when working with unaccompanied children, a child who remains unaccompanied at the time of her asylum interview will not have a parent or legal guardian present. When this is the case, the asylum officers will likely inquire into the location of the child's parents, and whether the parents are aware of the child's whereabouts and that the child has applied for asylum.¹⁵²

The asylum officer basic training course states that in some cases, it may be appropriate to delay adjudication of a case after the interview so that the child can provide further information or documentation about the guardianship arrangement and/or parental knowledge of, and consent to, the asylum application, where such information could be reasonably available, and if there are unresolved questions that the documentation could help answer. However, a child's inability to demonstrate a guardianship arrangement or parental knowledge and consent does not foreclose the adjudication of the application or a grant of asylum.¹⁵³

As mentioned previously in this chapter, if the Asylum Office finds that the child has in fact reunified with a parent or legal guardian, current USCIS guidelines instruct the asylum officer to declassify the child as an unaccompanied child. In other words, even if the child was truly unaccompanied at the time of filing her application, if at the time of the interview the child is living with a parent or guardian, they will not be able to benefit from unaccompanied children's status.

NOTE: This issue and USCIS's interpretation is still currently under review. Please ask your KIND pro bono coordinator for the most up to date information.

What if my client fails to show up for the interview?

If for some reason the child does not appear at the interview, USCIS must receive a written explanation within 15 days after the date of the scheduled interview. The Asylum Office director has discretion to reschedule the interview if provided with a reasonable explanation for the failure to appear. Otherwise, if the child is not in status at that time, the case may be referred to immigration court. Failure to appear at the interview may also affect eligibility to apply for work authorization.

What happens when a decision is rendered?

The asylum officer may (1) approve, (2) deny, or (3) "refer" an asylum application to the immigration court. According to the USCIS website, an affirmative asylum applicant is usually interviewed within 43 days of the application's submission and a final decision is received approximately 14 days after the interview (although processing times may vary in differing locations).

If the asylum officer approves the application, the child will receive a grant of asylum and be allowed to legally live and work in the United States. Alternatively, it is also possible that the asylum officer may issue a "recommended approval" meaning that the officer has determined the child to be eligible for asylum but that a final decision is being held pending identity and security checks. Once your client clears the security checks USCIS will then issue a final grant of asylum.

Child Practice Pointer:

All asylum applications submitted by minors are referred to the asylum office headquarters (HQASM) before a final decision is made. All asylum claims filed by principal applicants under the age of 18 at the time of filing must be submitted by the asylum officer to HQASM for a quality assurance review before they can be finalized. This requirement applies regardless of whether the applicant is considered an unaccompanied minor. This review may cause delays in receiving a decision.

What about children who are in legal status at the time of their asylum decision?

If the asylum officer decides that the child does not meet the necessary criteria for asylum, a Notice of Intent to Deny (NOID) will be issued to them. The NOID letter gives the reasons the officer is recommending denying the claim and provides the applicant an opportunity to provide additional documentation or evidence in support of her case. After such time, should the application be given a final denial, the applicant will be permitted to remain in the United States through the duration of her legal status.

The applicant may not reapply (at any time) for asylum in the United States without demonstrating changed circumstances that affect that applicant's eligibility for asylum.

What about children out of legal status at the time of their asylum decision?

If the asylum officer decides not to approve an asylum application and the child is out of legal status, the case will be referred to the immigration court and removal proceedings will be initiated. Technically, under these circumstances, the application is not "denied" but simply "referred" to the court.

NOTE: Under some circumstances, it may be possible to file a "motion to reconsider" with the Asylum Office or asylum headquarters before the case is referred to immigration court. This can only happen if the Notice to Appear has not been issued. Once the court receives the Notice to Appear, USCIS loses jurisdiction over the case.

When before the immigration judge in removal proceedings, the child may renew her request for asylum. Applications for asylum before an immigration judge are considered *de novo*, which means all of the evidence will be considered for the first time, without the influence of the asylum officer's opinion or findings.

Can I appeal USCIS's decision?

No. There is no administrative or judicial appeal of a decision of an asylum officer. Instead, the case is referred to immigration court, as described above, and a request for asylum may be renewed before the immigration judge. Any adverse decision of an immigration judge may be appealed administratively to the Board of Immigration Appeals, and then to the circuit court of appeals.

What about defensive asylum and adjudication in removal proceedings?

If an asylum officer does not approve the asylum application, and the child does not have legal immigration status at the time of the decision, DHS will issue a Notice to Appear (Form I-862).

Once the child is placed in removal proceedings, she may request asylum as a defense from removal. This is referred to as defensive asylum because the child, while conceding that she does not have valid immigration status and is removable under the Immigration and Nationality Act, is arguing that she is a refugee and should be granted asylum.

By regulation, any application for asylum is deemed to also be an application for withholding of removal. Unlike asylum officers, an immigration judge has jurisdiction to grant withholding of removal or Convention Against Torture (CAT) protection in addition to asylum relief. In adjudicating the asylum application, immigration judges are bound by statute, published BIA opinions, court of appeals decisions from the child's specific federal circuit, and U.S. Supreme Court decisions. While decisions from other circuits may be cited, they will serve only as persuasive authority and are not binding.

At the removal hearing, an ICE trial attorney represents the government. It is the role of the trial attorney to test the credibility, plausibility, and validity of the child's asylum claim in an adversarial process.

Child Practice Pointer:

Defensive asylum claims can be extremely intimidating for children - as a result of both the physical surroundings of a courtroom, as well as having to answer many questions from unfamiliar adults, including the judge and the trial attorney.

Can the child amend the asylum application before the immigration judge?

After being placed in immigration court proceedings, the child may amend her asylum application. For example, the child may submit amended pages of the application, as long as all changes are clearly reflected. Such amendments must be filed with the court by the usual filing deadlines set in forth in the EOIR Practice Manual (15 days in advance of the hearing) or by deadlines set by the immigration

judge. A cover page with an appropriate caption, such as "AMENDMENT TO PREVIOUSLY FILED ASYLUM APPLICATION" should accompany any amendment.¹⁵⁴

NOTE: Affirmative asylum applications referred to an immigration court by the Asylum Office are contained in the Record of Proceedings. Therefore, there is no need for the child to re-file the application with the immigration court.

What is my client's immigration status once asylum is granted?

When individuals are granted asylum in the United States, they are referred to as "asylees." With a few exceptions, asylees are entitled to reside in the United States indefinitely as evidenced by the issuance of an I-94 (Record of Admission) by USCIS. To obtain Form I-94, the child must make an appointment with USCIS. The child will need to bring a copy of the judge's order, two photos, and a copy of her birth certificate. To make an appointment, visit USCIS's InfoPass webpage at: <http://infopass.uscis.gov/>.

Is an asylee authorized to work once granted asylum?

Yes. Asylees have the right to work in the United States. In fact, an asylee does not need to apply and receive an employment authorization document (EAD) before obtaining employment. Instead, an asylee is legally able to work as of the date of the grant of asylum and needs only show proof of the asylum grant by producing the I-94 card. However, it is a good idea to file an EAD application for your client because many employers are unfamiliar with Form I-94 as proof of lawful status and an EAD is more readily accepted. Further, an EAD may be helpful for a child as it serves as a picture ID, demonstrating that she is present in the United States with lawful immigration status.

The EAD is typically granted for a two-year period, at which point it must be renewed. The first EAD for an asylee is free, but thereafter the asylee must pay a fee to USCIS or request a fee waiver. For specific details on how to file Form I-765, see the USCIS website at www.uscis.gov.

Child Practice Pointer:

Even though a child asylee may receive immigration documents authorizing her to work in the United States, the right to work will be a legal issue controlled by federal and state labor and employment laws. When advising an asylee under 18 years old about the right to work, you should check with state and federal laws as well as with school districts to determine if the child can work and if so, for how many hours per day.

Can my client apply for a social security card and other forms of identification?

Yes. To obtain a social security card, a child must be lawfully present in the United States. An asylee will need to present proof of status (form I-94 or an EAD) and in addition, the child must present proof of age. Some Social Security Administration offices may accept an EAD as proof of age while others may require an original birth certificate, with translation where necessary.¹⁵⁵

To obtain an identification card or driver's license, some states require that a noncitizen show proof of lawful status in the United States and provide a social security number. Again, Form I-94 or an EAD will satisfy those requirements. For more detailed information on what documentation is required, visit the state's Department of Motor Vehicles or Department of Public Safety's website.

What happens if my client moves after being granted asylum?

Any person who is a noncitizen in the United States, including asylees, must report any change of address within 10 days to USCIS via Form AR-11. The form can be downloaded from USCIS's website and can be filed electronically. Failure to report a change of address is a ground for removability.

Does my client need to register for the selective service?

Yes, if the client is over 18 years old. Any male living in the United States between the ages of 18 and 25 must register with the Selective Service System. Males can register on the Internet or at a local post office.¹⁵⁶

What kinds of social services programs are available to an asylee?

Asylees in the United States can access social programs designed to provide basic resources and training. Programs include cash and medical assistance, employment preparation, job placement, and English language training. It is important to direct asylees to these benefits as soon as possible because in certain instances there is a limited time during which an asylee can enroll in the social

programs. In general, the asylee must apply within the first 30 days after the grant of asylum.

The Office of Refugee Resettlement (ORR) administers the majority of these social programs. ORR contracts with social service agencies such as Catholic Charities and Lutheran Immigrant and Refugee Services (LIRS) to operate and manage these programs locally.¹⁵⁷

Who can assist an asylee in accessing these benefits?

Asylees can call the "Asylum Information and Referral Line," based in New York, NY, by calling 1-800-354-0365, to learn about local programs. The referral line is open Monday through Friday, from 9:00 a.m. to 6:00 p.m. EST.

The International Rescue Committee (IRC)¹⁵⁸ and the National Immigration Law Center (NILC)¹⁵⁹ are great resources to help asylee identify local programs that are available, as well as serve as a resource for information on public benefits.

What is the Unaccompanied Refugee Minor's Program?

The Unaccompanied Refugee Minor's (URM) Program is a federal foster care system operated by ORR for refugee and asylee children. Asylee children who do not have at least one parent in the United States are eligible for the URM Program. Children who are granted asylum while in the custody of ORR's Division of Children's Services (DCS), are automatically transitioned into the URM Program after the grant of asylum unless one of their parents is present in the United States (regardless of lawful immigration status).

Can my client travel outside of the United States after being granted asylum?

Yes, but it is not recommended until your client is granted lawful permanent status (LPR). In order for an asylee to travel outside the United States, the asylee must first obtain a Refugee Travel Document (RTD) from USCIS. An asylee cannot travel using her passport and so the RTD serves as an internationally recognized travel document that in theory provides the asylee re-entry into the United States. However, the asylee still has to be granted permission to re-enter the United States by an immigration officer. There is always a risk that the officer on the border may deny entry to an asylee returning to the United States with a RTD. Therefore, KIND strongly recommends that you advise

your client to wait to travel until she has been granted LPR status.

If your client must travel, an asylee can request an RTD by filing Form I-131 (Application for Travel Document). Form I-131 must be filed with USCIS along with the appropriate fee or a fee waiver request. The RTD must be requested before the asylee travels abroad and it must be done plenty of time in advance to allow USCIS to process the request.

Can an asylee apply to bring family members located outside the United States to the U.S.?

An asylee's spouse and children under age 21 can obtain derivative status through the asylee, the principal applicant. Though not common in the case of an unaccompanied child, there will be situations in which the child may have children of her own. To apply for derivative asylee status on behalf of family members, the asylee must file Form I-730 with USCIS for each family member. The deadline to file is two years from the asylee's grant of asylum. The form is fairly simple and requires little documentation, mainly birth certificates and pictures.

When can an asylee apply for lawful permanent resident status?

One year after obtaining asylee status, an asylee can apply to adjust her status to that of a Lawful Permanent Resident (LPR) pursuant to INA § 209. Note that asylees and refugees adjust status pursuant to a different provision in the INA than most other individuals applying to adjust status. Most adjust status pursuant to INA § 245. There are different requirements in § 209 from § 245. For example, an asylee is not barred from adjusting under § 209 for "being a public charge" by accepting cash assistance. Under § 245 being a public charge can deem an applicant ineligible for adjustment. Make sure to read the relevant portions of the INA.

To apply for LPR status, an asylee must file Form I-485 with USCIS along with required fees, medical exams, and other forms.

The adjustment of status process can be costly, and some asylees do not file for adjustment for many years - if ever. Unlike refugees, an asylee is technically allowed to live in the United States legally in asylee status indefinitely without adjusting his or her status. There is a risk to your client if he chooses not to adjust status.

When an asylee adjusts to LPR status, she no longer needs to obtain a travel document from USCIS. An LPR has the right to travel outside the United States for periods of up to six months at a time. Traveling for more than six months can lead to the revocation of LPR status for abandonment reasons.

Travel to the asylee's country of origin is highly discouraged because ICE may question the asylee at the port of entry about changed circumstances in the country of origin and later use the information against the asylee in removal proceedings. Travel to the country of origin is best done once an LPR becomes a naturalized U.S. citizen.

It is important to remind clients that they can lose their asylee or lawful permanent resident status in the United States if they engage in criminal activity.

Can my client apply for U.S. citizenship?

Yes. A lawful permanent resident is eligible to apply for U.S. citizenship five years after obtaining lawful permanent resident status. For asylees, upon the grant of LPR status, USCIS generally backdates the original date by one year, so that the applicant only has to wait four more years before applying for citizenship.

Practice Pointer:

All of the requirements for eligibility for U.S. citizenship pertain to asylees. An asylee should consult competent legal counsel for assistance in filing a citizenship application.

Can my client's asylum status ever be terminated?

Yes. Under certain conditions USCIS can terminate a person's asylum status. This is why you should in most cases encourage your client to adjust to permanent legal resident status as soon as your client is eligible for adjustment.

There are conditions under which asylee status may be terminated,¹⁶⁰ including:

- A fundamental change in circumstances such that the asylee no longer meets the eligibility requirements for asylum
- The asylee becomes subject to one of the mandatory bars to asylum
- The asylee has voluntarily availed herself of the protection of her country by returning there with permanent resident status, or the possibility of similar status
- The asylee has acquired a new nationality and enjoys the protection of her new country.

In practical terms, two of the most common ways in which an asylee's status could be terminated if a person commits a crime or returns to her home country from which she claimed asylum.

Citations

¹U.S. asylum law is codified at United States Code (USC), Title 8, Chapter 12, Section 1158 and Section 208 of the Immigration and Nationality Act (INA). The principle of nonrefoulement is codified in U.S. law under the name "Withholding of Removal" and can be found at 8 USC § 1231(b)(3), INA § 241(b)(3).

²On July 25, 1951, the United Nations adopted the Convention relating to the Status of Refugees, which formalized the international principles of (1) asylum (whereby a country could provide legal status to a person with a well-founded fear of persecution on account of a protected ground) and (2) nonrefoulement (whereby a country is under an obligation not to return a person to a country where his life or freedom would be threatened). In 1967, the UN adopted the Protocol relating to the Status of Refugees, which expanded asylum and nonrefoulement protection (the U.S. acceded to the Protocol in 1968).

³Sec. 462 of the Homeland Security Act of 2002; 6 U.S.C. § 279(g)(2).

⁴INS Office of International Affairs Memo: Guidelines for Children's Asylum Claims, Dec. 10, 1998.

⁵Asylum seekers apply for asylum if they are physically located in the United States. Individuals who are outside of the U.S. apply for status as refugees under the U.S. Refugee Program (USRP). If approved, refugees are then resettled in the United States. Both asylum seekers and refugees must prove that they meet the definition of a "refugee" under the INA 101(a)(42)(A).

⁶INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

⁷INA § 208(b)(1)(A); 8 U.S.C. § 1208(b)(1)(A).

⁸INA § 208(b)(1)(B); 8 U.S.C. § 1108(b)(1)(B); 8 CFR § 208.13(a) .

⁹*INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987).

¹⁰See USCIS Asylum Division, AOBTC Lesson Plan: Guidelines for Children's Asylum Claims - March 21, 2009, found at:

http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson29_Guide

¹¹UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("U.N. Handbook"), para. 219 (the Handbook is intended to provide guidance to government officials charged with the adjudication of refugee claims), see also *Matter of S-M-J-*, 21 I&N Dec. 722, at 739 (BIA 1997)(Rosenberg, L., concurring).

¹²*Ibid*, para. 213.

¹³*Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007)(holding that there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his or her child).

¹⁴8 CFR 208.13(b)(which states, "[t]he applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution."); see also *Matter of Chen*, 20 I.&N. Dec.16 (BIA 1989); *Shehu v. Gonzales*, 443 F.3d 435, 440 (5th Cir. 2006).

¹⁵*Matter of Kasinga*, Int. Dec. 3278 (BIA 1996); see also *Matter of Mogharrabi*, 19 I.&N. Dec. at 446.

¹⁶*Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir 1998).

¹⁷*Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998); *Bhatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999).

¹⁸*Ciorba v. Ashcroft*, 323 F.3d 539, 545 (7th Cir. 2003). ¹⁹*Matter of Sanchez and Escobar*, 19 I&N Dec. 276, 284 (BIA 1985).

²⁰*Eduard v. Ashcroft*, 379 F.3d 182, 190-1 (5th Cir. 2004).

²¹See INS Guidelines for Children's Asylum Claims (although note that an asylum officer or immigration judge is not bound by these Guidelines); see also UNHCR Handbook, para. 52 (stating that "due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.")

²²U.N. Convention on the Rights of the Child (CRC). G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989, found at: [The United States has signed but not ratified the CRC.](#)

²³8 CFR § 208.13(b)(1); *Matter of Chen*, 20 I&N Dec.16 (BIA 1989).

²⁴Even if the government is able to demonstrate changed country conditions, an applicant can still

prevail by demonstrating that there are "compelling reasons" for being unwilling or unable to return to his or her country or that he or she would suffer "serious harm" upon return. 8 CFR § 208.13(b)(1)(iii).

²⁵8 CFR § 208.13(b)(1)(i).

²⁶8 CFR § 208.13(b)(3).

²⁷*Id.*; see also *INS v. Ventura*, 437 U.S. 12 (2002 (per curiam))(where the U.S. Supreme Court reiterated that the applicant bears the burden of proving countrywide fear when the persecutor is not the government stating, "an individual who can relocate safely within his home country ordinarily cannot qualify for asylum").

²⁸8 CFR § 208.13(b)(1)(iii).

²⁹*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); see also *Kratchmarov. Heston*, 172 F. 3d 551, 553 (8th Cir. 1999).

³⁰*Matter of Mogharrabi*, 19 I&N 439, 441 (BIA 1987).

³¹*Id.* at 445.

³²See also *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

³³ *Id.*

³⁴*Matter of Mogharrabi*, 19 I. & N. Dec. at 444.

³⁵ 8 CFR § 208.13(b)(2)(iii).

³⁶ See *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004)(overturning the IJ finding that a 9-year-old applicant expressed only a "general ambiguous fear," noting that young children may be incapable of articulating fear to the same degree as adults.)

³⁷ AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), pg. 40.

³⁸ UNHCR Handbook, para. 215.

39

Id at 216. But see *Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996)(per curiam)(it is possible for a child to express a subjective fear of persecution, without that fear being objectively reasonable).

⁴⁰ *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); see also UNHCR Handbook, para. 43; *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).

⁴¹ AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), pg. 42; see also See 8 CFR sect; 208.13(b)(2); UNHCR Handbook, para. 217.

⁴² *Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994).

⁴³ *Div. B. of the Emergency Supplemental Appropriations Act for Defense*

⁴⁴ The BIA has held that the standard in mixed motive cases has not been radically altered by the Real ID Act of 2005's amendments. *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007). Pre-REAL ID Act case law requiring the applicant to present direct or circumstantial evidence of a motive that is protected under the Act still stands. Id. The protected ground cannot play a minor role in the past mistreatment or future mistreatment: it cannot be incidental, tangential, superficial, or subordinate to another reason for harm; it must be a - although not necessarily the - central reason. Id.

⁴⁵ INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996)

⁴⁶ See *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).

⁴⁷ UNHCR Handbook at ¶ 68.

⁴⁸ *Ibid* at ¶ 72.

⁴⁹ *Matter of S-A-*, 11 I & N. Dec 1328 (BIA 2000). In this decision, the BIA overturned the denial of an asylum claim of a 20-year-old Moroccan woman who had been seriously beaten on several occasions by her father. She was a member of the Muslim faith, as was her father. She testified that over several years she had been subjected to severe physical mistreatment, isolation and deprivation of freedom by her father. She stated that she would be subjected to future persecution at the hands of her father because of the differences in their religious views, especially related to the place and treatment of women in Islam. The BIA found that she had suffered past persecution and had a well-

founded fear of future persecution at the hands of her father on account of religion. Her religious beliefs differed from those of her father concerning the proper role of women in Moroccan society.

⁵⁰UNHCR Handbook at ¶ 74.

⁵¹UNHCR Handbook at ¶ 77.

⁵²*Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985); see also *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

⁵³*Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 75 (BIA 2007).

⁵⁴*Matter of E-A-G*, 24 I. & N. Dec. 591 (2008) and *Matter of S-E-G*, 24 I. & N. Dec. 579 (2008). In *S-E-G*, the BIA held that the social group of young men resisting gang recruitment is insufficiently socially visible. The BIA stated that social visibility requires that "the shared characteristic of the group should generally be recognizable by others in the community." The BIA reasoned that there is little evidence that "Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population."

⁵⁵However, in an amicus curiae brief to the BIA, UNHCR argues that the (interpretive but nonbinding) 2002 UNHCR Guidelines on Membership of a Particular Social Group do not require that the protected characteristic of the group be socially perceivable (i.e., visible). Rather, the Guidelines adopt two alternative approaches: either (1) that the group shares a common protected characteristic; or (2) that society views/perceives the group as sharing a common protected characteristic. A copy of the brief is available at <http://www.unhcr.org/refworld/pdfid/4b03eb182.pdf>. For more on how to argue for a group's social visibility, refer to the May 2007 memo prepared by the Pennsylvania Law School Law Clinic, discussing the BIA's analysis in *Matter of A-M-E and J-G-U* (BIA 2007). The memo is available at:

http://www.uscritefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/

⁵⁶*INS v. Elias Zacarias*, 502 U.S. at 478.

⁵⁷*Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987); UNHCR Handbook, ¶ 80-83.

⁵⁸*Civil v. INS*, 140 F.3d 52 (1st Cir. 1998)(while affirming the underlying denial of asylum, the First

Circuit criticized the immigration judge's presumption that youth "are unlikely targets of political violence in Haiti."); see also *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam)(where the Ninth Circuit overturned a BIA ruling where the BIA held it was implausible that the petitioner had been vice president of a branch of an opposition movement at the age of eighteen.)⁵⁹ *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); see also *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066,1076 (9th Cir. 2004)(evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).

⁶⁰24 I&N Dec. 591 (BIA 2008).

⁶¹24 I&N Dec. 579 (BIA 2008).

⁶²19 I&N Dec. 211 (BIA 1985).

⁶³ *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); see also *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)(a former member of a particular gang is a member of a social group).

⁶⁴See *Matter of R-A*-Int. Dec. 3403 (BIA 1999).

⁶⁵See <http://cgrs.uchastings.edu/campaigns/alvarado.php>.

⁶⁶See http://cgrs.uchastings.edu/documents/legal/proposed_regs_12-00.pdf

⁶⁷See Julia Preston, "U.S. Opens Path to Asylum for Victims of Sexual Abuse," *The New York Times* (July 16, 2009).

⁶⁸See <http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php>.

⁶⁹See *Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir. 1999). For a comprehensive description of female genital mutilation, see *Eliminating Female Genital Mutilation*, an interagency statement, February 2008, available at <http://www.unhcr.org/refworld/docid/47c6aa6e2.html>; see also World Health Organization, *Female Genital Mutilation, Trends*, available at <http://www.who.int/reproductive-health/fgm/trends.htm>. FGM is recognized in U.S.criminal statutes, at 18 U.S.C. § 116. Additionally, Congressional Resolution, H. RES. 32 (10/9/2007) unanimously condemns FGM as a "barbaric practice."

⁷⁰ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Abede v. Gonzales*, 432 F.3d 1037, 1041-43 (9th Cir. 2005).

⁷¹ *Kasinga* at 365; *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004).

⁷² *Kasinga* at 366-367.

⁷³ *Nwaokolo v. INS*, 314 F.3d 303, 307-311 (7th Cir. 2002) (Stay granted on BIA denial of motion to reopen under CAT where USC daughter might suffer female genital mutilation).

⁷⁴ *Kasinga* at 365; *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (holding that for purposes of FGM, a social group can be defined by both gender and tribal membership); *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *Mohammed v. Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005) (In cases involving FGM, membership in a particular social group may be defined by clan or as all Somali females given the widespread practice.)

⁷⁵ See *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008).

⁷⁶ For more guidance on FGM as an asylum claim, see UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009, available at: <http://www.unhcr.org/refworld/docid/4a0c28492.html>.

⁷⁷ *Escobar v. Gonzales*, 417 F.3d 363 (3rd Cir. 2005).

⁷⁸ See *In re Brus Wilson Fuentes Ortega* (BIA Nov. 6, 2001)(considering social group of "abandoned street children in Nicaragua"); *In re Juan Carlos Martinez-Mejia* (BIA Jan. 20, 1999)(considering social group of "minors without resources who have been abused by a custodial parent/guardian").

⁷⁹ For copies of unpublished BIA and immigration judge decisions on street children, visit http://uscri.refugees.org/site/PageNavigator/Resource%20Library/Asylum_Research_street_children. In addition, view the following law review article for background information on street children and a recent review of the available jurisprudence: Wexler, Laura P., *Street Children and U.S. Immigration Law: What Should Be Done?* 41 Cornell Int'l L.J. 545 (2008).

⁸⁰ INA § 208(b)(2)(A)(vi); 8 CFR § 208.13(c)(2)(B).

⁸¹ 8 CFR §& 208.15.

⁸²1See *Matter of Ng*, 12 I&N Dec 411 (BIA 1967) (holding that a minor was firmly resettled in Hong Kong because he was part of a family that resettled in Hong Kong).

⁸³INA § 208(a)(2)(A).

⁸⁴INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A).

⁸⁵See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A).

⁸⁶AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), 45.

⁸⁷INA § 208(a)(2)(C) and (D).

⁸⁸INA § 208(b)(2)(A)(i).

⁸⁹*Negusie v. Holder*, Attorney General, No. 07 - 499, U.S. (March 3, 2009).

⁹⁰*Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

⁹¹INA § 208(b)(2)(A)(iii).

⁹²Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110- 340 (Oct. 3, 2008), which creates a ground of inadmissibility for engaging in the use or recruitment of child soldiers.

⁹³INA § 208(b)(2)(A)(iv).

⁹⁴INA § 208(b)(2)(A)(v).

⁹⁵INA § 208(b)(1).

⁹⁶*Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

⁹⁷8 CFR § 209.2(a) provides a comprehensive list of the inadmissibility grounds that are automatically waived for asylees, which include public charge and the possession of a valid visa, entry document, or travel document. 8 CFR § 209.2(b) provides the grounds for when an asylee is eligible to apply for an inadmissibility waiver, which include humanitarian purposes, to assure family unity, or because it is otherwise in the public interest to waive the inadmissibility ground.

⁹⁸8 CFR § 209.2(a).

⁹⁹INA § 241(b)(3).

¹⁰⁰8 CFR § 208.16(b).

¹⁰¹*INS v. Stevic*, 467 U.S. 407, 430 (1984).

¹⁰²*INS v. Cardoza-Fonseca*, 480 U.S. at 421.

¹⁰³8 CFR § 208.16(d).

¹⁰⁴INA § 208(b)(2)(A)(i).

¹⁰⁵*Negusie v. Holder*, Attorney General, No. 07 - 499, U.S. (March 3, 2009).

¹⁰⁶INA § 208(b)(2)(A)(ii).

¹⁰⁷INA § 208(b)(2)(B)(i). The definition of "aggravated felony" may be found at INA § 101(a)(43).

¹⁰⁸*Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

¹⁰⁹INA § 208(b)(2)(A)(iii).

¹¹⁰Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110- 340 (Oct. 3, 2008), which creates a ground of inadmissibility for engaging in the use or recruitment of child soldiers.

¹¹¹INA § 208(b)(2)(A)(iv).

¹¹²*Matter of I-S- & C-S-*, 24 I&N 432 (BIA 2008).

¹¹³ 8 CFR sect; 208.16(f).

¹¹⁴United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984).

¹¹⁵8 CFR § 208.16(c)(4).

¹¹⁶8 CFR § 208.16(c)(2); see also *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002)

¹¹⁷8 CFR § 208.16(c)(3).

¹¹⁸CFR § 208.18(c).

¹¹⁹8 CFR § 208.18(a)(1).

¹²⁰*Matter of J-E-*, 23, I&N Dec. 291 (BIA 2002).

¹²¹8 CFR § 208.18(a)(2).

¹²²8 CFR § 208.18(a)(5).

¹²³8 CFR § 208.18(a).

¹²⁴8 CFR § 208.18(a)(6).

¹²⁵8 CFR § 208.18(a)(7).

¹²⁶8 CFR § 208.18(a)(3).

¹²⁷8 CFR § 208.17(a) and (b).

¹²⁸8 CFR § 208.17(b)(2).

¹²⁹8 CFR § 208.17(b)(1).

¹³⁰8 CFR § 208.17(b)(1).

¹³¹8 CFR § 208.17(d)(1).

¹³²8 CFR § 208.17(d)(3).

¹³³8 CFR § 208.17(e).

¹³⁴8 CFR § 208.17(f).

¹³⁵Section 235(d)(7) of the TVPRA amends section 208(b)(3) of the INA to state that: "[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . regardless of whether filed in accordance with this section or section 235(b)."

¹³⁶Langlois, Joseph E. USCIS Asylum Division. Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over

¹³⁷Asylum Applications Filed by Unaccompanied Alien Children, Memorandum to Asylum Office Directors, et al. HQRAIO 120/12a. (March 25, 2009).
Id at pg. 3.

¹³⁸INA § 208(a)(1); 8 C.F.R. § 103.2(a)(2).

¹³⁹Section excerpted from the AOBTC Guidelines for Children's Asylum Claims, March 21, 2009, pg. 18.

¹⁴⁰See Bo Cooper, INS General Counsel Elian Gonzalez, Memorandum. (Jan. 3, 2000); see also *See Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000)(where a six-year-old Cuban boy applied for asylum against the wishes of his father in Cuba and INS determined that he did not have the capacity to seek asylum on his own behalf, where it was found that Elian was not at risk of persecution or torture, that Elian's father had Elian's best interests in mind, and that the father did not have conflicts of interest that would prevent him from pursuing the child's best interests. The Eleventh Circuit upheld the INS policy, noting that line drawing on the basis of age is an adequate approach to determining who may individually file for asylum.)

¹⁴¹8 CFR § 208.6.

¹⁴²"Report on Asylum Seekers in Expedited Removal", U.S. Commission on International Religious Freedom, Vol. 1, Findings and Recommendations, (Feb. 2005) at 57. Available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_1.pdf

¹⁴³INA § 208(b)(1)(B)(ii).

¹⁴⁴See Germain, AILA's Asylum Primer (5th Ed.), pp. 385-389 (American Immigration Lawyer's Association 2007).

¹⁴⁵ICP Rule 3.3(e)(iv).

¹⁴⁶ICP Manual § 3.3(a).

¹⁴⁷Joseph E. Langlois, Chief, USCIS Asylum Division, Memorandum, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, March 25, 2009. Available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying/provision-tvpra-alien-children2.pdf>.

¹⁴⁸INS Office of International Affairs Memo: Guidelines for Children's Asylum Claims - December 10, 1998, found at: <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelin>

¹⁴⁹See UNHCR Handbook, para. 219.

¹⁵⁰See S-M-J-, 21 I&N Dec. 722, at 739 (BIA 1997).

¹⁵¹Langlois, Joseph E. USCIS Asylum Division. Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, Memorandum to Asylum Office Directors, et al. HQRAIO 120/12a. (March 25, 2009), page 6.

¹⁵²See Langlois, Joseph E., USCIS Asylum Division. Issuance of Revised Quality Assurance Referral Sheet and Instructions on Submission of Certain Claims for Quality Assurance Review, Memorandum. Feb. 9, 2007).

¹⁵³*Id.*

¹⁵⁴See EOIR Practice Manual Appendix F (Sample Cover Page).

¹⁵⁵ For further information on applying for a social security card visit: <http://www.ssa.gov/online/ss-5.html>. Applications can also be obtained by calling: 1-800-772-1213, or visiting a local Social Security Administration office.

¹⁵⁶For online registration and further information, go to: <http://www.sss.gov/>.

¹⁵⁷To learn more about the services available to asylees, go to ORR's website at <http://www.acf.hhs.gov/programs/orr/about/divisions.htm>.

¹⁵⁸Visit the IRC at: <http://www.theirc.org/where/northamerica.html>

¹⁵⁹For example, see "Overview of Immigration Eligibility for Federal Programs" October 2008, revised October 2011, found at: <http://www.nilc.org/overview-immeligfedprograms.html>

¹⁶⁰See 8 CFR 1208.24(a)-(f).

Chapter 6: U Visa Relief {83}

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

U visas are for victims of crimes who have suffered substantial mental and physical abuse.

What are the eligibility requirements for a U visa?

Practice Pointer:

It is helpful to illustrate, wherever possible, how a grant of a U visa in a particular case will aid in fulfilling law enforcement objectives.

At every stage of the U visa application process, it is always the noncitizen seeking a U visa who bears the burden to prove to USCIS that she meets the following requirements, which are set out in INA § 101(a)(15)(U)/8 U.S.C. § 1101(a)(15)(U).¹

It should be noted that the statute sets out the requirements only in a skeletal fashion; in order to fully understand these requirements, it is critical that the practitioner become very familiar with the U visa regulations, codified at 8 C.F.R. § 214.14 and referenced throughout this segment.²

- The child has suffered substantial physical or mental abuse as a result of having been a victim of one of the kinds of "criminal activity" enumerated under INA § 101 (a)(15)(U)(iii)/ 8 U.S.C. § 1101(a)(15)(U)(iii).
- The noncitizen child possesses information concerning the criminal activity.
- The noncitizen has been helpful, is being helpful, or is likely to be helpful to any federal, state, or local law enforcement official, judge, prosecutor, or other such authority which is investigating or prosecuting the criminal activity.

Child Practice Pointer:

If the person applying for a U visa is a minor under the age of 16, then a "parent, guardian, or next friend" can possess the information and provide the required assistance in place of the minor.³ A "next friend" is one who:⁴

- Appears in a lawsuit to act for the benefit of a noncitizen under 16 years of age.
- Has himself/herself suffered substantial physical or mental abuse as a result of being a victim of "qualifying criminal activity."
- Is neither a party to the legal proceeding nor appointed as a guardian.

AND the criminal activity either:

- Violated the laws of the United States.
- OR occurred in the United States, on an Indian reservation, on a military installation, or in any territory or possession of the United States.

What does it mean to suffer "substantial physical or mental abuse"?

"Physical or mental abuse" is injury or harm to the victim's person, or harm to or impairment of the emotional or psychological soundness of the victim.⁵

Substantiality of the abuse: In evaluating whether the abuse was substantial, USCIS considers a number of factors, including (but not limited to):⁶

- Nature of the injury inflicted or suffered.
- Severity of the perpetrator's conduct.
- Severity of the harm inflicted.
- Duration of the infliction of the harm.

- Extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.

No single factor is a prerequisite to establish that the abuse suffered was substantial.

Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level.⁷

Who is a "victim" of "qualifying criminal activity"?

Under the regulations, a qualifying "victim" is one who "has suffered direct and proximate harm as a result of the commission of qualifying criminal activity."⁸ Mere allegations that the child was subject to, for example, "false imprisonment" are not enough; rather, the child should supply evidence and specific facts from which the decision-maker at USCIS may reasonably conclude that she "has suffered direct and proximate harm as a result of the commission of qualifying criminal activity."⁹

Does the principal U visa petitioner always need to be the direct victim of the underlying criminal activity?

Not always. The regulations provide that the following family members of the direct victims of criminal activity are still considered primary "victims" for U visa purposes, thus enabling them to apply directly for U visa relief, even though the underlying criminal activity was not perpetrated directly upon them. These persons are often referred to as "indirect victims."¹⁰

- A noncitizen spouse of the direct victim
- A child of the direct victim who is under the age of 21
 - The child must also be unmarried¹¹
- If the direct victim is under 21 years of age
 - A parent of the direct victim
 - A sibling of the direct victim who is
 - Unmarried and
 - Under 18 years of age.

Can any family member of the direct victim be a "victim" for U visa purposes?

Family members of the direct victim may only be "indirect victims" when the direct victim is:¹²

Either:

- Dead due to murder or manslaughter (i.e., homicide).
- Or incompetent or incapacitated for any reason.

And is by reason of such death or incapacity unable to:

- Provide information concerning the criminal activity.
- Or be helpful in the investigation or prosecution of the criminal activity.

Can a bystander ever be the indirect victim of "criminal activity", even if unrelated to the direct victim?

Yes. USCIS may treat as indirect victims, on a case-by-case basis, bystanders who suffer unusually direct injuries, such as a pregnant bystander who suffers a miscarriage for fright over witnessing a violent crime.¹³

When is a U visa petitioner a victim of witness tampering, obstruction of justice, or perjury?

Sometimes, criminals victimize noncitizens in order to interfere with the investigation or prosecution of crimes that may fall outside the statutory list of "criminal activities" which can underlie a U visa application. So that the U visa provisions can cover these situations, the regulations provide that a U visa petitioner is a victim of witness tampering, obstruction of justice, perjury (or attempt, solicitation, or conspiracy to commit these criminal activities) if:¹⁴

- The petitioner has been directly and proximately harmed by the perpetrator of the criminal activity (i.e., by the would-be witness-tamperer), and
- There are reasonable grounds to conclude that the perpetrator committed the criminal activity (i.e., harmed the petitioner), at least in principal part, as a means to:
 - Avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity (i.e. criminal activity other than the witness tampering, obstruction of justice, or perjury of which the petitioner was a direct victim).
 - Or further the perpetrator's abuse or exploitation of, or undue control over, the petitioner through manipulation of the legal system.

What kinds of activities constitute "criminal activity" for U visa purposes?

Under the U visa statute: "criminal activity" includes only one or more of the following enumerated criminal acts, or any similar activity, which must violate federal, state, or local criminal law:¹⁵

- Rape
- Torture¹⁶
- Trafficking¹⁷
- Incest
- Domestic violence
- Sexual assault
- Abusive sexual contact
- Prostitution
- Sexual exploitation
- Female genital mutilation
- Held a hostage
- Peonage¹⁸
- Involuntary servitude¹⁹
- Involvement in slave trade²⁰
- Kidnapping
- Abduction
- Unlawful criminal restraint

- False imprisonment
- Blackmail
- Extortion
- Manslaughter
- Murder
- Felonious assault
- Witness tampering
- Obstruction of justice
- Perjury
- Attempt, conspiracy, or solicitation to commit any of the above.

For U visa purposes, no one actually needs to be officially charged with committing any of these crimes.²¹ The criminal activity also does not need to be the subject of any active investigation or prosecution at the time the U visa petition is filed.²² A plain reading of the statute and regulations seems to require that the petitioner be the victim of some unlawful activity, which amounts in substance to one of the criminal activities listed in INA § 101 (a)(15)(U)(iii).²³

Must the U visa applicant obtain any certification from law enforcement or similar personnel?

INA § 214(p)/8 U.S.C. § 1184(p) requires that the U visa petition contain a certification from a federal, state, or local²⁴ law enforcement official who is investigating or prosecuting the criminal activity; the certification must state that the noncitizen has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity.²⁵

A certifying official can also include a federal, state, or local judge.²⁶

The certifying official must complete USCIS Form I-918, Supplement B. The regulations set out further requirements of both the certifying official and of the corresponding law enforcement agency.

Agencies whose law enforcement officials may provide the required certification include those agencies which have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, Child Protective Services, the Equal Employment Opportunity Commission, and the Department of Labor.²⁷ (These may also include any local district attorney's office or police office, or the state police, for example).²⁸

The official providing the certification must be:

- Head of the certifying agency, or
- An official in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or
- A federal, state, or local judge.²⁹

Moreover, the decision of whether to certify helpfulness is solely at the discretion of law enforcement, which may deny certification for any reason or no reason at all. No court can compel law enforcement to certify helpfulness.³⁰

Practice Pointer:

The law enforcement certification is an absolute prerequisite for U visa eligibility, one on which USCIS will not budge. Obtaining the certification is often the single most difficult part of the U visa application process, such that many practitioners do not even start the application process until they have already secured the certification.

Often, the single biggest obstacle to gaining law enforcement certification is unfamiliarity on the part of law enforcement with both the existence and nature of the U visa. This highlights the need for you to work closely with law enforcement and to educate them about this important tool in their own crime-fighting arsenal. For instance, the practitioner might proactively work with a law enforcement agency's leadership in order to help them implement an institutional U visa certification protocol, if none exists.

It is important to remind law enforcement officials that they are only certifying helpfulness, and the noncitizen has many other requirements to meet before obtaining a U visa.

Also, in the interest of maintaining a favorable disposition on the part of law enforcement towards granting certifications, it is often better to go to the law enforcement agency or the district attorney first, and to use a judge as a last resort.

If you must resort to going to a judge, make sure that the judge from whom the certification is sought actually has "law enforcement" authority, as some courts, such as certain family courts, may lack such jurisdiction.

When does a crime "occur in" or "violate the laws of" the United States?

A crime occurs "in the United States" if it occurs in any of the 50 states, or in "Indian country", military installations, or territories and possessions of the United States.³¹

If the underlying "criminal activity" did not occur in the United States, then the regulations require that the criminal activity violate a federal law that provides for extraterritorial jurisdiction to prosecute the offense in a federal court.³²

Admissibility: Must my client be admissible to the United States in order to receive a U visa?

Yes. All U visa applicants must either be admissible to the United States or receive a waiver of inadmissibility, which the Secretary of Homeland Security may grant in most cases if the Secretary considers it to be in the public or national interest; it is important to understand that each and every ground of inadmissibility is potentially in play in the U visa context.³³ While thorough treatment of the grounds of inadmissibility is beyond the scope of these materials, for more information, see generally INA § 212/8 U.S.C. § 1182 and 8 C.F.R. § 212.17.³⁴

Who else besides the victim of "criminal activity" is eligible for a U visa?

Derivative applications

Certain family members of the U visa applicant are eligible for "derivative" relief, meaning that they get U-nonimmigrant status because of their relationship to the principal applicant. Be careful not to confuse "derivative" applicants with the "indirect victims" who may apply for U visas on their own. Eligible family members include:³⁵

If the applicant is under the age of 21:

- Spouse

- Children
- Siblings who are
 - Unmarried, and
 - Under 18 years of age on the date that the victim noncitizen applies for U nonimmigrant status
 - For purposes of this determination, USCIS will continue to consider the principal victim to be under 21, and the sibling to be under 18, even if either or both grow older than these ages before or during the adjudication of the petitions, so long as they were under the age limits when the principal U visa application was filed³⁶
- Parents.³⁷

The regulations classify applicants for U visas in the following ways, depending on the applicant's relationship with, or status as, the principal victim of the underlying criminal activity:³⁸

- U-1 is the principal petitioner, the direct or indirect victim of the criminal activity³⁹
- U-2 is the spouse of a U-1 petitioner
- U-3 is the child of a U-1 petitioner
- U-4 is the parent of a U-1 petitioner
- U-5 is the unmarried, minor sibling of a U-1 petitioner under age 21.

The regulations expound upon when the necessary relationship must exist between the "derivative" petitioner and the principal victim.

The family relationship must exist when the principal and family member petitions are filed, and must continue to exist until the family member's ultimate admission to the United States.⁴⁰

If the principal petitioner proves that she became a parent of a child sometime after the filing of the petition, the child is eligible for derivative relief.⁴¹

Who is not eligible for a U visa?

The perpetrator of the underlying criminal activity is ineligible.

A noncitizen is not eligible for a U visa if she is culpable for the qualifying criminal activity being investigated.⁴²

Persons subject to un-waived grounds of inadmissibility to the United States are ineligible.

All U visa applicants must either be admissible to the United States or receive a waiver of inadmissibility, which the Secretary of Homeland Security may grant in most cases if the Secretary considers it to be in the public or national interest.⁴³

Is there a limit to the number of U visas that can be granted in a given year?

Yes. The number of noncitizen victims who may receive U visas in any fiscal year is limited to 10,000. However, that limitation does not apply to family members who attain derivative U visas, but only to principal victims, including indirect victims.⁴⁴

If the number of approvable U visa applications in a given year exceeds 10,000, then the regulations prescribe a waiting list from which the excess applicants are officially granted U visas in subsequent years, with priority going to those who filed their applications the earliest. Applicants on the waiting list in any year are approved before any new applications are approved. The applicant on the waiting list must remain admissible to the United States throughout this process.⁴⁵

How does my client apply for a U visa?

A U visa applicant should send a completed application packet to the USCIS Vermont Service Center, 75 Lower Welden St., St. Albans, VT 05479.

Filing Pointers:

- Always include any necessary fees or a corresponding request for a fee waiver, lest the application be rejected before it even gets to the adjudicators.

- The applicant's original signature (no photocopies) is needed on the application, or that of a parent if the child is under age 14.
- To make it easier for USCIS to verify that the signature is original, have the applicant/parent sign in blue ink.
- If, after sending the application, you feel additional evidence or documentation is needed, wait until USCIS sends a Request for Evidence before sending any additional materials. This makes it easier for USCIS to keep the client's file organized.
- Never tab your files on the sides - that just makes more work for USCIS.
- Include the child's name and date of birth on the back of any photographs submitted.
- Use a two-hole punch on the top of every piece of paper submitted. This makes it easier for USCIS to assemble the applicant's file.

If I have questions about my application, can I contact the Vermont Service Center?

Yes. There are two ways you can communicate with the Vermont Service Center if you have questions regarding filing or other case-related matters. You can call the Center's VAWA Hotline at 1-802-527-4888. They ask that you leave a detailed message, and someone will call you back.

Questions with detailed specifics can also be sent via email to Hotlinefollowup19181914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours. It is requested that you use only one of the methods.

What must the application packet contain?

Although links to the most important forms are provided, bear in mind that USCIS often updates its forms and instructions. It is important to use the most current version when submitting any application for immigration relief, often by clicking a button provided on the form for the purpose (online version only).

The regulations require that the application packet contain the following:

- [Completed Form I-918 Petition for U Nonimmigrant Status](#).
 - NOTE: There is currently no application fee for Form I-918.⁴⁶
 - It is of critical importance that the practitioner pay exacting attention to the official instructions for Form I-918, as they contain a wealth of vital information, including examples of relevant initial evidence and guidance on personal narrative statements.
- Form I-918 Supplement B, U Nonimmigrant Status Certification (law enforcement certification) (Included online with the full Form I-918).
- Initial evidence, including:⁴⁷
 - Relevant documents in support of the child's claims that she was a victim of "criminal activity" under INA § 101(a)(15)(U)(iii)/8 U.S.C. § 1101(a)(15)(U)(iii).
 - A personal narrative statement from the child describing the criminal activity.
 - The statement should be signed by the child.⁴⁸
 - The statement may also contain information supporting any of the eligibility requirements for U nonimmigrant status.⁴⁹
 - If the child is under 16 years of age, incapacitated, or incompetent, a parent, guardian, or next friend may submit a statement on the child's behalf.⁵⁰

While biometrics (fingerprints, etc.) are required,⁵¹ USCIS charges no biometric fee for U visa applications.⁵²

- Form I-918 Supplement A (if applying for derivative status on behalf of a qualifying family member)(included online with full Form I-918).
- [Form I-192 Application for Advance Permission to Enter as Non-Immigrant](#), as necessary.⁵³
- [Form I-601 Application for Waiver of Grounds of Inadmissibility](#), as necessary.⁵⁴
- [Form I-193 Application for Waiver of Passport and/or Visa](#), as necessary.⁵⁵
- [Form G-28, Notice of Appearance](#), to let USCIS know that you are the attorney for your client.

- Your client must sign the form.
- If your client is under 14, generally the parent or guardian (or other legal representative) must sign the form.⁵⁶
- [Form I-912, Request for Fee Waiver](#), as necessary. This is the "global" fee waiver form, which can be used to request a waiver for all USCIS filing fees. Be sure to keep abreast of any updates or changes to this form.

Any other evidence that the petitioner would like for USCIS to consider, in order to establish eligibility for U-1 nonimmigrant status.⁵⁷

Practice Pointer:

You should physically accompany your client through the biometrics process to ensure that your client has all the necessary identification and other documents.

How does my client apply for a U visa on behalf of family members?

Generally, only either successful or pending principal U visa applicants may apply for "derivative" U visa status on behalf of family members, either contemporaneously with the initial U visa application or sometime later.⁵⁸ Application packets for family members must contain generally the same materials as the application for the principal victim, plus a separate Form I-918 Supplement A for each family member for whom derivative U visa status is sought.⁵⁹

The initial evidence submitted with the application for a relative must include:⁶⁰

- Evidence which demonstrates that the (derivative) applicant bears the relationship of a "qualifying family member" to the principal applicant.
- If the qualifying family member is inadmissible, Form I-192 "Application for Advance Permission to Enter as a Non-Immigrant" in accordance with the rules outlined in 8 C.F.R. § 212.17.

What if my client is already in removal proceedings?

If your client is already in removal proceedings,⁶¹ the client must still file the application directly with

USCIS. The government lawyer seeking your client's removal, exclusion, or deportation before the immigration judge (IJ) or the Board of Immigration Appeals (BIA) may, but need not, join you in a motion to terminate the removal proceedings without prejudice, in order to give USCIS time to decide whether to grant your client a U visa.⁶² Alternatively, you may move the IJ/BIA to grant your client a continuance, which effectively pauses the proceedings long enough for USCIS to decide the application.⁶³

If a family member seeking a derivative U visa is in removal proceedings, the procedure is generally the same, except that the principal petitioner, not the family member, must still file the Form I-918 Supplement A directly with USCIS.⁶⁴

If the U visa application is ultimately denied, the government can put your client (or family members, as the case may be) back into removal proceedings.⁶⁵

What happens if my client has already been ordered removed or deported from the United States?

If your client has already been ordered removed from the United States, he or she still may file a U visa application directly with USCIS, and may also file with DHS a request for a (non-automatic) stay of removal under the rules spelled out in 8 C.F.R. § 241.6(a) and 1241.6(a). If the request is granted, then DHS will hold off on removing your client from the United States while USCIS adjudicates the U visa application.⁶⁶

Granting the stay is not mandatory; DHS has discretion to grant the stay if the applicant establishes prima facie eligibility for U visa status to the USCIS, and DHS will "consider favorably any humanitarian factors" related to either the noncitizen or to any close relatives who rely on the noncitizen for support.⁶⁷ If the U visa application is ultimately denied, then the stay will be lifted once the denial becomes administratively final, i.e., when all administrative appeals are exhausted.⁶⁸

If the application is ultimately approved, the outcome depends on which government agency initially ordered your client to be removed.⁶⁹

If DHS issued the order of removal, the removal order is deemed cancelled by operation of law upon approval of the U visa petition.

If the removal order was issued by an IJ or the BIA, then the petitioner may file, with the IJ/BIA, a motion to reopen and terminate removal proceedings. ICE counsel may, but need not, join this motion

to overcome certain time and numerical limitations under 8 C.F.R. § 1003.2 and 1003.23.

Again, these procedures are generally the same for family members seeking derivative U visas, except that here, unlike in other cases, the regulations seem to allow a derivative applicant who has been ordered removed to file an application directly with USCIS.⁷⁰

How will I know whether USCIS has granted my client's U visa application?

USCIS will issue a written decision either approving or denying both the principal application and any derivative applications by sending notice of the decision to the child and/or her attorney.⁷¹

Can a U visa denial be appealed? If so, how?

U visa denials can be appealed only to the Administrative Appeals Office (AAO) of USCIS; the procedures for the appeal are set forth in 8 C.F.R. § 103.3.⁷²

How long does U visa status last, if approved?

Generally, the maximum duration of U visa status is four years from the date of approval. A qualifying family member may not be approved for derivative U status for any period that extends beyond the expiration date of the principal's status.⁷³ U visa status may be extended past four years under certain very specific circumstances.⁷⁴

Can U visa status be revoked once approved? If so, under what circumstances?

Yes. USCIS may revoke an approved U visa petition for any of the following reasons:⁷⁵

- The official certifying "helpfulness" pursuant to INA § 214(p)(1)/8 U.S.C. § 1184(p)(1) either withdraws the certification or disavows the contents in writing.
- Approval of the petition was in error.

- There was fraud in the petition.

If a qualifying family member has obtained derivative U status, that family member's status may also be revoked for any of the above reasons, and also if either of the following apply:⁷⁶

- The relationship to the principal U visa recipient has terminated (e.g. by divorce).
- The principal U visa recipient's U visa status is revoked (e.g. because the law enforcement officer withdrew the initial certification of helpfulness).

How can I check the status of my client's case while it is pending?

You can check the status of your client's case once your client receives a "Notice of Action" from USCIS, which will contain a 13-digit "receipt number". Once you have the receipt number, you may go to the USCIS website, enter the receipt number in the designated field, and then you will be able to see the status of your client's case.⁷⁷ You can also call the USCIS Vermont Service Center's VAWA Hotline at 1-802-527-4888. Questions can also be sent via email to HotlinefollowupI918I914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours.

How long should the U visa application/adjudication process take? Is expedited adjudication available under any circumstances?

As of this writing, the application/adjudication time frame for a U visa application is not posted on the USCIS website. Expedited processing for U visa applications is available based on humanitarian conditions involving exceptional circumstances; to request expedited adjudication, call USCIS Vermont Service Center's VAWA Hotline (1-802-527-4888).⁷⁸ Otherwise, average processing time has tended to be around six months or so, according to USCIS.⁷⁹ Experts in the field have found that, depending on the complexities of a particular case, including Requests for Evidence, the adjudication process can take anywhere from six months to one year.

What are the benefits of being granted a U visa?

Several very important benefits accrue to those who are granted U visas, including:

- Lawful presence in the United States.⁸⁰
- Eventual eligibility to apply for Lawful Permanent Residence (LPR) status under the conditions in INA § 245(m)/8 U.S.C. § 1255(m) and 8 C.F.R. § 245.1, 245.24, 245.1.
- Employment authorization.⁸¹
- Ability to apply for derivative relief on behalf of certain family members, including the parents of U visa recipients who are children.⁸²

Citations

¹INA § 101 (a)(15)(U)(i)(I-IV); 8 U.S.C. § 1101 (a)(15)(U)(i)(I-IV).

²On September 17, 2007, USCIS issued long-awaited interim regulations implementing the U visa legislation. In the 7-year absence of such regulations, immigration officials developed a deferred-action system to benefit noncitizens who established prima facie qualification for U visa status; this system was termed "U interim relief". With the issuance of the new interim regulations, USCIS no longer considers applications for interim relief, but has indicated that there is no deadline for those granted interim relief to apply for "official" U-nonimmigrant status.

³INA § 1101 (a)(15)(U)(i)(II-III); 8 U.S.C. § 1101 (a)(15)(U)(i)(II-III).

⁴8 C.F.R. § 214.14 (a)(7).

⁵8 C.F.R. § 214.14 (a)(8).

⁶8 C.F.R. § 214.14 (b)(1).

⁷8 C.F.R. § 214.14 (b)(1).

⁸8 C.F.R. § 214.14 (a)(14).

⁹See *In re Petitioner (name redacted)*, No. EAC 09 080 50515, 2010 WL 4088659 (Administrative Appeals Unit, March 3, 2010).

¹⁰For example, a living child might be an "indirect victim" of manslaughter if his parents were killed by vehicular homicide; the child would thus be able to apply directly for a U visa, as a principal petitioner, instead of a derivative one, even though the child was not the direct victim of the manslaughter.

¹¹New Classification for Victims of Criminal Activity; Eligibility for U Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,017 at n.5 (Sept. 17, 2007).

¹²8 C.F.R. § 214.14 (a)(14)(i).

13

New Classification for Victims of Criminal Activity; Eligibility for U Nonimmigrant Status, 72 Fed. Reg. at 53,016-53,017.

¹⁴See 8 C.F.R. § 214.14 (a)(14)(ii)(A-B). An example of such a situation is if the perpetrator committed a bank robbery where the U visa applicant somehow saw the perpetrator's face, and where the perpetrator later threatened to kill or harm the applicant if the applicant ever told anyone the perpetrator's identity. The "criminal activity" creating U visa eligibility here would be the later threats, which would amount to witness tampering, etc. under the statute.

¹⁵INA § 1101 (a)(15)(U)(iii); 8 U.S.C. § 1101 (a)(15)(U)(iii).

¹⁶Defined for federal criminal purposes at 18 U.S.C. § 2340 (1-2). See also United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, § 1, Jun. 26, 1987, 1465 UNTS 85.

¹⁷Defined and criminalized at 18 U.S.C. § 1582, 1590.

¹⁸Federally criminalized at 18 U.S.C. § 1581. "Peonage" essentially means a condition where a debtor is compelled to work for a creditor in order to pay off his debt to the creditor. *Bailey v. Alabama*, 219 U.S. 219 (1911).

¹⁹Defined at 22 U.S.C. § 7102 (5).

²⁰See generally 18 U.S.C. § 1581-1596.

²¹*Sanchez v. Mukasey*, 508 F.3d 1254 (9th Cir. 2007).

²²See Charles Gordon, et. al., *Immigration Law and Procedure* § 28.02 (2)(a)(ii), Matthew Bender & Co. (rev. ed. 2010) (hereinafter *Immigration Law and Procedure*)(citing *Garcia v. Audubon Cmty. Mgmt.*, LLC, No. 08-1291 (C), 2008 U.S. Dist. LEXIS 31221, at *9 (E.D. La. April 15, 2008)).

²³See *New Classification for Victims of Criminal Activity; Eligibility for U Nonimmigrant Status*, 72 Fed. Reg. at 53,018. A crime can be the subject of an investigation before any charges are filed, and investigation alone will suffice for U visa purposes. See INA § 101 (a)(15)(U).

²⁴This is an important contrast to the T visa requirements; in the T visa context, any law enforcement endorsement must come only from a federal agency. See 8 C.F.R. § 214.11 (a).

²⁵INA § 214 (p)(1); 8 U.S.C. § 1184 (p)(1).

²⁶8 C.F.R. § 214.14 (a)(3)(ii).

²⁷8 C.F.R. § 214.14 (a)(2).

²⁸See INA § 214 (p)(1); 8 U.S.C. § 1184 (p)(1).

²⁹8 C.F.R. § 214.14 (a)(3)(i-ii).

³⁰See, e.g., *Ordonez Orosco v. Napolitano*, 598 F.3d 222 (5th Cir. 2010).

³¹INA § 101 (a)(15)(U)(i)(IV); 8 U.S.C. § 1101 (a)(15)(U)(i)(IV). The term "United States", when used in a geographical sense, generally includes Guam and the Commonwealth of the Northern Mariana Islands, as well as Puerto Rico and the Virgin Islands. INA § 101 (a)(38); 8 U.S.C. § 1101 (a)(38).

³²8 C.F.R. § 214.14 (b)(4).

³³INA § 212 (a)(3)(E), (d)(14); 8 U.S.C. § 1182 (a)(3)(E), (d)(14).

³⁴There is no appeal of a decision to deny a waiver of inadmissibility for a U visa petitioner, but an applicant may re-file a request for waiver in "appropriate cases". 8 C.F.R. § 212.17 (b)(3). Moreover, in cases involving "violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the (INA), USCIS will only exercise favorable discretion (i.e., will only waive the ground of inadmissibility) in extraordinary circumstances." 8 C.F.R. § 212.17 (b)(2).

³⁵INA § (a)(15)(U)(ii); 8 U.S.C. § 1101 (a)(15)(U)(ii).

³⁶8 C.F.R. § 214.14 (f)(4)(ii).

³⁷INA § (a)(15)(U)(ii); 8 U.S.C. § 1101 (a)(15)(U)(ii).

³⁸8 C.F.R. § 214.14 (f)(1).

³⁹Immigration Law and Procedure § 28.02 (2)(a)(i).

⁴⁰8 C.F.R. § 214.14 (f)(4).

⁴¹8 C.F.R. § 214.14 (f)(4)(i).

⁴²See 8 C.F.R. § 214.14 (a)(14)(iii). Note: This exclusion does not apply to a noncitizen who has committed a crime other than the one underlying the U visa application. See 72 Fed. Reg. 53,018. However, bear in mind that certain crimes can render a noncitizen inadmissible to the United States. See generally INA § 212/8 U.S.C. § 1182.

⁴³INA § 212 (a)(3)(E), (d)(14); 8 U.S.C. § 1182 (a)(3)(E), (d)(14). Thorough treatment of the grounds of inadmissibility is beyond the scope of these materials; for more information, see generally INA § 212 (a), (d). See also, [Form I-192 Instructions](#); and [Form I-918 Instructions](#).

⁴⁴See INA § 214 (p)(2)(A-B); 8 U.S.C. § 1184 (p)(2)(A-B).

⁴⁵8 C.F.R. § 214.14 (d).

⁴⁶Check Filing Fees, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=b1ae408> (last visited Apr. 16, 2011) (hereinafter USCIS Fee Webpage).

⁴⁷8 C.F.R. § 214.14 (c)(1).

⁴⁸8 C.F.R. § 214.14 (c)(2)(iii).

⁴⁹8 C.F.R. § 214.14 (c)(2)(iii).

⁵⁰8 C.F.R. § 214.14 (c)(2)(iii).

⁵¹8 C.F.R. § 214.14 (c)(1). The regulations require that "(a)ll petitioners for U-1 nonimmigrant status must submit to biometric capture and pay a biometric capture fee. USCIS will notify the petitioner of the proper time and location to appear for biometric capture after the petitioner files Form I-918." 8 C.F.R. § 214.14 (c)(3).

⁵²USCIS Fee Webpage.

⁵³8 C.F.R. § 214.14 (c)(2)(iv). Form I-192 is not useful in most immigration cases where the applicant is physically present in the United States. However, in the context of applications for U and T visas

approval by USCIS of Form I-192 allows applicants who are physically present in the United States but subject to un-waived grounds of inadmissibility to remain in the United States. See I-192, Application for Advance Permission to Enter as Nonimmigrant, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=68db2c1a> (last visited Apr. 16, 2011).

⁵⁴Cf. 8 C.F.R. § 214.11 (j). The function of the I-601 in the U visa context, in practice, is to allow U visa applicants who are outside the United States to obtain waivers of the various grounds of inadmissibility and thus enter the United States.

⁵⁵Immigration Law and Procedure § 28.02 (3)(b). This will be necessary if the applicant is inadmissible for lack of a valid passport or visa.

⁵⁶See Signature Requirements for USCIS Forms, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9453d59a> (last visited Apr. 16, 2011).

⁵⁷8 C.F.R. § 214.14 (c)(2)(ii). Petitioner bears the burden to demonstrate eligibility for U-1 nonimmigrant status, and may submit all credible evidence relating to the petition for USCIS' consideration. USCIS conducts a de novo review of submitted evidence and may investigate any aspect of the petition as it chooses. USCIS determines the evidentiary value of all evidence, including the law enforcement certification, at its own sole discretion. 8 C.F.R. § 214.14 (c)(4). In the event that the decision-maker at the Vermont Service Center concludes that additional evidence would be helpful in adjudicating the application, he or she may send a Request for Evidence, or RFE, to the petitioner. See *In re: Petitioner (name redacted)*, No. EAC 08 098 51148, 2010 WL 4088040 (Admin. App. Office, April 15, 2010).

⁵⁸8 C.F.R. § 214.14 (f)(2).

⁵⁹8 C.F.R. § 214.14 (f)(2).

⁶⁰8 C.F.R. § 214.14 (f)(3).

⁶¹Proceedings for deportation, exclusion, ie., or removal.

⁶²8 C.F.R. § 214.14 (c)(1)(i).

⁶³*Sanchez v. Mukasey*

, 508 F.3d 1254 (9th Cir. 2007).

⁶⁴See 8 C.F.R. § 214.14 (f).

⁶⁵8 C.F.R. § 214.14 (c)(5)(ii).

⁶⁶8 C.F.R. § 214.14 (c)(1)(ii).

⁶⁷See USCIS, Adjudicator's Field Manual, Appendix 39-1, Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants, Memorandum from David J. Venturella, Acting Director, ICE (Sept. 24, 2009) (hereinafter Venturella Memo). According to this Memorandum, upon receiving the stay request, ICE will contact its local OCC to request a prima facie determination from the USCIS Vermont Service Center; if USCIS determines that prima facie eligibility exists, USCIS will notify ICE, which will grant the stay of removal unless "serious adverse factors" are present. The stay may remain effective for up to 180 days, but if at the end of that time USCIS has not finished adjudicating the U visa application, and no new adverse factors have emerged, ICE will extend the stay as needed for USCIS to finish adjudicating the petition.

⁶⁸8 C.F.R. § 214.14 (c)(5)(ii).

⁶⁹8 C.F.R. § 214.14 (c)(5)(i).

⁷⁰See 8 C.F.R. § 214.14 (f).

⁷¹8 C.F.R. § 214.14 (c)(5), (f)(6).

⁷²8 C.F.R. § 214.14 (c)(5)(ii).

⁷³See 8 C.F.R. § 214.14 (g)(1). If this rule has the effect of limiting the derivative's initial approved period to less than four years, then she may file Form I-539 Application to Extend/Change Nonimmigrant Status to request an extension of U nonimmigrant status for a period up to four years total. Approval may extend beyond the expiration date of the U-1 principal's status, but only if: 1. The derivative cannot enter the United States in a timely way because of delays in consular processing; 2. The extension is necessary to assure that the derivative can attain at least 3 years in nonimmigrant status for purposes of adjusting status under INA § 245 (m)/8 U.S.C. § 1255 (m). 8 C.F.R. § 214.14 (g)(2)(i).

74

8 C.F.R. § 214.11 (g)(2)(ii), explaining that "(e)xtensions of U nonimmigrant status beyond the 4-year period are available upon attestation by the certifying official that the alien's presence in the United States continues to be necessary to assist in the investigation or prosecution of qualifying criminal activity. In order to obtain an extension of U nonimmigrant status based upon such an attestation, the alien must file Form I-539 and a newly executed Form I-918, Supplement B in accordance with the instructions to Form I-539."

⁷⁵8 C.F.R. § 214.14 (h)(2)(i)(A-C). Revocation of a U-1 nonimmigrant's approval results in both termination of status for the principal and any derivatives, and in denial of any pending derivative petitions for the U-1's qualifying family members (but revocation of a derivative's approval only results in termination of status for the derivative). 8 C.F.R. § 214.14 (h)(4). Revocations, like denials, can be appealed to Administrative Appeals Office.

⁷⁶8 C.F.R. § 212.14 (h)(2)(i)(A-E).

⁷⁷USCIS website, My Case Status, <https://egov.uscis.gov/cris/Dashboard.do>.

⁷⁸USCIS, Questions and Answers: Filing U, T, and VAWA Petitions with USCIS (Aug. 3, 2009) http://www.uscis.gov/USCIS/Office%20of%20Communications/Community%20Relations/t_u_faq_final_for_w

⁷⁹USCIS, Question and Answer: USCIS National Stakeholder Meeting (Rev. Apr. 3, 2008), <http://www.uscis.gov/files/nativedocuments/MARCBOQA.pdf>.

⁸⁰See INA § 101 (a)(15)(U); 8 U.S.C. § 1101 (a)(15)(U).

⁸¹8 C.F.R. § 274a.12 (a)(19-20). A noncitizen who is granted U-1 nonimmigrant status does not need to apply for employment authorization, nor pay a fee for the initial EAD (Employment Authorization Documents), but if the U-1 nonimmigrant is outside the United States, then he or she must request EAD on admission to the United States and file the appropriate documentation. 8 C.F.R. § 214.14 (c)(7). In any case, the derivative U nonimmigrant must file an I-765 Application for Employment Authorization in order to receive his/her EAD. 8 C.F.R. § 214.14 (f)(7).

⁸²See INA § 101 (a)(15)(U); 8 U.S.C. § 1101 (a)(15)(U).

Chapter 7: T Visa Relief {107}

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What are the eligibility requirements for T visas?

The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) created the T visa for victims of trafficking in persons.¹ The materials that follow explore in some depth the legal requirements for obtaining a T visa.

The basic requirements are set forth in INA § 101 (a)(15)(T)/8 U.S.C. § 1101 (a)(15)(T). A noncitizen is eligible for a T visa if USCIS determines that the noncitizen:²

- Is (or has been) a victim of a severe form of trafficking in persons (as defined under 22 U.S.C. § 7102).
- Is physically present in the United States³, American Samoa, or the Commonwealth of the Northern Mariana Islands, or a port of entry to any of these, on account of such trafficking, including cases where the noncitizen was allowed entry into the United States in order to participate in investigative or judicial processes associated with an act or perpetrator of trafficking.

And either:⁴

- Has not attained 18 years of age.
- Has complied with any reasonable request for assistance in the federal, state, or local investigation or prosecution of:

- Acts of trafficking, or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime
- Or is unable so to cooperate because of physical or psychological trauma
- And would suffer "extreme hardship involving unusual and severe harm" upon removal.

Practice Pointer:

As with U visas, the statute only sets forth the most basic requirements. You should therefore become thoroughly familiar with the T visa regulations, found at 8 C.F.R. § 214.11. At every stage of the process, it is the applicant who bears the burden to prove eligibility for a T visa.⁵

What does it mean to be a victim of a severe form of trafficking in persons?

Congress has defined "severe form of trafficking in persons" as comprising either of two different acts:⁶

- Sex trafficking⁷ in which:
 - A commercial sex act⁸ is induced by force, fraud, or coercion, or
 - In which the person induced to perform the act is not yet 18 years of age
- Or the recruitment, harboring, transportation, provision, or obtaining of a person
 - For labor or services,
 - Through the use of force, fraud, or coercion,
 - For the purpose of subjection to involuntary servitude⁹, peonage¹⁰, debt bondage¹¹, or slavery¹²

Moreover, when an alleged trafficking victim is not actually forced to perform a commercial sex act or labor services, as when she escapes her traffickers before they can begin to exploit her, the alleged traffickers' intentions must be examined to see whether the traffickers obtained the applicant for the purpose of forcing her to perform either commercial sex acts or labor.¹³

Cases from the Administrative Appeals Office provide examples of when an applicant was found to be a victim of severe human trafficking¹⁴, and when the applicant was not found to be a victim of severe human trafficking.¹⁵

A recurring theme is the need for some force, fraud, or coercion, some act on the part of the traffickers to force the applicant to participate in either the commercial sex act (unless the victim is a minor) or the labor; thus, no matter how harsh the conditions under which the T visa applicant worked or performed sexual acts, if the participation never was forced, coerced or undertaken as a result of fraud, then no trafficking took place, unless the victim of the commercial sex act was a minor.¹⁶ Along these lines, the cases also illustrate the difference between "smuggling" and "trafficking".¹⁷

What documentation is required to prove that a T visa applicant was a victim of a severe form of trafficking in persons?

The T visa applicant must provide extensive and clear evidence establishing her status as a victim of a severe form of human trafficking in persons.¹⁸ The applicant may satisfy these evidentiary requirements in one of two ways:¹⁹

- By submitting "primary evidence", which can be done by either:²⁰
 - Submitting an endorsement from a "law enforcement agency" on Form I-914 Supplement B²¹, or
 - Demonstrating that the applicant's continued presence has been arranged in accordance with the rules under 28 C.F.R. § 1100.35.²²
- By submitting sufficient credible "secondary evidence" describing the nature and scope of any force, fraud, or coercion used against the victim.
 - Unless the person induced to perform a commercial sex act is under age 18

NOTE: Trafficking of a minor for labor still requires evidence.

If a law enforcement agency endorsement is submitted as

primary evidence, what requirements must it meet?

Firstly, the regulations limit the definition of "law enforcement agency" (LEA) for all T visa purposes to "any Federal²³ (sic) law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons."²⁴

The LEA endorsement (if submitted) must meet certain requirements:²⁵

For USCIS to consider the LEA endorsement to be persuasive evidence, the endorsement must:

- Contain a description of the victimization upon which the application is based (including the dates on which the severe forms of trafficking in persons and victimization occurred).
- And be signed by a supervising official responsible for the investigation or prosecution of severe forms of trafficking in persons.

The endorsement must address whether the victim had been recruited, harbored, transported, provided, or obtained specifically for either labor or services, or for the purposes of a commercial sex act and show that:

- The traffickers have used force, fraud, or coercion to make the victim engage in the intended labor or services, or, for those 18 or older, the intended commercial sex act.
- The situations which involve labor or (non-sexual) services rise to the level of involuntary servitude, peonage, debt bondage, or slavery.

The regulations and the cases place great weight on the LEA endorsement; indeed, though theoretically optional, the LEA endorsement often proves practically necessary.²⁶

If I must submit secondary evidence in lieu of the LEA endorsement or continued presence, what requirements must the secondary evidence meet?

The secondary evidence must meet the following requirements:²⁷

- It must include:
 - An original statement by the applicant indicating that she is a victim of a severe form of trafficking in persons
 - Credible evidence of victimization and cooperation (if cooperation is necessary), describing what she has done to report the crime to an LEA
 - A statement indicating whether similar records for the time and place of the crime are available.
- The statement or evidence should demonstrate that good faith attempts were made to obtain the LEA endorsement, including what efforts the applicant undertook to get the endorsement.

The secondary evidence should also explain the nonexistence or unavailability of the primary evidence and otherwise establish the applicant's status as a victim of a severe form of trafficking in persons.²⁸

What does it mean to be physically present in the United States on account of the underlying severe form of trafficking in persons?

The following noncitizens are considered present²⁹ in the United States on account of the underlying severe human trafficking:³⁰

- Those present because they are currently being subjected to severe human trafficking.
- Those who were recently liberated from severe human trafficking in the United States.
- Those who were subject to severe human trafficking sometime in the past and whose sustained presence in the United States is directly related to the original trafficking.

The T visa applicant is not present "on account of" the severe human trafficking if she:³¹

- Escaped the traffickers before law enforcement became involved with the matter.

- And fails to show that she did not have a "clear chance"³², in light of her individual circumstances, to leave the United States in the time between the escape and the filing of the T visa petition.

The cases indicate the importance of submitting the T visa application as soon as possible after the victim's liberation from the traffickers; the longer the delay, the lesser the all-important causal connection between the trafficking and the victim's sustained presence in the United States.³³

What documentation is required to establish presence in the United States on account of the underlying severe form of trafficking in persons?

The applicant must include in her application statements and evidence that both "state the date and place (if known) and the manner and purpose (if known) for which the applicant entered the United States".³⁴ The materials submitted must demonstrate that the applicant meets the criteria for presence in the United States on account of severe human trafficking.³⁵

To what extent, if any, must the T visa applicant cooperate with or assist law enforcement?

If the applicant is under the age of 18, or is unable to cooperate because of physical or psychological trauma, then she need not cooperate with law enforcement in any way.

A child who does not cooperate with law enforcement must submit proof of her age, which can consist of an official copy of her birth certificate, a passport, or a certified medical opinion which constitutes "primary evidence" of age. Failing this, the child may submit "secondary evidence" of age in accordance with the rules under 8 C.F.R. § 103.2 (b)(2)(i).³⁶

Even if a child under age 18 decides not to cooperate with law enforcement, she must still have some contact with law enforcement, e.g., to seek assistance or to report the trafficking, or else the applicant is categorically ineligible for a T visa.³⁷

When would a T visa applicant suffer "extreme hardship

involving unusual and severe harm upon removal" from the United States?

The threshold for "extreme hardship involving unusual and severe harm upon removal" is higher than the traditional standard of "extreme hardship"³⁸ as used elsewhere in the INA and regulations.³⁹ The regulations elaborate on the standard:

- The requisite finding may not be predicated upon any current or future economic detriment; nor may it be predicated upon any lack of, or disruption to, any social or economic opportunities.⁴⁰
- The analysis should take into account the factors pertinent to the traditional "extreme hardship" analysis and factors associated with the applicant's status as a victim of severe human trafficking.⁴¹

USCIS is likely to give special weight to the following factors:⁴²

- The age and personal circumstances of the applicant.
- Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country.
- The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons.
- The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the child, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection. In other words, the impact that non-access to the United States legal system would have on the applicant's ability to seek compensation for wrongs committed against her, and/or to aid in the prosecution of crimes committed against her, related to severe human trafficking.
- The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the child would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons.

- The likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the child.
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the child.
- The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status, under INA § 244/8 U.S.C. § 1254, or the granting of other relevant protections.

USCIS will not consider hardship to persons other than the child in making the required hardship determination.⁴³

Cases from the Administrative Appeals Office provide guidance on when an applicant would be subjected⁴⁴ to extreme hardship involving unusual and severe harm upon removal, and when she would not.⁴⁵

Admissibility: Must my client be admissible to the United States in order to receive a T visa?

Yes. All T visa applicants must either be admissible to the United States or receive a waiver of inadmissibility, which the Secretary of Homeland Security may grant in most cases if she considers it to be in the public or national interest.⁴⁶

Who else besides the direct victim of human trafficking is eligible for a T visa?

The following family members may obtain "derivative"⁴⁷ T visas if accompanying, or following to join, the principal T visa petitioner:⁴⁸

- If the principal T visa petitioner is under 21 years of age⁴⁹, her:
 - Spouse
 - Children
 - Siblings who are:
 - Unmarried

- Under the age of 18 on the date that the principal T petitioner applies for T nonimmigrant status
- Parents⁵⁰

The following family members of those eligible for derivative T nonimmigrant status may be also be eligible, but only if, in consultation with the law enforcement officer investigating a severe form of trafficking, the Secretary of Homeland Security determines that these family members face present danger of retaliation as a result of either the derivative applicant's escape from the severe form of trafficking or her cooperation with law enforcement:

- Parent
- Sibling who is:
 - Unmarried
 - Under 18 years of age

Under the regulations, any family member seeking a derivative T visa must demonstrate that:⁵¹

Either:

- The family member seeking derivative status, or
- The principal victim of trafficking (principal applicant).

Would suffer extreme hardship⁵² if the family member seeking derivative status were either:

- Denied admission to the United States (if absent), or
- Removed from the United States (if present).

Further, the regulations provide that the necessary relationship between the family member seeking derivative status and the principal applicant must exist at the time the principal applicant's petition was filed, and that it must continue to exist until the derivative applicant is admitted to the United States.⁵³

Who is not eligible for a T visa?

The following are ineligible for a T visa:

- Applicants who have never had contact (not to be confused with cooperation⁵⁴) with an LEA

regarding the underlying severe form of trafficking in persons.⁵⁵

NOTE: The plain language of the regulations makes no exception for minors on this point.

- Applicants who are subject to un-waived grounds of inadmissibility to the United States.⁵⁶

NOTE: The INA specifically exempts T visa recipients from the "public charge" ground of inadmissibility, so that even noncitizens who are likely to become public charges are eligible for T visas.⁵⁷ INA § 212(a)/8 U.S.C. § 1182(a) discusses the various grounds of inadmissibility and the circumstances under which they can be waived.

- Applicants who themselves have committed an act of severe trafficking in persons.⁵⁸

Is there a limit to the number of T visas that can be granted in a given year?

Yes. The maximum number of noncitizens who may receive principal T visas is 5,000; this limitation applies only to principal T visa applicants and has no bearing on the number of family members who can receive derivative T visas.⁵⁹

Once the annual cap of 5,000 is reached in any fiscal year, USCIS will continue to review and consider applications in the order received, though no further T visas will be issued during that year.⁶⁰ Anyone denied a T visa solely because of the annual limitation of 5,000 will be placed on a waiting list, where priority is governed by the order in which applications were filed.⁶¹ The applicant on the waiting list must remain admissible to the United States throughout this process.⁶²

This discussion of the T visa numerical limitation is largely academic, however, because of the low grant rates for T visas. Between FY 2000 and November 1, 2008, a span of nearly 8 years, only 1,318 T visas were granted - an average of less than 165 grants per year. However, grant rates have increased slightly in recent years.⁶³

How does my client apply for a T visa?

A T visa applicant should send a completed application packet to the USCIS Vermont Service Center, 75 Lower Welden St., St. Albans, VT 05479.

Filing Pointers:

- Always include any necessary fees or a corresponding request for a fee waiver, lest the application be rejected before it even gets to the adjudicators.
- The applicant's original signature (no photocopies) is needed on the application, or that of a parent if the child is under age 14.
- To make it easier for USCIS to verify that the signature is original, have the applicant/parent sign in blue ink.
- If, after sending the application, you feel additional evidence or documentation is needed, wait until USCIS sends a Request for Evidence before sending any additional materials. This makes it easier for USCIS to keep the client's file organized.
- Never tab your files on the sides - that just makes more work for USCIS.
- Include the applicant's name and date of birth on the back of any photographs submitted.
- Use a two-hole punch on the top of every piece of paper submitted. This makes it easier for USCIS to assemble the applicant's file.

If I have questions about my application, can I contact the Vermont Service Center?

There are two ways you can communicate with the Vermont Service Center if you have questions regarding filing or other case-related matters. You can call the Center's VAWA Hotline at 1-802-527-4888 and leave a detailed message. Someone will call you back. Questions with details can also be sent via email to Hotlinefollowup19181914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours. It is requested that you use only one of the methods.

What must the application packet contain?

The regulations specify that the application packet must contain the following items:⁶⁴

- A complete [Form I-914, Application for T Nonimmigrant Status \(Form I-914\)](#), along with all necessary supporting documentation.
- Form I-914 Supplement A for any family members seeking derivative status.
- Form I-914 Supplement B for any LEA endorsements.

NOTE: There is no application fee for Form I-914⁶⁵

It is of critical importance that the practitioner pay exacting attention to the official instructions for Form I-914, since they contain a wealth of vital information.

- Three current photographs. The photos should be full-frontal, color, passport-style photos.⁶⁶
- The fingerprint fee, if applicable (as of this writing, USCIS charges no fingerprint fee for T visa applications).⁶⁷
- Evidence that the applicant meets the eligibility requirements for a T visa - e.g., the required supporting documentation discussed supra.
- [I-601 Application for Waiver of Grounds of Inadmissibility](#), as necessary.⁶⁸
Applications for fee-waivers will be accepted from T visa petitioners.⁶⁹
- [I-192 Application for Advance Permission to Enter as a Nonimmigrant](#), as necessary.⁷⁰
- [Form G-28, Notice of Appearance](#), to let USCIS know that you are the attorney for your client. Your client must sign the form. If your client is under 14, generally the parent or guardian (or other legal representative) must sign the form⁷¹
- [Form I-912, Request for Fee Waiver](#), as necessary to waive fees above.
- Any other necessary applications or documentation.

Will my client have to talk with a representative of USCIS in

order to obtain a T visa?

It depends. Once the application is filed, USCIS may require the child to participate in a personal interview, at the sole discretion of USCIS. USCIS will make every effort to assure a convenient interview location for the applicant.⁷²

If the child fails to appear for the personal interview, the application may be denied, unless USCIS excuses the failure to appear for "exceptional circumstances".⁷³

How does my client apply on behalf of family members?

The application requirements for family members are essentially the same as those for principal victims of human trafficking, including the contents of the application packet and separate copies of any necessary documentation.⁷⁴ The principal T visa applicant must file a separate Form I-914 Supplement A for each family member, either concurrently with or subsequent to the initial principal application.⁷⁵

What happens if my client is already in proceedings to determine whether she can remain in the United States?

If a child who is already in proceedings for deportation, exclusion, or removal believes herself to be a victim of severe human trafficking, she must notify USCIS that she intends to apply for a T visa; this should be done by filing the application and then notifying the government lawyer seeking removal. In proceedings before an immigration judge (IJ) or the Board of Immigration Appeals (BIA), the applicant may request certain relief from the adjudicator that will allow the proceedings to essentially be paused long enough for USCIS to decide the T visa application.⁷⁶ Proceedings may be paused, however, only if the government lawyer seeking removal concurs in the motion - the IJ/BIA has no authority to grant this relief otherwise.⁷⁷ Even if the government lawyer concurs, the decision whether to "pause" the proceedings is discretionary on the part of the IJ/BIA.⁷⁸

Generally, the same principles apply when a family member seeking a derivative T visa is in proceedings before an IJ or the BIA.⁷⁹ In either case, if USCIS ultimately denies the application, then any "paused" proceedings may be reopened once administrative appeals are concluded.⁸⁰

What happens if my client has already been ordered removed or deported from the United States?

Your client may still file an application for a T visa with USCIS; this will not automatically stay removal by itself, but the client may request a stay of removal from DHS, which, if granted, means that DHS will hold off on removing the applicant from the United States until USCIS decides upon the T visa application.⁸¹ If USCIS determines that the application is bona fide, then removal is automatically stayed until USCIS can finish deciding the T visa application.⁸²

If the application is ultimately denied, the stay of the removal order is deemed lifted as of the date of denial, whether or not the applicant appeals the decision. If the application is granted, the removal order is deemed cancelled by operation of law as of the approval date.⁸³

The same general principles apply in the context of family members seeking derivative T visas who are subject to final removal orders.⁸⁴

What is USCIS' adjudication process for a T visa application?

USCIS adjudicates the T visa in two steps.⁸⁵

- USCIS determines whether the application is bona fide.
- If the application is bona fide, USCIS undertakes a de novo review of the application and final adjudication.⁸⁶

What does T visa adjudication stage one, bona fide application, entail?

USCIS will consider an application to be bona fide if it meets the following requirements:⁸⁷

- The application is properly filed.
- No instance of fraud appears in the application.

- The application is complete, including any LEA endorsements or secondary evidence.
- The application presents prima facie evidence that the applicant has met each element of eligibility for a T visa.
- USCIS has completed the necessary fingerprinting and criminal background checks.
- If the applicant is inadmissible under INA § 212(a)/8 U.S.C. § 1182(a), then the application is not bona fide unless either the ground is waived or the ground falls under INA § 212 (d)(13)/8 U.S.C. § 1182(d)(13). The "public charge" ground is inapplicable to T visa recipients.⁸⁸

An application can be deemed bona fide before waiver is actually granted, but only if the particular ground of inadmissibility is described in INA § 212 (d)(13)/8 U.S.C. § 1182(d)(13).

For more on inadmissibility in the context of T visa applications, see INA § 212(a)/8 U.S.C. § 1182(a).

What does T visa adjudication stage two, de novo review and final adjudication, entail?

After determining whether an application is bona fide, USCIS conducts a de novo review of all evidence submitted with Form I-914, together with both evidence submitted post-application, where appropriate, and evidence that the child may have submitted in connection with other immigration proceedings, like asylum applications.⁸⁹

At all times, the applicant bears the burden to provide evidence that fully establishes her eligibility for any benefits under T visa status.⁹⁰

How will I know whether USCIS has granted my client's T visa application?

USCIS will issue to the applicant (and/or to you) a written decision granting or denying the T visa application.⁹¹

Can a T visa denial be appealed? If so, how?

Any appeal of a T visa denial must be taken to the Administrative Appeals Office (AAO) of DHS.⁹² AAO has plenary power to review every appeal on a de novo basis. For more information, see the [webpage of the Administrative Appeals Office](#).

How long does T visa status last, if approved?

Generally, T visa status lasts for a maximum of four years from the date the application is approved⁹³, but may be extended if one of the following criteria is met:⁹⁴

- A federal, state, or local law enforcement official, prosecutor, judge, or other authority that is investigating or prosecuting any activity relating to human trafficking certifies that the T nonimmigrant's presence in the United States is necessary to assist in the investigation or prosecution of the trafficking-related activity.
- The child is eligible for adjustment of status under INA § 245(l)/8 U.S.C. § 1255(l) and is unable to obtain such adjustment because no implementing regulations have been issued.
- The Secretary of Homeland Security determines that an extension of status past four years is warranted due to exceptional circumstances.

Can T visa status be revoked once approved? If so, under what circumstances?

Any approved T visa may be revoked on any of the following grounds:⁹⁵

- The T nonimmigrant violated the requirements of T visa eligibility.
- The approval of the application itself either:
 - Violated 8 C.F.R. § 214.11, or
 - Involved error in preparation, procedure, or adjudication which affected the outcome of the application.
- If the principal T visa recipient is 18 years or older and an LEA that has jurisdiction regarding the severe human trafficking to which the T nonimmigrant was subjected takes the following actions:

- Notifies USCIS that the T nonimmigrant has unreasonably refused to cooperate with the investigation or prosecution of the trafficking, and
- Provides USCIS with a detailed explanation of its assertion in writing.⁹⁶
- The LEA providing any endorsement either withdraws the endorsement or disavows the statements in it and notifies USCIS with a detailed explanation in writing.

Generally, revocation procedures are set out in 8 C.F.R. § 214.11 (s).

Can I check on the status of my client's case while it is pending? If so, how?

Yes, you can check on the status of your client's case once your client receives a "Notice of Action" from USCIS, which will contain a 13-digit "receipt number". Once you have the receipt number, you may go to the USCIS website (www.uscis.gov), enter the receipt number in the designated field, and you will be able to see the status of your client's case.⁹⁷ You can also call the USCIS Vermont Service Center's VAWA Hotline at 1-802-527-4888. Questions can also be sent via email to Hotlinefollowup19181914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours.

How long should the application/adjudication process for a T visa take? Is expedited adjudication available under any circumstances?

The adjudication timeframes for T visas are not currently posted on USCIS' website. However, expedited adjudication is available where the circumstances indicate there are urgent humanitarian considerations involving exceptional circumstances. Expedited adjudication can be requested by calling the USCIS Vermont Service Center's VAWA Hotline at 1-802-527-4888.⁹⁸

Depending on the complexities of a particular case, including for example instances where the Vermont Service Center (VSC) sends a Request for Evidence, the adjudication process can take anywhere from six months to one year.

What are the benefits of being granted a T visa?

T visa recipients are eligible for several important protections, including:

- Many of the same benefits accorded to noncitizens granted asylum as refugees.⁹⁹
- Public benefits for trafficking victims, which are provided now in many states.¹⁰⁰
- For trafficked children, access to the Office of Refugee Resettlement's Unaccompanied Refugee Minor Program.¹⁰¹ **NOTE:** Minors do not need to receive a T visa to be eligible for these benefits.
- Eventual eligibility to apply for Lawful Permanent Resident (LPR) status under certain conditions, set forth under INA § 245(l)/8 U.S.C. § 1255 and 8 C.F.R. § 245.23(e).
- Employment authorization (for principal victims of trafficking).¹⁰²

Are trafficking victims, as such, eligible for any benefits before being formally granted a T visa?

Before a T visa is granted, a minor can receive a letter of eligibility from Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) entitling her to multiple protections, most of which are specifically geared towards aiding trafficking victims.¹⁰³

22 U.S.C. § 7105 governs access to these benefits, which include:

- Access to interim assistance from the Department of Health and Human Services under the conditions prescribed under 22 U.S.C. § 7105 (b)(1).
- Access to the Unaccompanied Refugee Minor Program.¹⁰⁴
- If the trafficking victim is in the custody of the federal government, then she must:¹⁰⁵
 - Not be detained in a facility inappropriate to her status as a crime victim
 - Receive necessary medical care and other assistance
 - Be provided protection if her safety is at risk, or if there is danger that she will suffer harm due to recapture by the traffickers, including:
 - Protection of the victim and her family from intimidation and threats of reprisals, and from actual reprisal, from the traffickers and their associates

- Assurance that the names and other identifying information of the victims and their relatives are not publicly disclosed
- Access to:¹⁰⁶
 - Information about their rights
 - Translation/interpretation services
 - To the extent practicable, information about federally-funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking.

Citations

¹Katherine Kaufka, T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner's Guide, 09-06 Immigr. Briefings 1 (Sept. 2006) (hereinafter Kaufka) (pages not numbered).

²INA § 101 (a)(15)(T)(i-ii); 8 U.S.C. § 1101 (a)(15)(T)(i-ii).

³The term "United States", as used in the INA in a geographical sense, generally includes Guam and the Commonwealth of the Northern Mariana Islands, in addition to Puerto Rico and the Virgin Islands. INA § 101 (a)(38)/8 U.S.C. § 1101 (a)(38).

⁴The Secretary of Homeland Security, in making the determinations required under this bullet heading, must consult with the Attorney General as directed by statute. See INA § 101 (a)(15)(T)(i)(III)(aa-bb).

⁵8 C.F.R. § 214.11 (l)(2).

⁶22 U.S.C. § 7102 (8)(A-B).

⁷"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. § 7102 (9)

⁸Commercial sex act means any sex act on account of which anything of value is given to or received by any person. 8 C.F.R. § 214.11 (a).

⁹Involuntary servitude means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of legal process. 8 C.F.R. § 214.11 (a). See also *United States v. Kozminski*, 487 U.S. 931, 952 (1988). This regulation parrots the definition of "coercion", also found in 8 C.F.R. § 214.11 (a).

¹⁰"Peonage" means a status or condition of involuntary servitude based upon real or alleged indebtedness. 8 C.F.R. § 214.11 (a).

¹¹"Debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined. *Id.* In order for the applicant to be in debt bondage, the debt owed must be to the alleged trafficker, not an unaffiliated third party. See *In re Applicant (Name Redacted)*, File No. Redacted, 2007 WL 5328555 (Admin. App. Office, February 21, 2007).

¹²The Administrative Appeals Office defines "slavery" as the applicant's being "held in a condition that involved his (or her) involuntary labor". *In Re Applicant (Name Redacted)*, No. Redacted, 2008 WL 3990097 (Admin. App. Office, Feb. 1, 2008).

¹³*In Re Applicant (Name Redacted)*, File No. Redacted, 2008 WL 3990097 (Admin. App. Office, Feb. 1, 2008).

¹⁴See, e.g.: *In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009) (A Liberian juvenile whose parents sold her into prostitution for money and food; applicant ultimately denied relief because she was not present in the US on account of the trafficking); *In re Applicant (Name Redacted)*, No. EAC 07 120 50062, 2009 WL 1742163 (Admin. App. Office, March 4, 2009) (A native Korean was forced into prostitution in exchange for a bailout from immigration custody; traffickers took away her immigration papers, thus forcing her to remain with them; applicant had been lured into the US by Korean brokers who promised her non-sexual employment here); *United States v. Cadena*, 207 F.3d 663 (11th Cir. 2000) (Young Mexican girls brought to the United States with promises of respectable employment; held instead as sex slaves); *United States v. Mubang*, No. 03-0539 (D. Md. 2003) (US citizens forced young Cameroonian girl to perform domestic chores; girl was beaten and forbidden either to communicate with anyone or to leave the house).

¹⁵See, e.g.: *In re: Applicant (Name Redacted)*, File No. Redacted, 2008 WL 3990096 (Admin. App. Office, Feb. 1, 2008) (Applicant was a native Indian indicating that her former fiancÃ©e's family tried to make her marry a man against her will, and in the process held her captive and physically mistreated her. This arrangement involved no underlying commercial transaction, and was thus not a "commercial sex act" under the statute. Moreover, since no forced labor was involved, she was not "the victim of servitude, peonage, debt bondage, or slavery, as contemplated" by the statute); *In Re Applicant (Name Redacted)*, No. Redacted, 2008 WL 3990097 (Admin. App. Office, Feb. 1, 2008) (A native Chinese woman who contracted with smugglers to get her into the United States so that she could escape a forced marriage arranged by her father, and who would have to work for a long time in

the United States in order to repay the smugglers' fees, was not a victim of severe human trafficking; there was no indication that the smugglers wanted anything but her payments, and she did not establish that she was forced or coerced into participating in the smuggling scheme or into working to pay off the debt).

¹⁶See *In re Applicant (Name Redacted)*, File No. Redacted, 2007 WL 5360868 (Admin. App. Off. Nov. 29, 2007)(no trafficking, because at the "formation" of the labor "contract", applicant could have anticipated working on a remote ranch under Spartan conditions for extended periods of time, all while pocketing virtually no money for his labors due to employer deductions and withholding).

¹⁷Smuggling involves the transportation of a person, often illegally, across the borders of a country, and may or may not involve coercion on the part of the smuggler. Trafficking, however, involves forcing or coercing a person into performing labor or sexual services, and may or may not involve the illegal transportation of a person across a country's borders. Compare *In re Applicant (Name Redacted)*, No. EAC 07 236 50177, 2009 WL 2748434 (Admin. App. Office, April 21, 2009) with *In re Applicant (Name Redacted)*, No. EAC 07 120 50062, 2009 WL 1742163 (Admin. App. Office, March 4, 2009).

¹⁸See 8 C.F.R. § 214.11 (f). Note: § 214.11 is in need of amending on several fronts to keep pace with changes in US immigration law since the creation of the Department of Homeland Security; thus, the practitioner should not be confused by certain seemingly inappropriate references to the Attorney General in that section.

¹⁹8 C.F.R. § 214.11 (f).

²⁰8 C.F.R. § 214.11 (f)(2).

²¹8 C.F.R. § 214.11 (f)(1).

²²There is no one mechanism for implementing continued presence; rather, continued presence is a discretionary remedy whereby DHS can employ a variety of statutory and administrative mechanisms to ensure a noncitizen's continued presence in the United States. Such measures can include parole, stay of final order, deferred-action, or any other authorized means. The specific mechanism used will depend on the noncitizen's current immigration status and "other relevant facts". 28 C.F.R. § 1100.35(b). "Continued presence", whatever the form it finally takes, allows individuals otherwise illegally present in the United States to remain here legally for a time in order to assist federal law enforcement officials in the investigation or prosecution of severe human trafficking. 28 C.F.R. §

1100.35(b). DHS guidance on continued presence can be found at Continued Presence, Department of Homeland Security, http://www.dhs.gov/files/programs/gc_1284411607501.shtm (last visited Apr. 16, 2011).

²³ Contrast this with the U visa law enforcement certification, which can come from state or local law enforcement agencies in addition to federal agencies. See INA § 214 (p)/8 U.S.C. § 1184 (p).

²⁴ 8 C.F.R. § 214.11 (a).

²⁵ 8 C.F.R. § 214.11 (f)(1).

²⁶ See 8 C.F.R. § 214.11 (f)(4). Accord *In re Applicant (Name Redacted)*, File No. Redacted, 2007 WL 5360721 (Admin. App. Off., Nov. 26, 2007).

²⁷ 8 C.F.R. § 214.11 (f)(3) (indicating that secondary evidence can include trial transcripts, court documents, police reports, news articles, and copies of reimbursement forms for travel to and from court. The applicant may also submit his or her own affidavits and those of other witnesses. In any case, USCIS encourages applicants to "provide and document all credible evidence because there is no guarantee that a particular piece of evidence will result in a finding that the applicant was a victim of a severe form of trafficking in persons.").

²⁸ 8 C.F.R. § 214.11 (f)(3).

²⁹ USCIS officials are instructed to use "existing authority and mechanisms" to ensure continued presence in the United States of possible victims of severe human trafficking, including parole, deferred action, continuances, and stays of removal. Current practice is to grant continued presence on a yearly basis if a trafficked person is still involved in an investigation or prosecution. Immigration Law and Procedure § 28.01 (2)(c)(i).

³⁰ 8 C.F.R. § 214.11 (g).

³¹ 8 C.F.R. § 214.11 (g)(2).

³² In making the "clear chance" determination, USCIS considers all evidence presented. Information relevant to the determination includes, but is not limited to, trauma, injury, low resources, and seized travel documents which resulted from the trafficking. The "clear chance" determination reaches both

noncitizens which are legally present in the United States and those who are not. 8 C.F.R. § 214.11 (g)(2).

³³See *In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009).

³⁴8 C.F.R. § 214.11 (g)(1).

³⁵8 C.F.R. § 214.11 (g)(1).

³⁶8 C.F.R. § 214.14 (h)(3).

³⁷8 C.F.R. § 214.11 (h)(2).

³⁸The threshold for the traditional "extreme hardship" standard is a degree of hardship beyond that typically associated with deportation. 8 C.F.R. § 1240.58 (b).

³⁹8 C.F.R. § 214.11 (i)(1). The pertinent legislative history expressly indicates that Congress meant for "extreme hardship involving unusual and severe harm" to set a higher threshold than "extreme hardship" used elsewhere in the INA. Immigration Law and Procedure, § 28.01 (2)(a)(ii) (citing H.R. Conf. Rep. No. 106-939, at 95 (2000)).

⁴⁰8 C.F.R. § 214.11 (i)(1).

⁴¹8 C.F.R. § 214.11 (i)(1). The 14 non-exclusive, traditional "extreme hardship" factors can be found in 8 C.F.R. § 1240.58 (b)(1-14).

⁴²See 8 C.F.R. § 214.11 (i)(1)(i-viii) (non-exclusive list).

⁴³8 C.F.R. § 214.11 (i)(2). The regulations advise the applicant to describe and document all factors that may be relevant to her case, since there is no guarantee that a particular reason or reasons will result in a finding that removal would cause "extreme hardship involving unusual and severe harm to the applicant." 8 C.F.R. § 214.14 (i)(2).

⁴⁴See, e.g.: *In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009) (applicant would be subjected to extreme hardship involving unusual and severe harm upon removal where: Her parents, in her native Liberia, had sold her into prostitution as

a child; the man to whom she was sold treated her in a very degrading and abusive fashion; she feared to return to Liberia because of a factually credible fear that her parents would sell her to this man again, and that she would be beaten and ostracized for reaching out for help; she also feared to return to Liberia because of "all the wars" there).

⁴⁵See, e.g. In re Applicant (Name Redacted), No. EAC 07 236 50177, 2009 WL 2748434 (Admin. App. Office, April 21, 2009) (applicant would not be subjected to extreme hardship involving unusual and severe harm upon removal where: she was 38 years old and described herself as a "very independent woman who (could) work very hard to earn an honest living" and was working two jobs at the time her T visa application was being adjudicated; she feared losing her family due to prolonged separation; she asserted that, if she was sent back to her native China, she would have no therapists to treat her depression and insomnia, but provided no documentary evidence to support this assertion; she sought no legal redress against her alleged trafficker; she expressed fear that she would be punished in China for prostitution, but did not explain that fear in any probative detail, and the record contained no evidence of how the Chinese legal system dealt with prostitution).

⁴⁶INA § 212 (a)(3)(E), (d)(14); 8 U.S.C. § 1182 (a)(3)(E), (d)(14).

⁴⁷"Derivative" meaning obtained by virtue of the applicant's relationship with the principal petitioner.

⁴⁸INA § 101 (a)(15)(T)(ii)(I-III); 8 U.S.C. § 1101 (a)(15)(T)(ii)(I-III).

⁴⁹If the T-1 petitioner is under 21 at the time her application for a T visa is filed with USCIS, the petitioner will continue to be considered a "child" for T visa purposes even if the petitioner reaches the age of 21 while the petition is pending before USCIS. INA § 214 (o)(5); 8 U.S.C. § 1184 (o)(5).

⁵⁰INA § 101 (a)(15)(T)(ii)(I-III); 8 U.S.C. § 1101 (a)(15)(T)(ii)(I-III).

⁵¹8 C.F.R. § 214.11 (o)(5).

⁵²"Extreme hardship" in this context is not the higher standard of "extreme hardship involving unusual and severe harm", but is more akin to the traditional standard of "extreme hardship" under 8 C.F.R. § 1240.58 (hardship beyond that typically caused by deportation). Further, the extreme hardship must be substantially different than the hardship generally experienced by other residents of their country of origin who are not victims of a severe form of trafficking in persons. 8 C.F.R. § 214.11 (o)(5).

⁵³8 C.F.R. § 214.11 (o)(4). Bear in mind that INA § 101 (a)(15)(T) contains age-out protection, so that

no one who is initially eligible for derivative relief by virtue of her own age and the principal's age will lose it because one or both of them grow older than the age limits.

⁵⁴For example, if the applicant is under 18, she can flatly refuse a request for assistance from law enforcement; however, if the applicant has not at least contacted a law enforcement agency, e.g., to report that the trafficking took place or to seek assistance from law enforcement, then she is categorically ineligible for a T visa.

⁵⁵8 C.F.R. § 214.11 (h)(2). Note: 8 C.F.R. § 214.11, in multiple places, improperly refers to 8 C.F.R. § 240.58 as containing the traditional definition and factors for "extreme hardship". However, § 240.58 does not exist; rather, it is 8 C.F.R. § 1240.58 that contains the current definition and factors for "extreme hardship".

⁵⁶8 C.F.R. § 214.11 (j).

⁵⁷INA § 212 (d)(13)(A); 8 U.S.C. § 1182 (d)(13)(a).

⁵⁸INA § 214 (o)(1); 8 U.S.C. § 1184 (o)(1).

⁵⁹INA § 214 (o)(2-3); 8 U.S.C. § 1184 (o)(2-3). This numerical limitation is unlikely to have much practical impact; for example, in FY 2009, there were only 390 total T visa applications. Visa Statistics for VAWA, T, and U, Immigration Road, <http://immigrationroad.com/visa/visa-statistics-for-VAWA-U-T.php> (last visited Apr. 16, 2011).

⁶⁰8 C.F.R. § 214.11 (m)(1).

⁶¹8 C.F.R. § 214.11 (m)(2).

⁶²8 C.F.R. § 214.11 (m)(2).

⁶³Polaris Project, Human Trafficking Statistics, at 2, <http://restore-austin.org/wp-content/uploads/2010/06/Human-Trafficking-Statistics.pdf> (citing government reports) (last visited Apr. 16, 2011).

⁶⁴See 8 C.F.R. § 214.11 (d)(1), (2)(i-vii).

⁶⁵USCIS Fee Webpage.

66

USCIS, USCIS is making photos simpler, available at <http://www.uscis.gov/files/form/m-603.pdf>.

⁶⁷The regulations state that "(a)ll applicants for T nonimmigrant status must be fingerprinted for the purpose of conducting a criminal background check." Once the application is submitted, USCIS will notify the applicant of the proper time and place to appear for fingerprinting. 8 C.F.R. § 214.11 (d)(5). Currently, USCIS charges no fingerprint fee for T visa applicants. USCIS Fee Webpage.

⁶⁸8 C.F.R. § 214.11 (j). From the Experts: Our contributors indicate that the function of the I-601 in the T visa context, in practice, is to allow T visa applicants who are outside the United States to obtain waivers of the various grounds of inadmissibility and thus enter the United States.

⁶⁹I-601 Application for Waiver of Grounds of Inadmissibility, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bb515f56f> (last visited Apr. 16, 2011).

⁷⁰The Form I-192 is not useful in most immigration cases where the applicant is physically present in the United States. However, in the context of applications for U and T visas approval by USCIS of Form I-192 allows applicants who are physically present in the United States, but subject to unwaived grounds of inadmissibility, to remain in the United States. See USCIS, I-192, Application for Advance Permission to Enter as Nonimmigrant, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=68db2c1a>

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⁷¹See Signature Requirements for USCIS Forms, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9453d59a> (last visited Apr. 16, 2011).

⁷²8 C.F.R. § 214.11 (d)(6).

⁷³8 C.F.R. § 214.11 (d)(7)(i-iii).

⁷⁴See 8 C.F.R. § 214.11 (o)(3)(i-v).

⁷⁵8 C.F.R. § 214.11 (o)(2).

⁷⁶See 8 C.F.R. § 214.11 (d)(8), explaining that if the noncitizen is in proceedings before an IJ or the BIA, with the concurrence of DHS counsel, she may request that the proceedings be administratively

closed, or that a motion to reopen/reconsider be indefinitely continued, in order to allow the noncitizen to pursue an application for T nonimmigrant status with USCIS. 8 C.F.R. § 214.11 (d)(8).

⁷⁷In re: Maria Lavy Hinayhinay, No. A099 625 117, 2010 WL 4509769 (BIA, October 25, 2010) (unpublished).

⁷⁸8 C.F.R. § 214.11 (d)(8).

⁷⁹See 8 C.F.R. § 214.11 (d)(8-9), (o)(8); see also USCIS Adjudicator's Field Manual § 39.2 (c)(1)(C).

⁸⁰See 8 C.F.R. § 214.11 (d)(8), (o)(8).

⁸¹8 C.F.R. § 214.11 (d)(9).

⁸²8 C.F.R. § 214.11 (d)(9).

⁸³ C.F.R. § 214.11 (d)(9).

⁸⁴See 8 C.F.R. § 214.11 (d)(8-9), (o)(8); see also USCIS Adjudicator's Field Manual § 39.2 (c)(1)(C).

⁸⁵Immigration Law and Procedure, § 28.01 (3)(d).

⁸⁶Note: USCIS is not, at this time, putting out information concerning the length of time between a determination of "bona fide application" and final adjudication of the application. USCIS, Questions and Answers: Filing U, T, and VAWA Petitions with USCIS (Aug. 3, 2009), http://www.uscis.gov/USCIS/Office%20of%20Communications/Community%20Relations/t_u_faq_final_for_w. However, the status of individual cases can be checked on USCIS' website. See My Case Status, USCIS, <https://egov.uscis.gov/cris/Dashboard.do> (last visited Apr. 16, 2011).

⁸⁷8 C.F.R. § 214.11 (k)(1). A determination that a T visa application is "bona fide" entails significant advantages for the client, including an automatic stay of removal (if your client has been ordered removed from the United States) under 8 C.F.R. § 214.11 (d)(9) and access to certain protections specifically designed for trafficking victims under 22 U.S.C. § 7105. NOTE: Minors (under 18) do not need to be certified to receive benefits and services.

⁸⁸INA § 212 (d)(13)(A); 8 U.S.C. § 1182 (d)(13)(A).

89

8 C.F.R. § 214.11 (l)(1) (explaining also that USCIS is not bound by any previous factual determinations, and USCIS determines at its sole discretion the value of any evidence submitted).

⁹⁰8 C.F.R. § 214.11 (l)(2)

⁹¹8 C.F.R. § 214.11 (l)(3). See also Finding Legal Advice, USCIS, <http://www.uscis.gov/legaladvice> (last visited June 25, 2012).

⁹²See *In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009).

⁹³8 C.F.R. § 214.11 (p)(1).

⁹⁴INA § 214 (o)(7)(A-B); 8 U.S.C. § 1184 (o)(7)(A-B).

⁹⁵8 C.F.R. § 214.11 (s)(1)(i)-(v). If a T-1 nonimmigrant's status is revoked, all family members deriving T nonimmigrant status from the T-1 will have their status revoked automatically; alternatively, if derivative applications are still being adjudicated, such applications will automatically be denied. 8 C.F.R. § 214.11 (s)(5).

⁹⁶The plain language of the regulations does not seem to limit the "un-helpfulness" ground of revocation to instances occurring after the T visa application is filed.

⁹⁷USCIS website, My Case Status, <https://egov.uscis.gov/cris/Dashboard.do>.

⁹⁸USCIS, Questions and Answers: Filing U, T, and VAWA Petitions with USCIS, available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Community%20Relations/t_u_faq_final_for_w

⁹⁹22 U.S.C. § 7105 (b)(1)(A-E). U.S. Asylum and refugee law is beyond the scope of this chapter, but see generally INA § 248/8 U.S.C. § 1258 and corresponding regulations.

¹⁰⁰See, e.g., SB 1569 Factsheet, Expanded Protections For human trafficking Survivors: How to access benefits, <http://www.castla.org/templates/files/factsheet1569.pdf>

¹⁰¹For more information, see Unaccompanied Refugee Minors, Office of Refugee Resettlement, http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm (last visited Apr.

16, 2011).

¹⁰²INA § 101 (i)(2); 8 U.S.C. § 101 (i)(2). Principal victims of trafficking get employment authorization automatically, and in most cases the necessary documents will be forwarded to the victim at no fee; family members getting derivative T status must apply for employment authorization. See 8 C.F.R. § 214.11 (o)(10). USCIS Fee Webpage.

¹⁰³See 22 U.S.C. § 7105 (a-b).

¹⁰⁴For more information, see Unaccompanied Refugee Minors, Office of Refugee Resettlement, [\(last visited Apr. 16, 2011\)](#).

¹⁰⁵22 U.S.C. § 7105 (c)(1).

¹⁰⁶22 U.S.C. § 7105 (c)(2).

Chapter 8: Violence Against Women Act (VAWA)

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What is the Violence Against Women Act?

The Violence Against Women Act (VAWA),¹ enacted in 1994 and later amended, protects victims of domestic violence when the domestic abuse is or was perpetrated by a U.S. citizen (USC) or a lawful permanent resident (LPR). Although KIND primarily serves children who are separated from their parents, there may be circumstances when an unaccompanied child may still qualify under VAWA, so it is important to be aware of this potential remedy.

Why is VAWA immigration status needed?

VAWA immigration provisions were created to remedy a serious flaw in family-based immigration. Normally, a U.S. citizen or LPR files a petition with the USCIS *on behalf* of the noncitizen family member (the beneficiary). Once the petition is approved, the beneficiary may file on her own for her green card (LPR status).

Normally under family-based immigration, it is the USC/LPR who controls when and if the visa petition is filed. This is extremely problematic in circumstances in which the USC or LPR petitioner is or was abusive towards the noncitizen spouse or child.

Prior to the passage of VAWA, an abusive petitioner could use her control of the immigration process to perpetuate or exacerbate domestic abuse. For example by threatening to report the victim (and/or the victim's child) to the immigration service, or by withholding the opportunity to obtain lawful status, the abuser could exercise further control over the noncitizen. Fear of losing sponsorship or being

deported could coerce abuse victims to continue living in an environment causing physical and/or psychological harm.

VAWA provides additional protection for abused spouses and children. Specifically, under VAWA, a child of a USC or LPR may self-petition for permanent status in the United States - without requiring the cooperation of the abuser. Thus, the child or the child's parent is no longer dependent on her abuser in order to obtain legal status in the United States.

What are the benefits of VAWA status?

VAWA status allows your child client to remain in the United States and if qualified, to obtain lawful permanent residency (a "green card"). In addition, your client can obtain an employment authorization document (EAD). Even if the child is too young or does not wish to work, the card serves as an important government-issued identification card. Finally, VAWA status makes your client eligible for certain public benefits.

Practice Pointer:

If you encounter a potential VAWA case, please contact your KIND pro bono coordinator for additional resources.

Who is eligible for VAWA?

Despite its name, VAWA is neither gender-specific nor age-specific; the victim may be either male or female and either an adult or a minor.

Your child client may be eligible for VAWA status under any of the following circumstances:

- An unmarried child who is abused by a USC or LPR parent or step-parent. Alternatively, if the parent is suffering abuse as well, the parent may submit the petition herself and include the abused child as a "**derivative beneficiary**."
- An unmarried child **who is not abused** may still be the derivative beneficiary of a petition filed by the child's parent, when the parent is or was the abused spouse of a USC or LPR.
- A child who is the **abused spouse or ex-spouse** of a USC or LPR may self-petition under VAWA.

How does my client apply for VAWA?

As explained above, depending on the circumstances, a child may either self-petition under VAWA or be a derivative beneficiary of a parent's VAWA petition. Only a child who was directly abused may self-petition. Otherwise, the child must be included as a derivative on a parent's petition. There may be different reasons why a parent of an abused child may want to file the petition instead of the abused child. Often, if a child is too young to articulate her claim or to testify to the abuse, a parent may want to file a VAWA petition on behalf of the child. Also, it may be extremely traumatic and intimidating for a child to self-petition. The ability of a parent to petition on behalf of the child could alleviate some of this stress.

What is a self-petition?

A self-petition is an application in which the individual is asking for relief because she has been abused. Remember, in normal circumstances, a USC or LPR has to petition as the spouse of a noncitizen for the noncitizen to obtain a green card. VAWA provides a mechanism for the noncitizen to apply for immigration status herself because the normal petitioner is abusive.

When is it appropriate for a child to self-petition under VAWA?

If a USC or LPR parent or spouse has abused your client, you should file a self-petition.

Child Practice Pointer:

Children may not realize that what they have endured constitutes abuse or extreme cruelty. Therefore, you will have to carefully draw out information from the child to determine whether she qualifies under VAWA.

Eligibility requirements for a child abused by a USC or LPR parent:

- The abuser is a U.S. citizen or LPR, or has lost USC or LPR status within the two years prior to the filing of the self-petition.
- The child was subjected to either physical battery or "extreme cruelty." Such extreme cruelty might include, for example, threats of violence, psychological abuse, denigration, sexual abuse,

stalking, or harm to other persons or things if intended to cause harm to the victim.

- The child lives or lived with the U.S. citizen or LPR parent or step-parent.
- The child must qualify as the abuser's "child" under 8 U.S.C. § 1101(b)(1) - i.e., the child must be unmarried, under the age of 21,² and fall into one of the specified categories, which include the following:
 - Children born in wedlock
 - Stepchildren, in which the marriage creating the step-relationship occurred before the child's 18th birthday
 - Adopted children in which the adoption was finalized before the child's 16th birthday, and the child has been in the adoptive parent's physical and legal custody for two years, or
 - Children born out of wedlock where the child has been legitimated by the father or can show a bona fide parent-child relationship.
- The self-petitioning child must be a person of "good moral character."

Child Practice Pointer:

Children under 14 presumptively meet the requirement of good moral character, while those over 14 must submit evidence.³

Can a parent file for her child?

Yes. In certain circumstances, a parent may file the petition and include the child as a derivative beneficiary. A child can be the beneficiary of a VAWA self-petition filed by the child's non-abusive parent, on either of the following bases:

A child's parent files a petition because a USC or LPR spouse is abusing the parent

Eligibility requirements:

- The abused self-petitioner is the spouse or former spouse (provided that the divorce occurred within the two years immediately prior to the filing of the VAWA petition) of a USC or LPR (or a person who has lost USC or LPR status within the two years prior to the filing of the self-petition).

- The marriage between the VAWA petitioner and the abuser must be valid and legal under the laws of the jurisdiction of the marriage.
- The marriage must have been entered into in good faith.
- During the marriage, the spouse was subjected to either physical battery or "extreme cruelty," as discussed above. Because the child is the beneficiary of a parent's VAWA petition, no evidence of the child having suffered abuse is required.
- The self-petitioner parent lived with her USC or LPR spouse.
- The self-petitioner parent is residing in the United States.

A child's parent files a petition because her USC or LPR spouse is abusing her child

Eligibility requirements:

- The self-petitioner is the spouse or former spouse (provided that the divorce occurred within the two years immediately prior to the filing of the VAWA petition) of a USC or LPR (or a person who has lost USC or LPR status within the two years prior to the filing of the self-petition).
- Generally, the marriage between the VAWA petitioner and the abuser must be valid and legal under the laws of the jurisdiction of the marriage.
- The marriage must have been entered into in good faith.
- During the marriage, the child was subjected to either physical battery, or "extreme cruelty."
- The petitioner lived with the USC or LPR spouse.
- The petitioner is a person of good moral character.
- The petitioner is residing in the United States.

Practice Pointer:

The self-petitioning parent may also obtain immigration status under VAWA, even though she is not

being abused.

How do I file a VAWA self-petition for my client?

Self-petitions by spouses and children of abusive citizens or lawful permanent residents are filed using Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. This form is used for a number of immigration purposes, not just VAWA self-petitions. All VAWA self-petitions are filed at the USCIS Vermont Service Center, which has been designated to handle all petitions filed by self-petitioning battered aliens.

Each self-petition submitted is assigned a "priority date" which is the date on which the petition is properly filed. The priority date takes on special meaning when the applicant subsequently files for adjustment of status (see below).

After a few weeks or even months after the date of filing, the self-petitioner should receive from the VAWA Unit a "Notice of Action." Provided that the petition was complete and properly filed, the Notice of Action should indicate that the petition has been found to establish a prima facie case.

The notice of a prima facie case will have an expiration date and will need to be renewed periodically until the petition is finally approved. Alternatively, USCIS may send a "Request for Further Evidence" (RFE) or a "Notice of Intent to Deny" (NOID). There is a deadline for responding, in either case.

While the VAWA petition is pending with USCIS, the self-petitioner is allowed to remain in the United States and may apply for an employment authorization document (EAD) using form I-765.

Child Practice Pointer:

Even for a child who is not of age to work, it may be advisable to apply for an EAD in order to obtain a government-issued identification document that can be used to obtain a social security number. This is particularly true in situations in which an abuse victim does not have other means of obtaining an identity document.

If the self-petition is approved by USCIS, the child will then apply to adjust her status (I-485). If the petition is not approved, the self-petitioner will be provided with written notice of this fact and offered an opportunity to present additional information or arguments before a final decision is rendered.

The self-petitioner has the right to appeal the denial of an I-360. If USCIS approves the VAWA self-petition, in most cases it will automatically grant the self-petitioner deferred action status for

petitioners and their derivatives. While this temporary legal status does provide work authorization, it is not a guarantee against removal. Deferred action is granted for a certain time period and is renewable.

How does my client adjust from VAWA to permanent lawful resident status?

Like other avenues to LPR status, obtaining LPR status through VAWA is a two-step process. First, the self-petition is filed with USCIS, using Form I-360. Regardless of whether the child was a self-petitioner or a derivative beneficiary, if the VAWA petition is approved, the child may take the second step: applying for LPR status based on the approved petition. This will entail filing Form I-485, Application to Adjust Status to That of Lawful Permanent Resident, and attending an adjustment of status interview with a USCIS adjudicating officer.

When will my client be eligible to file for adjustment of status?

It depends on the immigration status of the abuser.

If the abuser is a U.S. citizen, the self-petitioner can file for adjustment immediately after the initial petition is approved. That is because there are no numerical caps on the number of green cards available to spouses and children of U.S. citizens. They are considered immediate relatives.

If the abusive spouse or parent is an LPR, the abused victim must wait until her priority date becomes "current" before filing to adjust her status. This may take months, if not years.⁴

Practice Pointer:

This is a very complicated area in immigration law, so please consult your KIND pro bono coordinator for further information.

What if my child client entered the United States without inspection?

USCIS issued guidance on April 11, 2008⁵ for approved VAWA self-petitioners who are applying to adjust their status and who entered the United States without having been inspected and admitted or

paroled. According to the memo, an approved VAWA self-petitioner will still be eligible to adjust status, despite having entered without inspection or parole.⁶ In addition, the VAWA self-petitioner will not need to show that her illegal entry into the United States had a substantial connection to the domestic violence, battery, or extreme cruelty.

What if my client is a public charge?

VAWA self-petitioners are not subject to "public charge" grounds of inadmissibility under INA 212a(4)(C). When the I-485 is filed, you will also need to file an I-864W "exemption from affidavit of support."

Are there any activities or conditions that could result in my client's application being denied?

Yes. Although an applicant may qualify for VAWA relief because she has suffered abuse from a USC or LPR spouse or parent, this does not necessarily mean that the I-360 petition will be approved or the adjustment of status application granted. There are additional factors that may present serious problems. If your client qualifies under any of the circumstances below, please note that further investigation must be undertaken regarding her qualifications for VAWA relief. An affirmative VAWA self-petition should not be filed if, depending on the factors below, the end result is certain to be the commencement of removal proceedings and if no relief is available to the child. Please consult your KIND pro bono coordinator for further guidance if any of these circumstances apply to your child client.

- Previous deportation or removal may be a bar to both petition approval and adjustment of status. An exception may be available.
- Removal order has already been issued. The order must be rescinded before adjustment of status can take place.
- A felony conviction may be a bar to both petition approval and adjustment of status.
- Any criminal conviction⁷ may be a bar to both petition approval and adjustment of status.

Practice Pointer:

You should not assume that just because a child has a criminal conviction (juvenile or adult) that she

is automatically barred from gaining residence through the self-petitioning process. Relevant factors include the type of conviction, whether the child was charged as an adult, the sentence imposed, and when it occurred. Also, a VAWA self-petitioner may still be approved for residency if it can be shown that the criminal conduct was related to the abuse (for example, shoplifting because the abuser threatened her if she refused to engage in the activity).

What if my client is already in removal proceedings when I determine VAWA eligibility?

If your client is in removal proceedings, but has an approved 1-360 petition (application for VAWA status), the immigration judge can adjust your client's status.

If the petition is not yet approved, you should request a continuance or administrative closure so that the child may wait for her petition to be adjudicated by USCIS.

What is VAWA cancellation of removal?

In addition to the VAWA self-petition that is filed with the USCIS, there is a parallel remedy exclusively for aliens in removal proceedings referred to as VAWA cancellation of removal (VAWA cancellation).⁸ This relief is sought only before an immigration judge in immigration court. VAWA cancellation should not be confused with the remedy known as "cancellation of removal for non-LPRs" (described in a different section of this manual).

Practice Pointer:

In the context of removal proceedings, the child must file her own application for VAWA cancellation; there is no process analogous to being a derivative beneficiary of a parent's petition.

What are the advantages of applying for cancellation instead of a self-petition?

If granted VAWA cancellation, the child will be granted automatic lawful permanent residency status. This is a faster route to permanent status than the self-petition route which requires that the applicant first apply for VAWA status, get approval, and then file for adjustment.

What if my client qualifies for cancellation but is not in removal proceedings?

You can request that the local ICE office issue a Notice to Appear (NTA) to put your client into removal proceedings so that the child may apply for VAWA cancellation. However, this is a very risky strategy and you should proceed with the greatest of caution. Should the child's application for cancellation be denied, and no other form of relief is available, the child could be removed from the United States.

What are the eligibility requirements for cancellation of removal?

The petitioner:

- Must have lived in the United States continuously for three years (This is a different requirement than for a VAWA self-petition).
- Was subject to battery or extreme cruelty by the U.S. citizen or LPR parent while in the United States.
- Has demonstrated "good moral character" for the three years prior to the application.
- Is removable either on grounds of inadmissibility or deportability.
- Must prove that she would suffer extreme hardship if removed (This is also a different requirement than for a VAWA self-petition). Extreme hardship means more than just the general hardships due to removal from the United States.⁹ A list of extreme hardship factors to be considered are listed at 8 CFR § 1240.58(C). Qualifying factors of extreme hardship may include the following:¹⁰
 - Lack of access to legal proceedings and protections in home country
 - Lack of medical and social services necessary as a result of the abuse

- Likelihood of harm by the abuser or her family in home country
- Medical or educational needs of children that could not be provided for in home country

Practice Pointer:

Time stops accruing from the date the cancellation application has been filed, not the date of issuance of the NTA.¹¹

Citations

¹ VAWA was passed as part of the Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 40702, 40703, 108 Stat. 1796 (Sept. 13, 1994). Since the original enactment, the VAWA immigration provisions have undergone several amendments, and are codified principally at INA 204(a), 8 USC 1154(a).

² VAWA 2005 provides that someone who was the victim of incest when she was the child of a USC or LPR may file a self-petition up until the age of 25, as long as the abuse was a reason for the filing delay. See VAWA 2005 Pub. L. No. 109-162 Title VIII Subtitle A Sec. 805(c).

³ William R. Yates, "Determinations of Good Moral Character in VAWA-Based Self Petitions," (Jan. 19, 2005), USCIS Memo: HQOPRD 70/8.1/8.2.

⁴ In some cases in which the abuser previously agreed to sponsor the child, the abuser may have already taken the step of filing a relative petition (Form I-130) on the child's behalf. In other words - there may be two different petitions at play: an immediate relative petition (I-130) and a self-petition (I-360) - both submitted at different times. Always ascertain whether this has happened, because if an I-130 was previously filed (does not need to be approved), the child may use or "capture" the priority date derived from I-130 petition and assign it to her current VAWA self-petition, thus allowing the child to apply for adjustment of status much faster.

⁵ See Memo, Michael L. Aytes, USCIS, HQDOMO 70/23.1 AFM Update AD08-16 (April 11, 2008).

⁶ Effectively waiving inadmissibility under section 212(a)(6)(A)(i) (present without inspection).

⁷ Immigration Law Service 2D, "Relatives as Immigrants," 2005 Thomson/West, 2/2005, § 7168.

⁸ INA 240A(b)(2).

⁹ Id.

¹⁰ Id.

¹¹ AYUDA, Inc. VAWA Manual: Assisting Battered Immigrants and Their Children to File Immigration

Claims under the Violence Against Women Act, Section 6.3a. (5TH ED. 2006).

Chapter 9: Temporary Protected Status (TPS)

DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

What is Temporary Protected Status (TPS)?

TPS is a temporary immigration status granted to eligible nationals of certain countries¹ (or persons without nationality who last habitually resided in a country) designated by the Secretary of Homeland Security.² Such countries are designated in response to temporary dangerous conditions, such as armed conflict or a natural disaster, for nationals of these countries residing in the United States whose lives may be in danger if they were forced to return to the home country.

What does an applicant need to prove to be eligible for TPS?

An unaccompanied child only needs to prove that she is a national of a current TPS country and has been in the United States since the required designation date. As a result, TPS is only relevant for children already physically present in the United States at the time of their country's TPS designation, and not for those who arrive after such designation date. To qualify for TPS, the child does not need to prove that she will be singled out for persecution in her home country, as with other forms of relief.

What are the benefits of receiving TPS?

A person who has been granted TPS is allowed to remain in the United States for the duration of the TPS designation, which can be anywhere from six to 18 months.³ This status can also be longer if DHS extends the designation. While a person has TPS, the individual will not be removed from the United States. In addition, the individual will not be detained. A person with TPS is eligible to work in the United States and a grant of TPS will serve as evidence of lawful status for an application for work authorization. A person with TPS is also allowed to travel abroad with advance permission. Finally, a

person with TPS is considered to be in lawful immigration status for the duration of designation.

Can TPS lead to lawful permanent resident status?

No. It is important to understand that TPS is not a basis to apply for legal permanent residency. When the Secretary terminates a TPS designation, beneficiaries revert back to the same immigration status they had before receipt of TPS, unless that status has since terminated or expired. In other words, if the applicant was originally in the United States unlawfully and then received TPS, upon termination of TPS, she would yet again be without lawful status.

However, a TPS beneficiary may apply to adjust or change her status if she has an alternative basis of doing so. For example, if a TPS beneficiary married a U.S. citizen, she could apply for LPR status based on marriage.

Child Practice Pointer:

When considering a child's legal options, make sure to determine whether her home country falls under TPS protection, especially if the child comes from a war-torn country or one affected by a natural disaster.

How are countries designated as TPS eligible?

The legislation that created TPS authorizes DHS to designate a foreign state or part of a foreign state under any of three circumstances: (a) ongoing armed conflict that poses a serious threat to the personal safety of nationals who would be returned there; (b) an environmental disaster that has substantially but temporarily disrupted living conditions and the state cannot adequately handle the return of its nationals; and (c) extraordinary and temporary conditions that prevent safe return, and that staying in the United States would not be contrary to the national interest.⁴

The initial designation and any extension of designation for countries eligible for TPS is published by DHS in the Federal Register. Countries which have received TPS designation include: Burundi, El Salvador, Haiti, Honduras, Liberia, Nicaragua, Somalia, and Sudan.

Practice Pointer:

Each designation also has an effective end date, which means that unless the Secretary of DHS extends the designation further, the TPS program will end for that particular country. Therefore, it is important to check whether the TPS designation or re-designation for any particular country is still

effective as of the date you are advising your client.

Initial registration

Once a country is initially designated for the TPS program, USCIS will designate a period of time for applicants to file their applications for initial registration. This means the applicant must file for TPS status before the designated registration period expires.

When a country's designation has been extended, USCIS will set a new deadline for people to file their applications for registration.

Practice Pointer:

In order to maintain TPS status, a child must be registered with the TPS program when the TPS designation is initially made and must continue to renew her registration during each subsequent renewal period. Otherwise, the child's TPS will expire if she has no other immigration status and could be placed in removal proceedings.

What must my client prove to be granted TPS?

Besides proving that your client is a national of a country designated for TPS and has registered within the specified registration time, your client must satisfy four other criteria:

Continuous physical presence

Your client must prove that she has maintained continuous physical presence in the United States since the effective date of the country's designation. If your client arrived in the United States after TPS had been designated for your client's country of origin, your client would be ineligible for TPS. In other words, the child must be present in the United States on or before the effective date to be considered eligible for TPS.

Continuous residence in the United States

In addition to proving that your client has maintained continuous physical presence in the United States since the date of TPS designation, your client must also prove that she has continued to reside in the United States since a date designated by the Secretary of DHS. This may be a different date than the designation date depending on what country your client is from. For example, DHS designated TPS status for Haiti on January 12, 2010 and the date from which a Haitian applicant must prove continuous residence is January 21, 2010 which was later extended). However, for Sudan the designation date and the continuous presence date are the same, October 7, 2004. You will need to check the USCIS website to determine which dates are relevant for your client.

Practice Pointer:

There are certain absences and departures from the United States that do not break continuous physical presence and residence requirements for TPS. For further explanation, read INA § 244(c)(4).

Criminal and other disqualifying conduct

Your client will be ineligible for TPS if she has been convicted of a felony, two or more misdemeanors, or certain drug offenses; has persecuted others; is a terrorist, or is a threat to national security.⁵

Otherwise admissible:

You will need to prove that your client is admissible as an immigrant. There are a few exclusions grounds that are automatically waived, for example unlawful presence and entry without inspection. There are other grounds of inadmissibility that can be waived upon request at USCIS's discretion.

Practice Pointer:

TPS can be obtained even if the child entered the United States without lawful admission. Additionally, the child can obtain TPS in the United States even if, at the time of application, she is present without lawful immigration status.

What immigration forms does my client need to fill out to apply for TPS?

Your client will apply for TPS with USCIS, even if your client is in removal proceedings at the time of the designation.⁶ To apply for TPS with USCIS your client will need to file two forms: (1) Form I-821 (Application for Temporary Protected Status), and (2) Form I-765 (Application for Employment Authorization Document), regardless of age. The applicant must also submit the required fees or a

fee waiver (Form I-912 or a written request explaining your client's inability to pay the requisite fees). If your client is not applying for work authorization, your client does not need to submit the fees for the I-765. However, your client must fill out Form I-765 to be granted TPS. The fees include biometric screening costs required for the adjudication of the application forms.

What if my client missed the initial registration deadline?

If your client did not register during the initial registration period, your client may register during any subsequent "extension" period. There are additional requirements your client must meet if your client is a late registrant. Late initial registrants must show that during the initial registration period, she:

- Was a nonimmigrant or had been granted voluntary departure status or any relief from removal.
- Had an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal or change of status pending or subject to further review or appeal.
- Was a parolee or had a pending request for re-parole, or
- Was the spouse or child of an alien currently eligible for TPS.

Child Practice Pointer:

Late Initial Filing for TPS

A child of a person eligible for TPS may register after the initial registration period during subsequent extensions of TPS, as long as the relationship existed at the time of the parent's initial registration. This means your child client does not need to wait for registration to reopen to apply for TPS as long as the child can demonstrate that she was born at the time the parent was initially eligible for TPS in order for the child to subsequently qualify for TPS.⁷ The child must still independently meet all the TPS eligibility requirements listed.

In contrast, you cannot obtain TPS as a derivative because your parent has TPS.

Citations

¹ TPS designations are decided through an interagency process that includes DHS, the White House, DOJ, and the U.S. State Dept.

² INA § 244.

³ INA § 244(b)(2).

⁴ INA § 244 (b)(1).

⁵ INA § 244(c).

⁶ 8 C.F.R. § 244.7(a) & (d) (2008).

⁷ 8 C.F.R. 244.2(f)(iv).

Chapter 10: Immigration Consequences of Delinquency and Crimes

DISCLAIMER

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Why should I be concerned about my client's delinquency record?

As a general principle, any criminal issue (criminal conduct, arrest and/or conviction) can affect an individual's ability to obtain immigration benefits and avoid removal. Immigration law provides for certain grounds of inadmissibility at INA § 212 (8 U.S.C. § 1182) and certain grounds of deportability at INA § 237 (8 U.S.C. § 1227) that determine whether a person can gain or retain immigration status.¹ Among these grounds are criminal-related grounds. Most of these criminal grounds are triggered only by a conviction. Since dispositions of juvenile delinquency are not considered to be convictions under immigration law, regardless of the nature of the offense, they do not trigger these conviction-based grounds of inadmissibility or deportability.

This does not mean that there are no consequences to delinquency offenses. Despite the misperceptions of many youth, juvenile delinquency dispositions can often have a significant impact on a noncitizen youth since numerous crime-related grounds of inadmissibility and deportability can be triggered by conduct alone. Drug-related incidents are especially problematic.

Additionally, many forms of relief from deportation are discretionary. As such, even though they may not specifically trigger a statutory ground of inadmissibility or deportability, immigration judges or USCIS examiners may consider them as significant negative discretionary factors in any application for lawful status or other immigration benefit. Furthermore, although your client may not have been charged or adjudicated delinquent, virtually all immigration applications require disclosure of any criminal activity whatsoever.

As a general matter any contact with the police or law enforcement can significantly complicate your client's immigration case now or in the future. Some of the best advice you can give your client is to stay out of trouble!

Is a juvenile court disposition a conviction under immigration law?

No. It is well established that adjudication in juvenile proceedings does not constitute a conviction for any immigration purpose, regardless of the nature of the offense. The Board of Immigration Appeals (BIA) has consistently held that "juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes."² Many, although not all, immigration criminal penalties require a conviction.³ For this reason, having a case handled in delinquency proceedings as opposed to adult criminal court is crucial to noncitizen children. Minors who are tried and convicted in adult court will generally be deemed to have convictions under immigration law, which may trigger the criminal grounds of inadmissibility or deportability and mandatory bars to immigration relief.

Child Practice Pointer:

When determining whether an adjudication was made in delinquency proceedings, you should not go solely by the age of the child, but should check the record of proceedings. If the record of proceedings indicates that proceedings were in juvenile court, you can be assured that there is no conviction.

What delinquency findings will trigger conduct-based grounds of inadmissibility and/or deportability?

Although not a conviction, a delinquency disposition still can create problems for juvenile immigrants. Certain grounds of inadmissibility and deportability do not depend upon conviction; mere "bad acts" or

status can trigger the penalty. The following are commonly applied conduct-based grounds and the juvenile court dispositions that might provide the government with evidence that the person comes within the ground. Each will be discussed in more detail below.

Delinquency Disposition	Immigration Penalty	Immigration Waiver Available?
Prostitution (being the prostitute, not the customer)	Inadmissible for engaging in prostitution	Waivers are often available
Sale, possession for sale, cultivation, manufacture, distribution, delivery, other drug trafficking offenses	Inadmissible when DHS/ICE has "reason to believe" participation in drug trafficking	No waivers except for the S, T, or U visa.
Repeated drug findings, finding of abuse, addiction to drugs	Inadmissible and deportable for drug addict or abuser	Waivers often available
Suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), perhaps repeated alcohol offenses (showing alcoholism)	Inadmissible for mental disability posing threat to self or others	Waivers may be available
Use of false documents and fraud offenses relating to false claim to citizenship	Inadmissible and deportable for false claim to U.S. citizenship	Waivers may be available, e.g., SIJS and U visa
Violations of protective or "no-contact" orders designed to prevent repeated harassment, credible threats of violence, or bodily injury	Deportable where court finds violation of domestic violence protective order designed to prevent repeated harassment, credible threats of violence, or bodily injury	Some waivers are available

Of these grounds, the most dangerous to a noncitizen child is the inadmissibility ground that is triggered merely if the government has "reason to believe" (RTB) that the young person is, has been,

or has assisted, a drug trafficker. (See next section for in depth discussion about this ground and how to argue against it.) If the child is undocumented, becoming inadmissible for "reason to believe" can be a permanent bar to obtaining lawful status despite significant equities since there are generally no waivers available for this conduct-based ground of inadmissibility.

Other delinquency findings may be amenable to a discretionary waiver of inadmissibility or deportability, depending on the immigration context. For example, an applicant for special immigrant juvenile status may either be exempt from a ground of admissibility or apply for a discretionary waiver of inadmissibility under any of the conduct grounds except for RTB.

Delinquency findings of other activities not listed above such as violent offenses including serious assault or gang-related activity do not trigger automatic immigration bars to obtaining immigration status.⁴ Such findings will be considered a negative factor in any discretionary decision, however. This is particularly true for allegations of gang-related activity since targeting noncitizen gangs is a high priority of DHS. Many juveniles have been subject to secure detention pending removal proceedings because of alleged gang activity and affiliations, and for violent offenses.

What strategies are available if my client has a criminal record?

Sealing records and obtaining expungements

DHS/ICE often uses FBI rap sheets as evidence to meet its burden of proof in establishing that a noncitizen is removable as charged (either under the grounds of inadmissibility or deportability) and ineligible for any immigration benefits that would permit the judge to grant relief from removal. Thus, one avenue to avoid this outcome is to get the juvenile record sealed with the relevant state entity (e.g., the juvenile court) where possible in order to prevent the juvenile delinquency findings from appearing on the FBI rap sheet. One problem is that a record in some cases may only be sealed once the minor turns 18; therefore, this will not protect the child if removal proceedings are initiated while still a juvenile. Additionally, even though a child may still have to disclose the delinquency on her application for lawful status, sealing the record gives the child much more control over when and how to disclose the information.

Obtaining an expungement in the vast majority of cases does not eliminate the immigration consequences of delinquent or criminal conduct. The person must still disclose the offense in her application for lawful status. An expungement, however, is evidence of rehabilitation, which may convince the adjudicator to grant the application as a matter of discretion.

How do I obtain juvenile court records?

In the case of juvenile offenses, certain records may be sealed, and obtaining them may be difficult. This may require going to court and obtaining a court order to obtain the file. If you run into trouble, you should consult with a criminal attorney who practices in the area or, if accessible, the attorney who represented the child in juvenile or criminal court (whether a private attorney or public defender). You will need a consent form signed by the child to obtain these records from the defender. For assistance in obtaining these records you can either contact your KIND pro bono coordinator or contact the juvenile defender in the area where the criminal offense occurred using the National Juvenile Defender Center (call (202) 452-0010 or go to <http://www.njdc.info/>).

How should I approach a case in which criminal issues are of concern?

To analyze a criminal case, you must answer the following questions:

- What ground of inadmissibility or deportability is the client charged with or has to overcome to obtain an immigration benefit?
- Can the government establish that the client is inadmissible or deportable under the ground(s) charged?
- What potential relief is available?
- Is the child eligible for the relief sought, or barred from relief for some reason?
- Can the child get rid of the conviction and clear up her record by expungement or other means? Will DHS accept this?

What are the crimes I should be most concerned about for my client?

Reason to believe the child engaged in or assisted in drug trafficking

A noncitizen is inadmissible if immigration authorities have *probative* and *substantial* "reason to believe" that she ever has been or assisted a drug trafficker in trafficking activities.

INA § 212(a)(2)(C).⁵

What are the penalties for "reason to believe"?

While a conviction is not necessary, a delinquency adjudication or substantial underlying evidence showing a sale or a related drug trafficking offense will alert immigration officials and serve as a reason to believe. Because "reason to believe" does not depend upon proof by conviction, the government is not limited to the record of conviction and may seek out police or probation reports, or use a defendant's out-of-court statements.

If the youth is undocumented, becoming inadmissible for "reason to believe" can be a permanent bar to obtaining lawful status despite significant equities, such as U.S. citizen family members, dependency determinations of abuse, abandonment, and/or neglect, or a strong claim of persecution that would otherwise qualify for a grant of asylum. Almost the only relief available to such a person would be an application for a U visa (victim/witness to a crime) or T visa (victim of human trafficking). This is a very serious ground that applies to juveniles as well as adults and cannot be waived in an application for SIJS status or any other application for lawful status (except for U visa or T visa applicants as discussed in other chapters).

If the child is a lawful permanent resident, the RTB inadmissibility ground cannot be used as a basis to deport/remove her unless she departs the United States and attempts to reenter, at which points she would be placed in removal proceedings.⁶ Additionally, a finding of RTB will impact a permanent resident youth's application for U.S. citizenship.

Can I contest a "reason to believe" finding by DHS?

Yes. The standard of what constitutes a "reason to believe" is lower than that required for an admission to an offense. For instance, someone whom USCIS suspected of dealing drugs in the past, even as a juvenile and without a conviction, could be found inadmissible. USCIS, however, must have more than a mere suspicion - it must have "reasonable, substantial, and probative evidence," that the person engaged in drug trafficking.⁷ This means that an arrest or charge of drug trafficking by itself should not suffice as substantial evidence to prove inadmissibility under "reason to believe." The government must support the charge with other evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person herself.⁸

The government must also present evidence that shows the applicant was *knowingly and consciously* connected to the drug trafficking in some way (e.g. aider, abettor, or beneficiary) in order to trigger this ground of inadmissibility.⁹ They must prove the essential element of intent, which is the specific intent to distribute controlled substances.¹⁰

The government will argue that an arrest, admission, and/or adjudication in delinquency proceedings to sale or possession for sale will trigger this ground. The BIA and the Eleventh Circuit, for example, have held that the facts underlying drug trafficking offenses even if the offenses themselves no longer trigger immigration consequences, can be used to exclude a person under this ground.¹¹

Are waivers available?

The U and T visas are the very few forms of relief that waive this ground of inadmissibility. The U visa waiver is located at INA § 212(d)(14) and the T visa waiver is at INA § 212(d)(13). The U visa waiver allows this ground to be waived "if the Secretary of Homeland Security considers it to be in the public or national interest to do so." The T visa provides a waiver by the Attorney General in his/her discretion provided that the particular inadmissibility ground to be waived was caused by or incident to the noncitizen's victimization. For criminal activities not incident to the trafficking, the application will only be granted in "exceptional cases." 8 CFR § 212.16(b)(2).

What other options do I have if my client is ineligible for a waiver?

Because there are no waivers for the "reason to believe" ground, advocates have developed some

creative defense strategies that may be helpful to you in representing any juvenile with a potential drug trafficking issue. Since these are just arguments, you should warn your client of the potential risks of applying for an immigration benefit if she is not already in removal proceedings. Drug trafficking charges and adjudications are taken seriously by USCIS and often lead to a denial of an immigration benefit.

Consider whether the conduct meets the definition of drug trafficking. The U.S. Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006), held that "ordinarily [illicit] 'trafficking' means some sort of commercial dealing." The BIA similarly defined trafficking as "the unlawful trading or dealing of any controlled substance" in *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). The BIA has explained that the concept of "trafficking" includes, at its essence, a "business or merchant nature, the trading or dealing in goods." Under the reason to believe standard, DHS must prove the specific intent to distribute a controlled substance.

Where possible, you should use the underlying facts of the case to show that the child did not knowingly and consciously possess drugs with the intent to deliver, distribute, or sell them. In other words, the child did not have the specific intent to sell and/or she did not participate in the drug trafficking. In a case in which the child asserts that she did not participate in the trafficking, credibility is an issue that can and should be addressed by the evidence.¹² If there is significant circumstantial evidence of the trafficking, however, the child might not be able to overcome this ground.¹³

If the child has a delinquency adjudication relating to drugs, make sure that the offense itself meets the definition of trafficking. Many state drug offenses, such as importation or transportation for personal use appear serious, but do not meet this definition. If a child has an arrest for drug trafficking, but pleads to a lesser drug offense that does not meet the definition, you should argue that the judicial proceedings themselves determined that your client did not engage in the activity. Other juvenile delinquency adjudications that clearly do not meet the definition of trafficking include: simple possession, under the influence, or possession of paraphernalia, etc. and therefore, do not necessarily give the government "reason to believe" the child has engaged in trafficking (unless it involved a suspiciously large amount). Also, some drug transactions may be so small that they arguably might not fit the definition of trafficking.¹⁴

The evidence must show that the substance allegedly trafficked is prohibited under federal drug schedules. For immigration purposes, a controlled substance is defined by federal drug schedules (lists of controlled substances) at 21 USC § 802. Often, state drug schedules are broader than the federal drug schedules and penalize offenses relating to drugs that would not be penalized under federal law. In *Matter of Paulus*, the BIA held that if the state definition of controlled substances

is broader than the federal definition (as is the case under many state laws, the subject of *Paulus*) and if the substance is not specifically identified in the record, the conviction is not necessarily of an offense "relating to" controlled substances under the federal definition, and therefore, is not a basis for deportability or inadmissibility.¹⁵ Because the government is not limited to only the official record of conviction under the reason to believe ground and can consult a broad amount of evidence, it might not be possible to assert this argument as the type of controlled substance may be named in police reports or other reports. However, you should look closely at all the evidence to see if the controlled substance was not named.

Juvenile delinquency is insufficient to trigger inadmissibility under the "reason to believe" standard. Although this is not the strongest argument, you could argue as a last resort that a reason to believe a child was a drug trafficker does not constitute a reason to believe she engaged in "illicit trafficking" since "illicit" means criminal and the child was not guilty of a crime, but merely an act of juvenile delinquency. See *Matter of MU*, 2 I&N Dec. 92 (BIA 1944).¹⁶

The sale of drugs was committed under duress making it involuntary. You should explore the underlying facts of the case to see if they support the assertion that the child had no choice in selling drugs. One example would be an impoverished child living with an abusive parent who forced the child to deal drugs. Even though the child engaged in trafficking, the facts may convince a sympathetic officer to grant the benefit where other equities exist. You should see how adjudicators in your area have handled these types of cases in the past before moving forward on this claim. In addition, if this argument may apply in your case, it would be useful to consult the Ninth Circuit's opinion in *Lopez-Umanzor v. Gonzales*.¹⁷ In that case, the petitioner was a longtime survivor of domestic violence who asserted that, contrary to police detectives' testimony, she was not a participant in her abuser's drug trafficking activities.

What if my client is a drug abuser or addict?

Drug abuse and addiction are grounds of inadmissibility and deportability. A noncitizen is inadmissible if the drug addiction or abuse is current, and deportable if the addiction or abuse occurred at any time after admission into the United States, even if she has overcome the problem.¹⁸ The issue of drug abuse and addiction generally arises during a child's medical examination, a requirement for applications for lawful status.

The standard for determining who is a drug abuser or addict for purposes of triggering deportation is not defined in INA § 237(a)(2)(B)(ii). However, it is likely that DHS will use the same standard as the

drug abuser or addict health ground of inadmissibility in INA § 212(a)(1)(A)(iv). The inadmissibility statute delegates authority to the Secretary of Health and Human Services (HHS) to define drug addict or abuser.

What is the definition of drug abuse?

The Centers for Disease Control and Prevention (CDC), has created a definition of drug abuse which can be found in its "Technical Instructions for Medical Examinations of Aliens," and 42 CFR § 34.2(g) and (h). The CDC has adopted a very strict test for "drug abuse." It states that *any* drug use that goes beyond mere "experimentation" with drugs is drug abuse. The example the CDC gave of experimentation was *taking an illegal drug one time*.

This regulation appears to define abuse as nearly synonymous with use. It is critical information for a noncitizen child who will take a government-ordered medical examination for immigration application purposes. Persons who must prove that they are not inadmissible based on a health ground (for example, SIJS applicants) generally are required to take a medical examination administered by an examining physician who has been certified to perform such tests. The U.S. Public Health Service issues regulations, adopted by the former INS,¹⁹ as well as instructions to such doctors on how to evaluate applicants under the health inadmissibility grounds.

What is the definition of drug addiction?

Drug addiction in the interim Public Health Service regulations is defined to include the non-medical use of a controlled substance, "which has resulted in physical or psychological dependence." A drug addict is defined under 42 USC § 201(k) as a person who has "lost the power of self control" over her addiction, or whose habitual drug use poses a threat to public morals, health, safety, or welfare. A "mere user" is not an addict,²⁰ but a finding of drug abuse carries separate immigration penalties as described above.

Practice Pointer:

If you are representing a permanent resident facing removal for drug addiction or abuse, you should challenge either the regulation or a finding in the case. Noncitizens who contest removability can submit evidence from an independent physician on the issue of drug abuse or addiction.²¹

Can any drug abuse or addiction make my client inadmissible?

No. In order to trigger inadmissibility, drug abuse or addiction must be "current." "Current" is defined as drug abuse or addiction in the last three years for non-medical purposes. "Non-medical use" is "more than experimentation with the substance (e.g., a single use of marijuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates)."²² Thus, a person who has not used drugs at all, or who has not engaged in "more than experimentation" with drugs for the last three years is not inadmissible as an abuser. The medical instructions state that "[w]hen a clinical question is raised as to whether the use was experimental or part of a pattern of abuse, a physician with experience in the medical evaluation of substance abusers should be consulted to assist in making this determination."²³

NOTE: Alcoholics are inadmissible under a separate ground for having a "physical or mental disorder" that can pose a threat to self or others. See discussion in the next section.

What if my client has a physical or mental disorder?

Noncitizens are inadmissible:

- If they have a "physical or mental disorder and behavior associated with the disorder" that poses "a threat to the property, safety, or welfare of the noncitizen or others," or
- If they had such a disorder and history of such dangerous behavior in the past, which is "likely to recur or to lead to other harmful behavior."²⁴

The determination of who comes within this definition will be made in accordance with regulations to be issued by the Department of Health and Human Services (HHS), which were not published at the time of this writing.

Alcoholism is identified as such a disorder. The "Technical Instructions for Medical Examinations of Aliens," published online by the Centers for Disease Control and Prevention,²⁵ lists alcoholism as a disorder inherently posing a threat to the noncitizen or others. On July 7, 2007, the Department of State issued a cable to provide guidelines to consular officials in handling cases where the applicant's criminal record shows an arrest or conviction for drunk driving or other alcohol related offenses.²⁶ The cable provides that a record of alcohol abuse or drunk driving is insufficient to automatically find an applicant ineligible under the physical or mental disorder inadmissibility ground and requires a referral to a panel physician who must make certain findings to trigger inadmissibility. The cable provides the updated language for 9 FAM 40.11 N8.3, which states,

While alcoholism constitutes a medical condition, INA 212(a)(1)(A)(iii) does not refer explicitly to alcoholics or alcoholism. Evaluation for alcohol abuse or dependence is included in the evaluation for mental and physical disorders with associated harmful behavior. An alcoholic is not ineligible to receive a visa unless there is harmful behavior associated with the disorder that has posed, or is likely to pose, a threat to the property, safety, or welfare of the alien or others. To ensure proper evaluation, you must refer applicants to panel physicians when they have a single drunk driving arrest or conviction within the last three calendar years or two or more drunk driving arrests or convictions in any time period. You also must refer cases to a panel physician if there is any other evidence to suggest an alcohol problem.

It is unclear whether these instructions will apply for juvenile delinquency adjudications for driving under the influence since they are considered "convictions." You can argue that the cable only intended to use adult convictions as evidence of alcoholism. Nonetheless, under this new guideline, a noncitizen should not be found inadmissible for a record of drunk driving arrests, delinquency adjudications, or adult convictions unless a panel physician has made two findings: (1) that there is a diagnosis or mental disorder (alcohol abuse), and (2) current harmful behavior or a history of harmful behavior related to the disorder that is likely to recur in the future.

Other persons who might be charged under this ground include persons who are suicidal, psychopathic, or show a history of sexual predator crimes. Children with a series of sexual offenses on their juvenile record (arrests and adjudications) will likely trigger this ground. Children who only have a single adjudication for a sexual offense (especially against a minor) will have additional difficulties as a matter of discretion to obtain immigration relief such as SIJS. In these cases, you should gather as many equities in the case as possible.

Is a waiver available for physical and mental disorders?

Yes. A waiver is available for most of the conduct or conditions related to this ground at INA § 212(g). Note, however, that INA § 212(g) does not waive all parts of the health-related grounds of inadmissibility. Specifically, there is no waiver for an alien inadmissible as a drug abuser or addict. For additional information on filing for a § 212(g) waiver, consult the regulations at 8 CFR § 212.7(b).

Practice Pointer:

Expert statements by medical or mental health professionals regarding current and potential danger should be used as where appropriate in order to provide a statement that the child is not an alcoholic or sexual predator. Since this is a health-related ground of inadmissibility, government-appointed doctors may make the evaluation of the child's condition. For example, a child applying for SIJS will have a medical examination with a DHS-approved doctor, who will make a determination.

What about prostitution?

A noncitizen is inadmissible, but not deportable, if she comes to the United States to engage in prostitution or has "engaged in prostitution" within the last ten years. INA § 212(a)(2)(D)(i). While no conviction is required for this finding, one or more delinquency adjudications for prostitution will serve as evidence. This includes prostitutes and people who work with them in the business, but not customers. *Matter of R.M.*, 7 I&N Dec. 392 (BIA 1957). This provision will apply even if the person engaged in prostitution in a country where it is legal. 22 CFR § 40.24(c).

A single act of prostitution does not amount to engaging in prostitution under this provision. *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549 (BIA 2008); *Matter of T-*, 6 I&N Dec. 474 (BIA 1955). Rather, "prostitution" is defined as engaging in a pattern or practice of sexual intercourse for financial or other material gain.²⁷ Engaging in prostitution also does not encompass sexual conduct that falls short of intercourse.²⁸

NOTE: A minor involved in a commercial sex trafficking act may be eligible for a T visa as a minor can't consent to commercial sex.

A noncitizen is also inadmissible, but not deportable, if she attempts to procure or import prostitutes, or receive the proceeds of prostitution. INA § 212(a)(2)(D)(ii). Solicitation of a prostitute by a customer does not fall within a ground of inadmissibility for procuring a prostitute. This ground only applies to

persons who engage in the business of obtaining prostitutes for use by others, not to isolated incidents of people hiring a prostitute. *Matter of Gonzalez-Zoquiapan, supra*.

What if my client has a finding of a violation of a domestic violence protective order?

Under INA § 237(a)(2)(B)(ii), any noncitizen who violates a court ordered protective order designed to protect someone against threats of violence, repeated harassment, or bodily injury is deportable, but not inadmissible. A protective order under this ground is defined as "any injunction²⁹ issued for the purpose of preventing violent or threatening acts of domestic violence." Therefore, if you are representing a child who has a protective order issued against her, the government will have to prove, by clear and convincing evidence, first that the protective order was a domestic violence protective order, and secondly that it was violated.

Example: Edward got into a fight with his girlfriend Sally's brother, Mike. Edward is a much larger and stronger man than Mike. Mike is afraid of him, so he got a court to issue an injunction against Edward. Edward goes to Sally's house a week later to pick her up for a date and Mike is there. Mike calls the police and Edward is arrested.

Is Edward deportable for violating a protection order under INA § 237(a)(2)(B)(ii)? No. First of all, the protective order is for Mike, not Mike's sister, and is therefore not a domestic violence protective order. Secondly, it's not clear that Edward violated the order if he did not have any reason to believe that Mike would be at Sally's house when he came to pick her up (we don't know in this example if a court found that Edward violated the protective order).

It is arguable that a noncitizen is deportable only if a state court determines that she has violated "*the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.*" A noncitizen who is found to have violated a different portion of the protection order, not related to the designated acts, is arguably not deportable. In a 2008 Ninth Circuit court case, however, the court held that where a protection order can be issued only upon a showing of reasonable proof of a past act of abuse, any violation of such protection order will trigger removal, even if the act that violates the protection order is not itself a domestic violence offense.³⁰

This ground of deportability can only be triggered by an act that takes place *after admission*. However, note that this ground *does not require a conviction*, though a court would have to make a

finding that the protective order in question had in fact been violated.

Making a false claim to U.S. citizenship

A person who falsely represents, or has falsely represented, herself to be a U.S. citizen for any purpose or benefit under the INA or any other federal or state law is inadmissible and deportable. INA § 212(a)(6)(C) and INA § 237(a)(3)(D). The language in these two provisions of the law is identical. These provisions only apply to false claims of U.S. citizenship made on or after September 30, 1996³¹. No conviction is required.

These provisions punish people for claiming U.S. citizenship for entry into the United States, and any other purpose under any federal or state law. Thus, in theory, DHS could apply these provisions to someone who is under age and uses the U.S. passport of an older friend to get into a bar and have a drink, someone who votes in an election not realizing that she's not permitted to vote, or even someone who came to the United States as a baby and believes herself to be a U.S. citizen. Although this does not appear to be the current practice, you should be wary and counsel clients to exercise caution.

What if my client made a false claim to U.S. citizenship?

By its plain language, the false claim to U.S. citizenship ground enacted in 1996 requires a showing that the false representation was made for a specific purpose - to satisfy a legal requirement or obtain a benefit that would not be available to a noncitizen under the INA or any other state or federal law. This requirement also suggests that the individual must have knowledge that the representation is false. However, the Fifth Circuit held that a false claim to citizenship under the INA does not require the same level of intent as the federal crime of false claim to citizenship under 18 USC § 911, which expressly requires a willful misrepresentation.³²

According to several circuit courts and a 1998 INS memorandum, the person to whom the false claim to citizenship is made does not have to be a U.S. government official, but can be any private individual.³³ The example provided is a private employer who receives a Form I-9 (Employment Eligibility Verification).

Courts have found the following acts to constitute false claims to U.S. citizenship:

- Falsely representing oneself as a U.S. citizen to obtain a U.S. passport.³⁴
- Using a false U.S. passport to enter the United States.³⁵
- Using a false U.S. passport to obtain a state driver's license.³⁶
- Claiming U.S. citizenship on a job application for private employment,³⁷ and
- Submitting fraudulent identification, e.g., social security card or driver's license, with an I-9 form to obtain employment.³⁸

Some other examples of false claims to citizenship that the government may also charge include: oral statements made in response to questioning by an officer to obtain a benefit such as entry into the United States, a signature on a voter registration card that specifically asked the question "Are you a U.S. citizen?," false declarations of citizenship to obtain a credit card, bank financing, a mortgage, student financial aid, or health insurance, and any other declaration under oath or penalty of perjury, in writing or orally, that the noncitizen was a U.S. citizen in order to obtain a benefit under the INA or other state or federal laws.

Example: Martha claimed U.S. citizenship so that she could get in-state tuition at her state university. DHS could assert that she is inadmissible for a false claim to citizenship. If she made this claim before September 30, 1996 she would not fall within INA § 212(a)(6)(C)(ii).

Example: Silvia always thought she was a U.S. citizen, until she finally learned she had been born in Mexico. Practitioners should argue that she is not inadmissible for any false claims to citizenship that she made because she did not know they were false.

Example: Joaquin intentionally represented himself as a U.S. citizen at the border in San Diego on January 12, 2000 in order to gain admission to the United States. Because he willfully misrepresented a material fact to a government official in order to gain a benefit under the INA and it took place after September 30, 1996, he is inadmissible for a false claim to U.S. citizenship under § 212(a)(6)(C)(ii), as well as misrepresentation of a material fact under INA § 212(a)(6)(C)(i).

What if my client's parent made the false claim of citizenship?

A false claim to U.S. citizenship does not apply if someone else made the false claim on behalf of the

applicant, such as a parent making the claim for a child.³⁹

Can children make false claims of citizenship?

Some consulates have made exceptions for children, though recently they have been backtracking from that position,⁴⁰ and some advocates are arguing that minors lack the legal capacity to make false claims to U.S. citizenship.⁴¹

Are there any exceptions to making false claims of citizenship?

There is a narrow exception to both the inadmissibility and deportability provisions. The person must meet the following requirements to not be inadmissible or deportable for a false claim to citizenship (INA § 212(a)(6)(C)(ii)(II) and INA § 237(a)(3)(D)(ii):

- Each natural or adoptive parent of the person is or was a citizen.
- Person began to reside permanently in the U.S. before the age of 16.
- Person reasonably believed at the time of such statement, violation, or claim that she was a citizen of the United States.

Child Practice Pointer:

This exception does not apply to children of lawful permanent residents or undocumented immigrants, or children with only one U.S. citizen parent, even if they really believed themselves to be U.S. citizens.

Is a waiver available?

It depends. These provisions are harsh, both because they are broadly written and because generally there are no waivers. For children seeking legal status, however, these provisions do not apply in many different applications for benefits. There is an exemption for Special Immigrant Juvenile Status applicants⁴² and a waiver is for U and T visas. In addition, a false claim to U.S. citizenship is not a bar to asylum and restriction on removal. You should look closely at the benefits the child is applying for to see if the false claim to citizenship ground applies. In any application, it will be considered as a

matter of discretion.

What if my client admits to having committed certain conduct as a minor?

Under the INA, a noncitizen who pleads or formally admits all of the elements of a controlled substance crime or a crime involving moral turpitude can be found inadmissible.⁴³ Furthermore, inadmissibility applies if the noncitizen admitted to the essential elements of either of these types of crimes. An admission occurs when: (1) the conduct in question involves a crime, (2) the government provides a plain language description of the crime, and (3) the admission is voluntary.

These provisions, however, do not apply to minors or adults who merely admit to committing acts of juvenile delinquency. The Board of Immigration Appeals held that an admission made by a minor or adult about such an offense committed when the person was a minor does not trigger inadmissibility under these grounds because the admission is of committing juvenile delinquency, not a controlled substance or moral turpitude "crime."⁴⁴ This is in keeping with consistent holdings of the BIA "that acts of juvenile delinquency are not crimes ... for immigration purposes."⁴⁵

Practice Pointer:

Answering criminal questions on the I-485

There are three pertinent questions on the I-485, adjustment of status application, relating to crimes.

Have you ever, in or outside of the U.S., knowingly committed any crime involving moral turpitude or a drug-related offense for which you have not been arrested? While there is no case law on point, if the juvenile has only a record of delinquency, there is a strong argument that the answer to this question is no because it applies to crimes, and the BIA has held that acts of delinquency are not crimes.

Have you ever, in or outside of the U.S., been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance excluding traffic violations? If your client has ever been arrested, even as a minor and even if the case was dismissed, she must answer yes to this question.

Have you ever illicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance? There are several arguments, e.g.,

the underlying offense did not meet the definition of drug trafficking, which would allow you to answer no to this question if applicable. You need to weigh the strength of your argument against the need to disclose all of the relevant evidence in the application because the issue may come up during the interview based on evidence in the officer's possession. It would also be wise to learn about local practices in your jurisdiction on this issue.

What are the other potential consequences of juvenile dispositions?

Certain juvenile dispositions can bar family unity

In a significant departure from the rule against using juvenile delinquency dispositions in immigration proceedings, 1996 legislation barred family unity benefits to persons who "commit an act of juvenile delinquency, which if committed by an adult" would be a felony involving violence or the threat of physical force against another person.⁴⁶ Although the statute does not require that a juvenile court have found that the person committed such an act, you should argue this. "Family unity" is a benefit for relatives of participants in the amnesty programs of the late 1980s, which currently affect few persons. The rule applies to family unity benefits "granted or extended" after September 30, 1996.⁴⁷

Certain juvenile dispositions can bar a U.S. Citizen or LPR from petitioning a family member

Effective July 27, 2006, Congress passed the Adam Walsh Child Protection and Safety Act of 2006 to prevent both U.S. citizens and lawful permanent residents convicted of certain crimes against minors from filing family-based petitions, unless they qualify for a narrow exception. If they are denied this narrow exception, there is no judicial review of this denial. These offenses include relatively minor crimes such as false imprisonment or solicitation of any sexual conduct. Certain serious juvenile delinquency dispositions also will be considered "convictions" for this purpose.

Whereas under the Immigration and Nationality Act, juvenile adjudications do not count as convictions for immigration purposes, section 111(a) of Adam Walsh includes juvenile delinquency adjudications as convictions if two criteria are met: (1) the offender is 14 years or older at the time of the offense, and (2) the offense was the same as or more severe than aggravated sexual abuse described in 18 USC § 2241 or was an attempt or conspiracy to commit such an offense. 18 USC § 2241 criminalizes someone who crosses a state border to engage in a sexual act with a child under the age of 12 or someone who knowingly engages in sexual conduct with a child between the ages of 12 and 15 by using force or threatening the child with serious bodily harm.

The only exception to this entire provision is if the Secretary of Homeland Security decides in her

"sole and unreviewable" discretion that the citizen or permanent resident petitioner poses no risk to the relative.

What if my child client is tried as an adult?

Minors who are tried as adults and those who have just become adults and enter the adult criminal justice system face devastating immigration consequences if a conviction results. Even minor non-violent offenses such as theft can have serious consequences. In fact, the Department of Homeland Security prioritizes immigration enforcement against people who have had contact with the criminal justice system. If your client has an immigration application pending, this can result in its denial based on statutory ineligibility or as a matter of discretion. If the person is not already in removal proceedings, it can also lead to removal being initiated.

The intersection between criminal law and immigration law is extremely complex and constantly changing. For one thing, Congress, the Board of Immigration Appeals, and the circuit courts of appeals frequently make significant changes in the law and/or decide new interpretations of the law. In addition, each state has its own criminal laws; therefore an individual analysis of how federal law applies to state criminal laws must be conducted. Because this area is so complicated, an in depth discussion is beyond the scope of this chapter.

Child Practice Pointer:

A child who has a criminal offense adjudicated in juvenile court does NOT have a conviction on her record. This will only be considered a delinquency adjudication. This is an important distinction because the immigration consequences analysis for delinquency differs significantly from the consequences of a criminal conviction resulting from adult court.

What strategies should I employ when working with my child client?

Warn your client to stay out of trouble

Due to the serious immigration consequences of crimes, it is essential to counsel young clients to stay out of trouble now and in the future. That is, while the application for relief is pending, as well as after the relief has been granted. For example, if your client's application for relief is pending, a criminal arrest or conviction may result in a longer application process as well as a denial of the application and removal from the United States. Also, if your client wins a form of relief, a criminal

arrest or conviction may have an impact on her current status, eligibility to travel abroad, become a citizen, or even stay in the United States. For example, if your client is granted asylum and she is subsequently convicted of certain crimes as an asylee, she may not be eligible to adjust to lawful permanent residence (LPR), and later obtain citizenship. In addition, certain offenses may make it possible for DHS to terminate your client's status as an asylee and seek her deportation. Lastly, even if your client is or becomes an LPR, she can still be deemed inadmissible or deportable for certain offenses. In fact, many LPRs who do not become citizens and are subsequently convicted of crimes that make them deportable are subject to detention and deportation. If they are deported, many are permanently barred from ever coming back to the United States.

For all of these reasons, it is important to caution your client to stay out of trouble, and to provide her with basic information about the possible risks and consequences of committing a crime - even if she already has legal permanent residency.⁴⁸

Mitigate the consequences of the criminal case

If your client is arrested while an application is pending or just before you file for an immigration benefit, it is imperative that you be in touch with your client's criminal defense attorney to mitigate the immigration consequences of the case. Many criminal attorneys are unaware of the immigration consequences of criminal convictions and could advise your client to do something that will make her deportable or inadmissible. You need to advise the attorney that immigration concerns are a priority. There are many resources to assist defenders in obtaining an immigration safe plea.

In addition, should you become involved in a case after a disposition in your client's criminal case, it may not be too late to withdraw the plea, appeal, vacate, or expunge the disposition. In fact, it is essential that you pursue these remedies as soon as possible because there are often strict statutes of limitations as to when you can file these motions in state court. A conviction that a trial or appeals court vacates because it was legally defective is not a conviction for immigration purposes.⁴⁹ Post-conviction relief can be a complicated matter that you may or may not consider pursuing depending on how the conviction will affect your client's immigration case, but these alternatives should be kept in mind.

Child Practice Pointer:

If your client is facing charges in juvenile court it is imperative that you work with criminal defense counsel to avoid transfer of the case to adult court even if the potential charges and sentence are lesser in adult court. If the transfer to adult court absolutely cannot be avoided, defense counsel should arrange for an adult conviction of an offense for which the juvenile *could not have been* transferred to adult court under the Federal Juvenile Delinquency Act, so that you at least can argue

that this disposition does not constitute a "conviction" for immigration purposes. See *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

Gather the facts of an existing adult criminal case to analyze the consequences

If there is *any* chance that your client has been arrested or convicted of a crime as an adult, you must find out all the facts in order for an expert to assist you in analyzing the potential consequences of the case. Don't rely on the client's memory. Often those who go through the criminal justice system do not understand or are not told what has happened, particularly children. They do not recall or never understood whether they were convicted, of what crime they were convicted, whether or how they pled, and the length of their sentence. Also, many people are embarrassed about criminal problems and may understate what really happened.

How can I get the facts about my client's criminal history?

To properly analyze the case and determine whether your client is removable as charged or ineligible for an immigration benefit, you need to see the client's official criminal records. Generally DHS will have the person's complete criminal record. DHS will obtain this record by sending the person's fingerprints to the FBI. You need to have at least as much information as DHS in order to prepare a defense.

Three records are most important:

1. *Get a copy of the FBI rap sheet for yourself.* Then you will know what DHS sees. The rap sheet is often inaccurate and incomplete. For example, it may not include every offense your client has committed, but it is a helpful cross-reference to be certain there are not additional offenses of which you are not aware. See instructions on FBI fingerprint charts, below.
2. *Client's State Rap Sheet.* Each state has a different procedure to obtain criminal records. You need state rap sheets because FBI reports are often wrong or do not contain enough detail. This document will ensure that you get your client's entire criminal record in a particular state.

3. *Get a complete copy of the record from the court where the client was convicted.* You may have to call the court clerk first to get the requirements. In many states, superior courts handle felonies and municipal courts handle misdemeanors. Many courts allow you to retrieve adult criminal records so long as you have the individual's name and date of birth. If the child or a family member lives near the court, you could also give the child or family member a letter signed by the child requesting the entire file and ask the child or family to get the file. The record will help to determine the immigration consequences of the conviction(s). In addition, if you or another attorney are going to try to clear up the criminal record, you will need a copy of the court papers.

FOIA requests

In addition, you can conduct a Freedom of Information Act (FOIA) request to obtain your client's complete immigration file, which will often contain the FBI "rap sheet." It is wise to submit a FOIA request as soon as you begin working with a client, form G-639. Fast-track processing is available in certain cases and should be utilized if at all possible (otherwise, your request may take many months or years to process).

How do I request a copy of the FBI record on my client?

To get your own copy of the child's criminal record, send a cover letter which includes a release from the child, a completed FD-258 fingerprint form,⁵⁰ and the correct fee payment in the form of a certified check (no personal checks) or money order made out to the Treasury of the United States, or pay by credit card (fill out the credit card payment form) to FBI CJIS Division: Record Request, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.⁵¹ There is a space on form FD-258 to indicate the reason for requesting the record. In this space the applicant should write something like "record check" but should not use the word "immigration." You should expect that upon receipt by the FBI it will take 8 to 10 weeks to process the request.

Citations

¹ INA § 212(a), INA § 237(a).

² *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000)(*en banc*), citing *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

³ A mere plea or admission will not result in inadmissibility. *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980).

⁴ Practitioners should be aware, however, that Congress in 2005 and 2006 actively tried to push gang legislation that would include immigration consequences for juvenile convictions involving gang related activity such as a violent or controlled substance felony. Check www.ilrc.org and www.nationalimmigrationproject.org for updates.

⁵ Additionally, this ground also applies to the spouse, son, or daughter of a drug trafficker if they received any "financial or other benefit" from the drug trafficking within the previous five years. INA § 212(a)(2)(C)(ii). An important distinction under immigration law is the difference between the statutory definition of a child (a person under 21) and the definition of a son or daughter (person over 21). The RTB family ground at INA § 212(a)(2)(C)(ii) will only apply to persons who received the benefit after reaching the age of 21. See INA § 101(b)(1).

⁶ As such, noncitizen youth who are ever implicated in any way in a drug trafficking activity should never leave the United States unless they become U.S. citizens.

⁷ *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000). See also *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence"); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979).

⁸ *Igwebuikie v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007)(unpublished)(holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute "reason to believe," and that the "reason to believe" charge triggering inadmissibility must be based on facts underlying an

arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person's subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003)(in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner); *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979)(applicant admitted to participating in an attempt to smuggle a kilogram of marijuana into the United States); *Matter of Rico*, supra (BIA did not rest on evidence of arrest for drug trafficking, but on testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found, as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident).

⁹ INA § 212(a)(2)(C)(i), 8 USC § 1182(a)(2)(C)(i).

¹⁰ See, e.g., *Matter of Rico*, supra at 186 (1977) (finding that the petitioner was a "knowing and conscious participant" in an attempt to smuggle drugs into the United States which "brings him within the provisions of section 212(a)(23) of the Act relating to 'illicit trafficker'"); *Matter of Favela*, 16 I&N Dec. 753, 755 (1979) (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under section 212(a)(23)).

¹¹ See *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979) (juvenile convicted under the Federal Youth Corrections Act of a drug trafficking offense, after expungement rendered the conviction itself of no immigration consequence, could still be excluded under the "reason to believe" ground based on facts underlying the expunged conviction); *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992)(facts underlying a drug trafficking conviction which had been expunged under the former Federal Youth Corrections Act could still be used to exclude the person under the "reason to believe" ground).

¹² See e.g., *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1052 (9th Cir. 2005).

¹³ See e.g., *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004).

¹⁴ *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003)(stating in dicta that a college student selling an ounce of marijuana to a roommate might not trigger the "reason to believe" ground of inadmissibility).

¹⁵ *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir.

2007)(affirming rule in *Paulus* where it found that conviction of possessing a "controlled substance" as defined under Calif. H&S § 11377(a), where the reviewable record did not specify a substance, was not a basis for deportability as a federally defined drug conviction).

¹⁶ Note that this argument is weakened by the fact that delinquency is not considered non-criminal for any purpose. Specifically, delinquency adjudications count towards a defendant's criminal history under the United States Sentencing Guidelines. See USSG § 4A1.1(c).

¹⁷ *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005).¹⁸ INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii), 8 USC § 1227(a)(2)(B)(ii) (deportation ground).

¹⁹ Public Health Service regulations are found at 42 CFR Part 34. The PHS regulations are adopted by INS pursuant to 8 CFR § 234.1.

²⁰ See *In re KCB*, 6 I&N Dec. 374 (BIA 1954)(holding that conviction for use or under the influence does not necessarily show addiction).

²¹ See *Matter of FSC*, 8 I&N Dec. 108 (BIA 1958) (a noncitizen's admission of addiction was held to be not sufficient when contradicted by two physician's opinions and repudiated by the alien).

²² Amendments to p. III-14, 15 of Technical Instructions for Medical Examination of Aliens.

²³ *Id.*

²⁴ INA § 212(a)(1)(A)(iii), 8 USC § 1182(a)(1)(A)(iii).

²⁵ Go to <http://www.cdc.gov/ncidod/dq/technica.htm>; or go to www.cdc.gov and use the search function for "technical instructions aliens."

²⁶ This cable can be obtained at http://travel.state.gov/visa/laws/telegrams/telegrams_3267.html or in *Interpreter Releases*, 84 No. 27 Interrel 1610 (July 16, 2007).

²⁷ *Matter of Gonzalez-Zoquiapan, supra*. See also State Department regulations at 22 CFR § 40.24(b) which defines prostitution as "engaging in promiscuous sexual intercourse for hire ... that must be based on elements of continuity and regularity, indicating a pattern of behavior of deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as

distinguished from the commission of casual or isolated acts."

²⁸ *Matter of Gonzalez-Zoquiapan, supra*. See also *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)(holding that prostitution for immigration purposes only encompasses offering sexual intercourse for a fee, as opposed to other sexual conduct).

²⁹ For example, a temporary restraining order or TRO.

³⁰ *Alanis-Alvarado v. Mukasey*, 541 F.3d 966 (9th Cir. 2008).

³¹ IIRIRA § 344(a).

³² *Theodros v. Gonzales*, 490 F.3d 396, 402 (5th Cir. 2007).

³³ *Theodros, supra*. See also *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080, 1084 (10th Cir. 2007); and INS Memorandum regarding Section 212(a)(6)(C)(ii) Relating to False Claims to U.S. Citizenship, April 6, 1998.

³⁴ *Jackson-Omier v. Gonzales*, 246 Fed. Appx. 1 (1st Cir. 2007)(unpublished); *Suarez v. Attorney General*, 2008 U.S. App. Lexis 24013 (3d Cir. 2008)(unpublished).

³⁵ *Almendarez v. Mukasey*, 282 Fed. Appx. 326 (5th Cir. 2008)(unpublished).

³⁶ *Lara-Rivas v. Mukasey*, 270 Fed. Appx. 526 (9th Cir. 2008)(unpublished).

³⁷ *Theodros, supra*.

³⁸ *Kirong v. Mukasey*, 529 F.3d 800 (8th Cir. 2008) and *Rodriguez, supra*.

³⁹ Cable, Albright, Sec. of State, DOS-17342, 96 Stat. 239978 (Sept. 17, 1997) *reprinted in* 74 *Interpreter Releases*, p. 1483-85 (Sept. 29, 1997).

⁴⁰ For example, in 2007 the U.S. Consulate in Ciudad Juarez, Mexico had a policy that, if a child is age 15 or younger, the child would not be considered to have the mental capacity to have made the false claim, and thus would not be found inadmissible. However, that policy seems to have been revoked, according to reports by practitioners.

41

In an unpublished decision, an immigration judge held that a 16-year-old minor unaccompanied by her parents who presented her U.S. citizen sister's birth certificate to inspectors at the border, but then later revealed her actual identity and status, lacked the capacity to make false claims or misrepresentations. To see all the individual arguments she raised, read "Children Lack Capacity to Make False Claims or Misrepresentations, IJ Holds" in 83 *Interpreter Releases*, 775-776 (April 24, 2006).

⁴² The Trafficking Victims Protection Reauthorization Act of 2008 provides an automatic exception to inadmissibility for special immigrant juvenile applicants of the false claim to citizenship ground of inadmissibility.

⁴³ INA § 212(a)(2)(A)(i), 8 USC § 1182(a)(2)(A)(i).

⁴⁴ *Matter of MU*, 2 I&N Dec. 92 (BIA 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility); but see *United States v. Gutierrez-Alba*, 128 F.3d 1324 (9th Cir. 1997) (without discussion of issue of juvenile delinquency, juvenile's guilty plea in adult criminal proceedings constitutes admission, regardless of whether adult criminal court prosecution was ineffective due to defendant's minority status).

⁴⁵ *Matter of Devison*, Int. Dec. 3435 (BIA 2000)(en banc), citing *Matter of C.M.*, 5 I&N Dec. 327 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

⁴⁶ IIRIRA § 383 amended the Immigration Act of 1990 § 301(e)(3) to bar from family unity a person who "(3) has committed an act of juvenile delinquency which if committed by an adult would be classified (A) a felony crime of violence that has as an element the use or attempted use of physical force against another individual, or (B) a felony offense that by its nature involves a substantial risk that physical force against another individual may be used in the course of committing the offense."

⁴⁷ IIRIRA § 383.

⁴⁸ A know your rights and responsibilities guide for immigrant youth entitled *Living in the United States: A Guide for Immigrant Youth* in English, Spanish, and Korean can be found at http://www.ilrc.org/immigration_law/remedies_for_immigrant_children_and_youth.php

⁴⁹ *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Sirhan*, 13 I&N Dec. 592 (BIA

1970).

⁵⁰ The FD-258 is the fingerprint card that applicants formerly submitted to DHS prior to the institution of the Application Support Centers.

⁵¹ To check for a sample request and updates in instructions, go to www.fbi.gov and search for "FBI Identification Record Request."