Skadden

Attorney Resources for Representing Minors in the Wake of President Trump's Recent Executive Orders

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INTRODUCTION

This guide examines current U.S. immigration laws, regulations, policies, and procedures, as well as applicable international authorities, as they relate to immigrant and refugee children. The guide was prepared to assist attorneys who are not versed in immigration law, but are interested in helping children impacted by President Trump's recent executive order titled, *Protecting the Nation from Foreign Terrorist Entry into the United States* (the "Foreign Nationals EO" or the "EO").

In addition to the Foreign Nationals EO, President Trump has signed two other executive orders altering U.S. immigration policy: *Enhancing Public Safety in the Interior of the United States* ("Interior Enforcement EO"), and *Border Security and Immigration Enforcement Improvements* ("Border Enforcement EO"). While all three of these orders significantly impact immigrant and refugee children, this guide focuses primarily on the Foreign Nationals EO.

Enforcement of the Foreign Nationals EO has already separated children in the United States from their families. For example, a two-year-old Iraqi boy who was badly burned in a refugee camp is currently stranded alone in the United States.[1] His father, who rushed the boy to the United States for emergency surgery, returned to Iraq to attend the birth of his second child. The family planned to return before the boy's next surgery and remain throughout the necessary medical treatments.[2] Those plans suddenly changed when their visas were revoked as mandated by the EO.[3] On February 4, 2017, the U.S. Department of State ("DOS") reversed course and reinstated tens of thousands of visas.[4] As of February 5, 2017, however, the family had not been able to secure travel visas to the United States.[5]

The Foreign Nationals EO also has prevented children from joining their families in the United States. The revocation of visas in the wake of the EO prohibited a 12-year-old Yemeni girl from traveling to the United States with her father, a U.S. citizen.[6] As a result of the EO, the girl was stranded in Djibouti, unable to travel to the United States or return to war-torn Yemen.[7]

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1 Christina Hager, *Executive Order Separates Badly Burned Iraqi Boy From Family*, CBS Boston (Jan. 31, 2017), http://boston.cbslocal.com/2017/01/31/iraq-boy-burned-surgery-immigration-trump-executive-order/; Jacqueline Howard & Ben Tinker, *Injured toddler's future waits on Trump's travel policy*, CNN (Feb. 5, 2017), http://www.cnn.com/2017/02/03/health/iraqi-refugee-dilbireen-profile/.

2 Howard & Tinker, *supra* n.1.

3 Hager, *supra* n.1; Notice of Supp. Authority (State Dep't Mem.), *Loughalam v. Trump*, No. 17-cv-10154 (D. Mass. Jan. 31, 2017).

4 Robert Barnes, Matt Zapotosky & Abby Phillip, *State Dept. reverses visa revocations, allows barred travelers to enter U.S.*, Washington Post (Feb. 4, 2017), https://www.washingtonpost.com/politics/state-dept-reverses-visa-revocations-allows-banned-travelers-to-enter-us/2017/02/04/0ab5880a-eaee-11e6-bf6f-301b6b443624_story.html?utm_term=.2afe69fae3e8.

5 Howard & Tinker, *supra* n.1.

6 Josh Levin, *Thanks to Donald Trump, a 12-Year Old Girl With American Parents Is Stuck in Djibouti*, The Slatest (Jan. 29, 2017), http://www.slate.com/blogs/the_slatest/2017/01/29/a_12_year_old_girl_is_stuck_in_djibouti_thanks_to_trump_s_executive_order.html.

7 *Id*.

Only a nationwide temporary restraining order ("TRO") staying enforcement of certain provisions of the EO[8] permitted the girl and her father to safely enter the United States.[9]

Children entering the United States alone also have been detained for hours at airports across the country without access to attorneys. On January 28, 2017, a five-year-old Iranian boy was reportedly detained and handcuffed for several hours at Dulles International Airport in Virginia.[10] That same day, a 16-year-old Jordanian boy was detained at George Bush International Airport in Houston and then transferred to a shelter in Chicago for unaccompanied minors without proper immigration papers.[11] The child was denied access to attorneys for four days and it remains unclear if he will be reunited with his brother in Houston.[12] While Jordan is not one of the countries enumerated in the Foreign Nationals EO, the child's attorneys "think the events are connected."[13]

The Foreign Nationals EO also prevents refugees from all nations from entering the United States for 120 days and prohibits all Syrian refugees from entering the United States indefinitely. As of February 6, 2017, U.S. Customs and Border Protection ("CBP") is not enforcing the refugee ban pursuant to a federal court's stay of enforcement.[14] However, if this provision of the EO is reinstated, it will have a devastating impact on thousands of refugee children from El Salvador, Guatemala, and Honduras seeking to join their lawfully present parents in the United States.[15] Countless other children from all over the world[16] will also be affected as the United States had previously planned to admit 110,000 refugees this year.[17]

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8 TRO, *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017).

9 Josh Levin, *The 12-Year-Old Yemeni Girl Who Was Stranded in Djibouti Is Now a U.S. Citizen*, The Slatest (Feb. 4, 2017, updated Feb. 6, 2017), http://www.slate.com/blogs/the_slatest/2017/02/04/yemeni_girl_who_was_stranded_in_djibouti_about_to_become_a_u_s_citizen.html.

10 Rachel Roberts, *Donald Trump's 'extreme vetting' sees five-year-old boy detained for hours at airport*, The Independent (Jan. 31, 2017), http://www.independent.co.uk/news/world/americas/donald-trump-extreme-vetting-five-year-old-boy-detained-for-hours-airport-washington-dc-a7552066.html.

11 Elyssa Cherney, *Detained Jordanian teen sent to Chicago couldn't talk to lawyers for days*, Chicago Tribune (Feb. 3, 2017), http://www.chicagotribune.com/news/local/breaking/ct-jordanian-teen-heartland-shelter-20170202-story.html.

12 *Id*.

13 *Id*.

14 TRO, *Washington v. Trump*, No. 2:17-cv-00141-JLR.

15 *See* Nina Lakhani, *Thousands of young Central Americans at risk as refugee ban halts key program*, The Guardian (Feb. 2, 2017), https://www.theguardian.com/us-news/2017/feb/02/central-america-young-refugees-cam-trump-travel-ban.

16 Dan Glaun, *Children as young as 9 months old among refugees barred from Northampton by President Trump's executive order*, Masslive (Jan. 31, 2017), http://www.masslive.com/news/index.ssf/2017/01/children_as_young_as_nine_mont.html.

17 Philip Connor & Jens Manuel Krogstad, *U.S. on track to reach Obama Administration's goal of resettling 110,000 refugees this year*, Pew Research Center (Jan. 20, 2017), http://www.pewresearch.org/fact-tank/2017/01/20/u-s-on-track-to-reach-obama-administrations-goal-of-resettling-110000-refugees-this-year/.

These challenging situations are currently unfolding across the United States and around the world. The dangers and obstacles facing children attempting to enter the country will continue to evolve as President Trump issues additional executive orders, agencies offer guidance, and legal challenges progress through the courts. Hopefully this guide can provide a useful resource for attorneys seeking to aid these children.

EXECUTIVE SUMMARY

This guide provides an overview of many of the established laws, practices, and procedures that can be used when representing a child seeking immigration to, or resettlement in, the United States. To the extent applicable, it also sets forth the impact of the Foreign Nationals EO on such authorities.

Section I begins by discussing the Foreign Nationals EO, as well as the judicial challenges that have been launched against it.

Section II outlines the most significant statutes governing immigration and refugee resettlement for children: the Immigration and Nationality Act ("INA"), the Trafficking Victims Protection Reauthorization Act ("TVPRA"), and the Homeland Security Act ("HSA"). The INA offers a number of important provisions:

- Children seeking asylum on their own are provided more preferable treatment, including prioritization of their applications; ability to file applications beyond the typical one-year time period; and initial jurisdiction by U.S. Citizenship and Immigration Services ("USCIS") regardless of whether the child is already in removal proceedings. Such initial jurisdiction means that children receive a second *de novo* review by an immigration judge if their first application considered by UCSIS is unsuccessful.

- Non-U.S. citizen children in the United States who do not have permanent residence and have been abused, abandoned, or neglected by one or both parents may be eligible for Special Immigration Juvenile status. This status allows a child to apply for lawful permanent resident ("LPR") status while remaining in the United States. If granted, LPR status allows that child to live and work permanently in the United States.

- Children who commit certain crimes under the age of 18 are not susceptible to the same risk of deportation or inadmissibility as adults.

The TVPRA offers special protections to children entering the United States unaccompanied by a parent or legal guardian and to child victims of trafficking:

- Unaccompanied Alien Children ("UACs"), except those from Mexico and Canada, who enter the United States must be transferred to the U.S. Department of Health and Human Services ("HHS"). This implicitly prohibits the government from returning UACs from non-contiguous countries to their countries of origin.

- UACs from contiguous countries may voluntarily return to their country of origin at no cost to them. If a UAC from a contiguous country does not agree to voluntary removal, he or she is entitled to a removal proceeding and is not subject to expedited removal.

- Victims of severe sex trafficking may be permitted to remain in the United States to facilitate the investigation and prosecution of those responsible for such crimes.

The HSA assigns certain functions related to the care of UACs to HHS and the Office of Refugee Resettlement ("ORR"), an office within HHS that is tasked with the care, custody, and placement of UACs. Under the HSA:

- ORR must take into account the best interests of the child and find the least restrictive setting in which to hold each UAC.

- The range of services for UACs must parallel the range of child welfare benefits and services available to children in foster care.

Section III provides an overview of past and current executive branch memoranda related to children:

- In a memorandum dated January 31, 2017, the Executive Office of Immigration Review ("EOIR") states that undocumented children with a sponsor in the United States and undocumented children not in detention are no longer priorities for removal proceedings. However, undocumented children in detention with no sponsor remain a priority for removal proceedings.

- The U.S. Department of Homeland Security ("DHS") continues to implement a memorandum dated November 17, 2000 that authorizes district directors and chief patrol agents to exercise favorable prosecutorial discretion in certain situations, including those involving children.

- Similarly, a June 17, 2011 memorandum instructs U.S. Immigrations and Customs Enforcement ("ICE") to give particular consideration to minors when exercising prosecutorial discretion under the Secure Communities program.

Section IV explains the *Flores* agreement, which provides three major categories of protection to all undocumented minors apprehended by the government:

- The agreement requires the government to "release a minor from its custody without unnecessary delay" to certain family members or a licensed program willing to accept legal custody of the minor, unless detention of the minor is required either (1) to secure his or her timely appearance before the immigration court, or (2) to ensure the minor's safety or that of others.

- The government is required to transfer minors to licensed facilities upon apprehension "as expeditiously *as possible*," usually within three to five days.

- The agreement also contains conditions of confinement for minors who remain held in facilities pending their release or the conclusion of immigration proceedings.

Sections V and VI provide overviews of the Deferred Action for Childhood Arrivals program ("DACA") and the Central American Minors program ("CAM"), which are specifically designed to protect children against deportation from, and unsafe passage to, the United States, respectively:

- DACA provides temporary protection from deportation for certain people who came to the United States as children and meet several guidelines. Applicants may request consideration of deferred removal action for a period of two years, subject to renewal.

- DACA does not provide lawful status or a path to citizenship, but if approved, individuals are eligible for work authorization and may apply for a social security number.

- CAM permits qualifying parents who are lawfully present in the United States to apply to bring their children and certain other relatives to the United States from El Salvador, Guatemala, or Honduras through the U.S. Refugee Admissions Program ("USRAP").

Section VII outlines select international authorities relevant to child immigration and refugee resettlement, including the U.N. Convention on the Rights of the Child ("CRC"), the Vienna Convention on Consular Relations ("VCCR"), the Model Agreement for the Repatriation of Mexican Nationals, and certain European Union ("EU") policies. These treaties and agreements set forth the following standards, among others:

- In all actions involving children, the CRC calls for governing bodies to consider the best interests of the child and requires that the facilities responsible for children must conform with the standards established by competent authorities, particularly in the areas of safety, supervision, and health.

- The VCCR provides for the rights of consular officers to access and contact nationals of their state in the custody of the receiving state.

- Local Arrangements for the Repatriation of Mexican Nationals are designed to ensure safe, orderly, and humane repatriation of Mexican Nationals from the United States to Mexico.

- Several EU directives provide for the right to representation for unaccompanied minors.

The authorities and sources outlined in this guide will assist attorneys new to immigration law, but they should not be viewed as a comprehensive manual of all relevant laws, policies, practices and procedures.[18]

[18] This guide focuses on laws and practices that are specific to children. It is not intended to address additional authorities that would apply regardless of age, such as those pertaining to students, employees, and ill or *(cont'd)*

DISCUSSION

I. Executive Order & Resulting Judicial Orders

A. "Protecting the Nation from Foreign Terrorist Entry into the United States"

On January 27, 2017, President Trump issued the Foreign Nationals EO.[19] The part of the EO that has garnered the most attention and caused significant confusion bars nearly all foreigners traveling on passports from seven Muslim-majority countries from entering the United States.[20] Although the EO itself does not name the specific countries affected, a subsequent fact sheet issued by DHS listed the following countries: Iraq, Syria, Sudan, Iran, Somalia, Libya and Yemen.[21]

In addition to prohibiting otherwise lawful travel, the EO directs the Secretary of State to suspend USRAP, barring all refugees for 120 days while DHS and interagency partners review screening procedures to ensure admitted refugees do not pose a security risk.[22] The EO singles out Syrian refugees, barring them indefinitely. Both provisions are subject to the following exception:

> Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest – including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and

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mentally ill individuals, to name a few. Attorneys are encouraged to review the issue-specific guides that have been prepared by other members of DC Pro Bono Counsel group to further their research.

[19] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). President Trump issued the EO pursuant to executive authority granted by the INA. As noted above, the President also issued two other related EOs: *Border Security and Immigration Enforcement Improvements* (Exec. Order No. 13,767) and *Enhancing Public Safety in the Interior of the United States* (Exec Order No. 13,768). These orders concern immigration and border security as they relate to federal enforcement priorities, compliance by local government with federal immigration authorities, and restatement of the Secure Communities program. A summary of their provisions and potential impact on unaccompanied minors are discussed in more detail in KIND's Feb. 1, 2017 guidance.

[20] Though not immediately clear, LPRs were later exempted from the EO. *See* Dep't of Homeland Sec., *Fact Sheet: Protecting the Nation from Foreign Terrorist Entry to the United States* (Jan. 29, 2017), https://www.dhs.gov/news/2017/01/29/protecting-nation-foreign-terrorist-entry-united-states ("Lawful Permanent Residents of the United States traveling on a valid I-551 will be allowed to board U.S. bound aircraft and will be assessed for exceptions at arrival ports of entry, as appropriate.").

[21] *Id*.

[22] Going forward, the EO caps the number of refugees that may enter the United States in FY 2017 at 50,000. Exec. Order No. 13,769, 82 Fed. Reg. at 8979, Sec. 5(d). Then-President Obama had previously announced the United States would accept 110,000 refugees in 2017. *See* Dep't of State, *Proposed Refugee Admissions for Fiscal Year 2017* (Sept. 15, 2016), https://www.state.gov/j/prm/releases/docsforcongress/261956.htm.

denying admission would cause undue hardship – and it would not pose a risk to the security or welfare of the United States.[23]

1. *Impact on Children*

While nothing in the EO expressly targets children, it appears the EO will apply to them with equal force. Additional guidance issued by DHS and CBP does not exempt children or protect them beyond the "case-by-case basis" exception outlined in the EO.

In fact, at least one unaccompanied child has already been impacted by the EO. At Dulles International Airport in Virginia, a 5-year-old U.S. citizen arriving from Iran with another family member was separated and detained for several hours.[24] The White House later defended the detention, stating that, "[t]o assume that just because of someone's age and gender that they don't pose a threat would be misguided and wrong."[25] Although the EO provides an exception for those who do not pose a security risk, the White House statement indicates children will not receive a favorable presumption allowing their otherwise lawful entry.

Moreover, the EO also has impacted countless refugee children. For example, the EO's suspension of USRAP affects all children seeking entry pursuant to CAM, which allows children from El Salvador, Guatemala, and Honduras to apply for refugee status in order to flee civil wars or violence and join parents who legally reside in the United States.[26] Other refugee children who were cleared by DOS to enter the United States beginning February 20, 2017 are currently stranded in camps and shelters overseas until further notice.[27] It is also unclear whether refugees and children in need of medical services or treatments that have been scheduled in the United States will be able to enter the United States to receive medical care.[28]

2. *Impact on Visas*

On January 27, 2017, DOS "provisionally revoke[d] all valid nonimmigrant and immigrant visas" of nationals from the aforementioned seven countries.[29] The government estimated over 100,000 visas were revoked after the EO was issued.[30] The number of children

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23 *See* Exec. Order 13,769, 82 Fed. Reg. at 8979, Sec. 5(e).

24 Roberts, *supra* n.10.

25 *Id*.

26 This program is described in more detail in Section VI.

27 Glaun, *supra* n.16.

28 Gillian Mohney, *Children and Refugees Who Planned Medical Care in the US Stuck After Trump Executive Order*, ABC News (Jan. 31, 2017), http://abcnews.go.com/Health/children-refugees-planned-medical-care-us-stuck-trump/story?id=45154920.

29 Notice of Supp. Authority (State Dep't Mem.), *Loughalam*, No. 17-cv-10154.

30 Laura Jarrett, *Over 100,000 visas revoked, government lawyer says in Virginia court*, CNN (Feb. 3, 2017), http://www.cnn.com/2017/02/03/politics/over-100000-visas-revoked-government-lawyer-says-in-virginia-court/index.html. This revocation was reversed by the State Department on February 4, 2017, immediately following a federal court's temporary restraining order on enforcement of the EO. The effect on previously revoked visas and the duration of this reversal pending a decision on the merits of the EO remains to be seen.

affected remains unclear, but reports have verified instances of children with visas being denied entry to the United States.[31] On February 4, 2017, however, DOS announced that it had reinstated the previously revoked visas.[32] Given the uncertainty and evolving circumstances, attorneys should monitor the DOS website for updates regarding visa revocation.

B. Judicial Orders

Within a week of President Trump signing the Foreign Nationals EO, at least fourteen lawsuits challenging the EO were filed across the country. While some seek relief on behalf of specific individuals and others seek class action status, nearly all the actions seek an injunction of the Foreign Nationals EO as applied to lawful entrants from the seven specified countries. Attorneys General in Virginia, Massachusetts, and New York have sought to intervene in suits brought by private plaintiffs. Several TROs have been granted and none have yet to be denied (although several remain pending).

Most significantly, on February 3, 2017, Judge James Robart of the U.S. District Court for the Western District of Washington granted a temporary nationwide stay of enforcement of the EO until the EO can be considered on the merits. Although temporary stays had been issued by courts in the U.S. District Courts for the Eastern District of Virginia and the Eastern District of New York, this stay blocks enforcement of all parts of the order nationwide. The U.S. Department of Justice ("DOJ") announced an immediate appeal. DHS also announced its full compliance with the stay pending appeal, suspending enforcement of the EO, and returning DHS's policies and procedures to the pre-EO status quo.[33]

A full list of pending actions, including their status and the basis of their claims, is provided in Appendix A. The actions generally assert the following claims:

- ***First Amendment – Establishment of Religion and Right to Association***. The EO impermissibly targets Muslims, as demonstrated by public statements, the countries banned, and the prioritization of entrants who are members of religious minorities in majority-Muslim countries.

- ***Fifth Amendment – Procedural Due Process***. The United States may not force a noncitizen to return to a country where he may face torture or persecution. *See also* the United Nations Convention Against Torture ("CAT").[34]

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[31] Kim Yonenaka, *12-year-old Yemeni Girl Stranded Overseas Due to Trump's Ban*, NBC Bay Area (Feb. 1, 2017), http://www.nbcbayarea.com/news/local/12-Year-Old-Yemeni-Girl-Stranded-Overseas-Due-to-Trumps-Ban-412502003.html.

[32] Associated Press, *State Department Reverses the Cancellation of 60,000 Visas*, Time (Feb. 4, 2017), http://time.com/4660445/state-department-visa-reverse-cancellation/.

[33] Dep't of Homeland Sec., *DHS Statement on Compliance with Recent Court Order* (Feb. 4, 2017), https://www.dhs.gov/news/2017/02/04/dhs-statement-compliance-recent-court-order, ("In accordance with the judge's ruling, DHS has suspended any and all actions implementing the affected sections of [the EO].").

[34] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

- ***Fifth Amendment – Equal Protection***. The EO discriminates against individuals based on their country of origin without sufficient justification and with animus as a motivating factor.

- ***Immigration and Nationality Act, 8 U.S.C. § 1152***. The INA grants noncitizens the opportunity to apply for asylum, withholding of removal, and CAT relief. The EO effectively mandates removal without the required opportunity to pursue these statutorily available options that permit someone to remain in the United States.

- ***Administrative Procedures Act, 5 U.S.C. §§ 551-559***. The EO violates the INA, which forbids discrimination in issuance of visas based on a person's race, nationality, place of birth, or place of residence. 8 U.S.C. § 1152(a)(1)(A). Therefore, the actions in detaining individuals were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law**.**

Additional cases are being filed and quickly evolving based on the status of the EO and its enforcement. Attorneys should monitor dockets and review new cases to stay up-to-date on potential causes of action.

II. Statutes & Related Regulations

The most significant statutes governing immigration and refugee resettlement for children are the INA, the TVPRA, and the HSA. Enforcement of the EOs would contradict certain provisions of these statutes. Where such a conflict arises between an executive order and a statute, the language of the applicable statute will control.[35]

A. Immigration and Nationality Act

The INA is the primary federal statute governing immigration and citizenship in the United States. It generally establishes (i) the types of visas available to persons traveling to the United States who are not U.S. citizens, (ii) the conditions for eligibility to receive visas to enter and remain in the United States, and (iii) the grounds for inadmissibility and deportation. This part of the guide provides an overview of the main provisions of the INA that apply to a "child," which the INA generally defines as an unmarried person under 21 years of age.[36]

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[35] *See United States v. R.I. Dep't of Corr.*, 81 F. Supp. 3d 182, 188 (D.R.I. 2015) ("[I]f an executive order conflicts with an existing statute, the executive order must fall."); *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996) (holding executive order assumptively authorized under statute advanced by government nevertheless invalid insofar as that order contradicted separate act of Congress); *see also, e.g., Texas v. United States*, 787 F.3d 733, 762–67 (5th Cir. 2015) (denying motion to stay preliminary injunction against implementation of executive order because of substantial likelihood that executive order contravened procedures in Administrative Procedures Act), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016).

[36] *See* Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. The INA is divided into titles, chapters, and sections. Although it stands alone as a body of law, the Act is also contained in the United States Code.

1. *Definition of "Child" Under the INA*

The INA defines "child" as an unmarried person under 21 years of age who is:

- A child born in wedlock[37];
- A stepchild, whether or not born out of wedlock, provided the child had not reached the age 18 at the time the marriage creating the status of stepchild occurred[38];
- A child born out of wedlock (the parents were not married at the time the child was born). If the father is filing the petition, proof of a bona fide (real and established) relationship with the father must be supplied[39];
- An adopted child if the child was adopted before the age of 16 and has lived with the adoptive parent(s) in their legal custody for at least two years prior to the date of the visa application[40]; or
- An orphan under the age of sixteen at the time a petition is filed in his or her behalf who has been adopted abroad by a U.S. citizen or is coming to the United States for adoption by a U.S. citizen.[41]

2. *Family-Based Immigration*[42]

This section discusses how (i) a U.S. citizen can petition for a child to become an LPR; and (ii) how an LPR can petition for his or her child to become an LPR.

It is important to note at the outset, however, that both scenarios require applying for a visa as a middle step. Pursuant to the Foreign Nationals EO, DOS had temporarily stopped scheduling appointments and processing immigrant visa applications for nationals and dual-

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37 INA § 101(b)(1)(A).

38 INA § 101(b)(1)(B). A stepchild is ineligible for citizenship or naturalization through the U.S. citizen stepparent unless the stepchild is adopted. A child is considered an adopted son or daughter of his or her U.S. citizen parent if (1) the child is adopted in the United States or abroad; (2) the child is adopted before he or she reaches 16 years of age (except for certain cases where the child may be adopted before reaching 18 years of age); (3) and the child is in the legal custody of the adopting parent or parents at the time of the adoption. *See* INA §§ 101(b)(1)(E)(ii), (F)(ii), § 101(c)(1). *See also* Dep't of Homeland Sec., USCIS, *Policy Manual, Vol. 12 – Citizenship & Naturalization*, Ch. 2 (n.d.), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html.

39 INA § 101(b)(1)(D).

40 INA § 101(b)(1)(E). *See also* INA § 101(b)(1)(F)(ii) (providing additional definitions for siblings of adopted children).

41 INA § 101(b)(1)(F)(i).

42 This guide does not go into significant detail regarding family-based immigration, as another research group is focusing exclusively on this topic. Because of its vital importance to children generally, however, this guide still provides a brief overview.

nationals of Iraq, Syria, Sudan, Iran, Somalia, Libya, and Yemen until further notice.[43] Since then, DOS has reversed course and is again allowing applications for visas to move forward.[44] Nevertheless, attorneys representing clients from these countries should monitor developments on this front before pursuing this path.[45]

(a) Petitions From Parents Who Are U.S. Citizens

Parents who are U.S. citizens may petition for their children to become LPRs.[46] There is no limit to the number of visas that can be utilized for this category of children in a particular year, meaning that children theoretically would not have to wait for a visa to become available.[47] Parents must file a Petition for Alien Relative (Form I-130) and an Affidavit of Support (Form I-864) to ensure the child will not become a charge of the state after entry.[48] The petitioning parent must be at least 18 years old and domiciled in the United States in order to sign the affidavit.[49]

After receipt of the visa, the child must present the visa at a U.S. port of entry. Possession of a visa, however, does not guarantee entry if one or more grounds for inadmissibility apply.[50]

Attorneys should also note that, when a child turns 21 years old, the child is no longer entitled to an immediate visa and instead must wait for a visa to become available.[51] However, the child will move to First Preference FI category – unmarried son/daughter (over 21). The child

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[43] Dep't of State, *U.S. Visas Important Announcement* (n.d.), https://travel.state.gov/content/visas/en/immigrate/Immigrate-Announcement.html.

[44] *Id*.

[45] Indeed, one of the most prominent cases filed since President Trump signed the EO dealt with this very issue. *See* Compl., *Ali v. Trump*, No. 2:17-cv-00135 (W.D. Wash., Jan. 30, 2017); *see also* Press Release, Northwest Immigrant Rights Project ("NWIRP"), NWIRP and Partners File Class Action Suit Challenging Trump Administration's "Muslim Ban" (n.d.), https://www.nwirp.org/nwirp-and-partners-file-class-action-suit-challenging-trump-administrations-muslim-ban/. In *Ali*, lawyers filed a class action lawsuit on behalf of U.S. citizens and LPRs who had filed visa petitions for their immediate family members who are nationals of the seven countries named in the EO. Specifically, the named plaintiffs are (1) a U.S. citizen and her six-year-old son who is a Somali citizen with a pending immigrant visa application; (2) a U.S. citizen and his 12-year-old daughter who is a Yemeni citizen with an approved immigrant visa application; and (3) an LPR and her 16-year-old son who is a Syrian citizen with a pending immigrant visa application. Pursuant to the EO, review of the pending visa applications had been suspended and the Yemeni plaintiff with the approved visa application was not allowed to board a flight to the United States. This litigation is ongoing.

[46] INA § 101(b)(1). *See also* Petition to Classify Alien as Immediate Relative of a U.S. Citizen or as a Preference Immigrant, 61 Fed. Reg. 13,061 (Mar. 26, 1996).

[47] INA § 201(b)(2)(A)(i).

[48] 8 C.F.R. § 204.1(a)(1).

[49] 22 C.F.R. § 40.41(b). *See also* Dep't of State, *Family-Based Immigrant Visas* (n.d.), https://travel.state.gov/content/visas/en/immigrate/family/family-preference.html.

[50] INA § 221(h) ("Nothing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this Act, or any other provision of law.") *See also* Dep't of State, *Family-Based Immigrant Visas*, *supra* n.49.

[51] INA § 201(b)(2)(A)(i).

also may be eligible to retain "child" status under the Child Status Protection Act ("CSPA") in limited circumstances.[52] Similarly, if the child marries, the child is no longer eligible for an immediate visa and converts to Third Preference F3 category – married son/daughter.[53]

(b) Petitions From Parents Who Are LPRs

An LPR may petition for family members, including children, to become LPRs by filing a Petition for Alien Relative (Form I-130).[54] After the petition is approved, the child is invited to apply for an immigrant visa.[55] A child of an LPR applying for a visa falls under the F2A preference category.[56] After the child applies for the visa, the petitioner must submit an Affidavit of Support (Form I-864) to ensure the child will not become a charge of the state after entry. The petitioner must be at least 18 years old and must be domiciled in the United States in order to sign the affidavit.[57] After receipt of the visa, the child must present the visa at a U.S. port of entry. Possession of a visa, however, does not guarantee entry if one or more grounds for inadmissibility apply.[58]

Attorneys should note that, when the child turns 21 years old, the child will convert from category F2A to category F2B – unmarried son/daughter. The child may be eligible to retain "child" status under the CSPA in limited circumstances. If the child marries, the child no longer qualifies for a visa through his or her LPR relative as there is no visa category for married child of LPRs.[59]

3. *Visas for Victims of Specific Crimes*

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act ("VTVPA"), which created two categories of nonimmigrant visas: U visas for victims of certain crimes and T visas for victims of trafficking.[60] These visas provide temporary status to individuals, including children, who are or have been victims of a severe form of trafficking or

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52 Dep't of Homeland Sec., USCIS, *Green Card for an Immediate Relative of a U.S. Citizen* (Feb. 18, 2016), https://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen.

53 *Id*.

54 8 C.F.R. § 204.1(a)(1).

55 INA § 101(a)(16); 22 C.F.R. 42.41. *See also* Dep't of Homeland Sec., USCIS, *Green Card for a Family Member of a Permanent Resident* (Feb. 18, 2016), https://www.uscis.gov/green-card/green-card-through-family/green-card-family-member-permanent-resident.

56 *See* Dep't of Homeland Sec., *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* n.52.

57 22 C.F.R. § 40.41(b). *See also* Dep't of State, *Family-Based Immigrant Visas*, *supra* n.49.

58 INA § 221(h) ("Nothing in this [Act] shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this [Act], or any other provision of law."). *See also* Dep't of State, *Family-Based Immigrant Visas*, *supra* n.49.

59 *See* Dep't of Homeland Sec., *Green Card for an Immediate Relative of a U.S. Citizen*, *supra* n.52.

60 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (200). The VTVPA is also known as the Trafficking Victims Protection Act ("TVPA") of 2000.

who have suffered substantial physical or mental abuse as victims of criminal activity. Persons who are granted T or U visas may later apply to adjust their status and become LPRs.

(a) T Visas

The T visa is an immigration benefit for noncitizens (i) who have been victims of a severe form of human trafficking, (ii) who are in the United States on account of that trafficking, and (iii) who would suffer extreme hardship involving unusual and severe harm upon removal from the United States.[61]

"Severe form of trafficking" is defined as: (1) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (2) "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 servitude, peonage, debt bondage, or slavery."[62]

Applicants must be physically present in the United States, its territories, or at a port of entry "on account of" trafficking.[63] The physical presence requirement is satisfied for an individual who is:

> present because he or she is being subjected to a severe form of trafficking in persons; [w]as recently liberated from a severe form of trafficking in persons [ ]; . . . [or] [w]as subject to severe forms of trafficking in persons at some point in the past and whose continuing presence in the United States is directly related to the original trafficking in persons.[64]

Further, applicants must demonstrate that they will "suffer extreme hardship involving unusual and severe harm upon removal."[65] A finding of extreme hardship involving unusual and severe harm "may not be based solely upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities."[66] Factors that may be considered in evaluating "extreme hardship" include, but are not limited to:

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61 *See* INA § 101(a)(15)(T).

62 22 U.S.C. § 7102(9). *See also* CAIR, *Practice Manual for Pro Bono Attorneys: Representing Unaccompanied Immigrant Children* (Jan. 2014), https://www.caircoalition.org/sites/caircoalition2016/files/PracticeManualforRepresentingUnaccompaniedImmigrantChildrenJan312014.pdf (discussing the type of trafficking and the steps required to apply for a T-Visa).

63 INA § 101(a)(15)(T)(i)(II).

64 8 C.F.R. § 214.11(g)(i)-(ii), (iv).

65 INA § 101(a)(15)(T)(i)(IV).

66 8 C.F.R. § 214.11(i)(1).

- 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 U.S. courts and criminal justice system for purposes relating to the incident;
- The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant 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 applicant;
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the applicant; and
- 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.[67]

Unless applicants for T visas are under the age of 18, they are required to comply with all reasonable requests to assist authorities in the investigation of the trafficking.[68] The T visa is a form of relief that is particularly beneficial to children because certain family members – specifically, the child's parents, children, and unmarried siblings under the age of 18 – may be included in the application.[69] The T visa thus confers an immediate immigration benefit to victims and certain family members.

(b) U Visas

The INA provides that U visas are available for individuals, including children under the age of 21, who (i) have suffered substantial physical or mental abuse on account of being victims of specified criminal activities; (ii) possess information regarding the criminal activity; and (iii) have been or are likely to be helpful in a law enforcement investigation or prosecution of such activity. [70] The qualifying crimes are defined in the INA and include abduction, blackmail,

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67 *See* 8 C.F.R. § 214.11(i)(2).

68 *See* INA § 101(a)(15)(T).

69 *Id*.

70 INA § 101(a)(15)(U).

domestic violence, kidnapping, torture, felonious assault, peonage, involuntary servitude, among others.[71]

U visa petitioners must possess credible and reliable information establishing knowledge of the details of the criminal activity or events leading up to the criminal activity. If the victim was either under the age of 16, incompetent, or incapacitated when the qualifying crime occurred, a parent, guardian, or "next friend" may possess the information about the crime on the victim's behalf.[72]

Principal recipients of U visas under age 21 can also apply for derivative U visa status for their spouses, parents, unmarried children under age 21, and unmarried siblings under the age of 18.[73] However, if the family member committed the qualifying crime against the applicant, he or she will not be eligible to obtain U visa status as a derivative.[74] Further, noncitizen parents may also apply for recognition as "indirect victims" of a crime committed against a child if: (1) the principal victim is a child under the age of 21 and is unable to provide assistance to law enforcement in the investigation or prosecution of the crime because of incompetence or incapacity; or (2) the child is deceased due to murder or manslaughter.[75]

4. *Protections for Unaccompanied Children*

UACs are defined as children who (i) lack lawful immigration status in the United States; (ii) are under the age of 18; and (iii) are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide immediate care and physical custody.[76] UACs may have entered the country without legal authorization or may have entered legally but overstayed the duration of admittance. The majority of child apprehensions occur at borders[77]; however, ICE may coordinate with local police and juvenile probation or detention officers to detain UACs within U.S. territory.[78]

UACs encountered at ports of entry are generally inadmissible to the United States.[79] Section 212(d)(5)(A) of the INA, however, allows the Secretary of Homeland Security to permit the physical entry of individuals into the United States without being admitted – an allowance

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71 *Id*.

72 Dep't of Homeland Sec., *U Visa Law Enforcement Certification Resource Guide* (n.d.), https://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (defining a "next friend" as someone dedicated to the best interests of the individual who cannot appear on his or her own behalf because of inaccessibility, mental incompetence, or other disability).

73 8 C.F.R. § 214.14(f)(4).

74 8 C.F.R. § 214.14(f)(1).

75 8 C.F.R. § 214.14(a)(14)(i).

76 6 U.S.C. § 279(g)(2).

77 William A. Kandel, Cong. Research Serv., R43599, *Unaccompanied Alien Children: An Overview* 5 (2016).

78 *Id*.

79 *See* INA § 212(a)(7).

called "parole" – on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[80]

The following sections discuss special relief from removal available to UACs, as well as rights afforded to them in removal proceedings.[81]

(a) Special Immigrant Juvenile Status

Children may be eligible for Special Immigrant Juvenile ("SIJ") status.[82] SIJ status is designed for non-U.S. citizen children in the United States who do not have permanent residence and have been abused, abandoned, or neglected by one or both parents. SIJ status allows a child to apply for LPR status while remaining in the United States. Applicants who are granted LPR status through the SIJ program can live and work permanently in the United States. They cannot petition for LPR status for their parents; however, applicants who later become naturalized U.S. citizens may petition for LPR status for siblings.[83]

(i) *Eligibility*

For a child to be eligible, a U.S. state juvenile court[84] must: (1) make the child dependent on the court (or place the child under the legal custody of a state agency or other individual

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80 INA § 212(d)(5)(A).

81 This section is limited to discussing UACs within the scope of the INA; however, there are additional policies and laws that directly affect the treatment and processing of UACs. *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) (codified in part at 8 C.F.R. §§ 236.3, 1236.3) (requiring that immigration officials detaining minors provide (1) food and drinking water; (2) medical assistance in emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect minors from others; and (6) separation from unrelated adults whenever possible); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (assigning DHS to apprehension, transfer, and repatriation of UAC and assigning HHS-ORR the responsibility of coordinating the care, placement, reunification of UACs, among other responsibilities); INA § 245(h), *as amended by* Trafficking Victims Protection Reauthorization Act of 2008, Pub. Law No. 110-457, 122 Stat. 5044 (2008), Section 235(d); 8 C.F.R. § 204.11, 205.1(a)(3)(iv). These authorities are also addressed in this guide.

82 INA § 101(a)(27)(J). The Immigration Act of 1990 amended the Immigration and Nationality Act of 1965 to add the Special Immigrant Juvenile Status. Dep't of Homeland Sec., USCIS, *History of SIJ Status* (July 12, 2011), https://www.uscis.gov/green-card/special-immigrant-juveniles/history-sij-status. *See also* Dep't of Homeland Sec., USCIS, *Special Immigrant Juveniles (SIJ) Status* (Oct. 12, 2016), https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status.

83 INA § 101(a)(27)(J)(iii)(II).

84 State law governs which court (*e.g.*, juvenile court, family court, probate court) will have jurisdiction over a juvenile requesting a dependency or custody order. U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0034, *Implementation of the Special Immigrant Juvenile* Perez-Olano *Settlement Agreement* (Apr. 4, 2011), http://www.uscis.gov//Laws/ Memoranda/2011/April/olano-settlement.pdf. The petitioner is required to obtain consent from the Secretary of DHS for a state court's exercise of discretion over the child's custody status or placement in the custody of HHS. *See* INA § 101(a)(27)(J)(ii)-(iii). Consent is necessary to show that the request for SIJS classification was not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment." Memorandum from U.S. Citizenship and Immigration Services Office of Policy and Strategy to Field Leadership, HQOPS 70/8.5, *Trafficking Victims Protection Reauthorization Act* *(cont'd)*

appointed by the state); (2) declare that the child cannot be reunited with one or both of his or her parents due to abuse, abandonment, or neglect (or a similar basis under state law); and (3) declare that it is not in the best interests of the child to be returned to his or her country of citizenship. [85] This final determination may be part of, or separate from, the dependency or custody order.[86]

The U.S. state juvenile court issuing such orders must apply state laws to examine whether a child's reunification with one or both parents is not viable due to abuse, neglect or abandonment. Juvenile court dependency orders may apply the state's definition of "dependent" or other immigration standards defined in case law.[87] Thus, attorneys should take into consideration other state law provisions, including standing requirements, residency requirements, and state statutory definitions of abuse, abandonment, neglect, or other bases for reunification.[88] Further, a change in state residence may jeopardize the case if the change occurs after obtaining the predicate order but while the SIJ application or adjustment of status is still pending.

(ii) Grounds of Inadmissibility for SIJ Status

Numerous crimes may render a petitioner ineligible for SIJ status, although the Attorney General of the United States[89] may waive certain grounds of inadmissibility on a case-by-case basis for "humanitarian purposes, family unity, or when it is otherwise in the public interest."[90] Grounds of inadmissibility that are *waivable* include: health-related grounds, prostitution and commercialized vice, association with terrorist organizations, student visa abusers, certain aliens previously removed, aliens unlawfully present after a previous immigration violation, among

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of 2008: Special Immigrant Juvenile Status Provisions 3 (Mar. 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf (citing H.R. Rep. No. 105-405, at 130 (1997)).

85 INA § 101(a)(27)(J)(i)-(iii). The language regarding reunification with one or both parents has been subject to varying interpretations, some of which would permit the granting of SIJ status to children who could be reunited with one parent, but not the other. Other interpretations would not permit this. *See* Kate M. Manuel & Michael John Garcia, Cong. Research Serv., R43623, *Unaccompanied Alien Children—Legal Issues* (2016). *See also* Dep't of Homeland Sec., USCIS, *Policy Manual, Vol. 6* (Jan. 5, 2017), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter1.html (explaining that "[c]hildren in a variety of different circumstances may be eligible for SIJ classification, including but not limited to: (1) [c]hildren who have been abused prior to their arrival in the U.S., or while in the U.S.; (2) [c]hildren in federal custody with the U.S. Department of Health and Human Services, Office of Refugee Resettlement, Unaccompanied Children's Services Program; or (3) [c]hildren in the state child welfare system in the custody of a state agency (for example, foster care), or in the custody of a person or entity appointed by a state or juvenile court.").

86 *See* INA § 101(a)(27)(J)(ii).

87 *Matter of Menjivar*, File No. A70 117 167, INS Admin. Appeals Unit (1994).

88 CAIR, *Practice Manual for Pro Bono Attorneys*, *supra* n.62, at 116.

89 INA § 101(a)(5).

90 INA § 245(h)(2)(A)-(B).

others.[91] Certain grounds of inadmissibility that are *not waivable* include: multiple criminal convictions, controlled substance traffickers, terrorist activities, and "serious adverse foreign policy consequences," among others.[92] Attorneys should be aware that the government may increasingly invoke inadmissibility based on "serious adverse foreign policy consequences"[93] in light of the EO's focus on certain countries of origin.

(b) Asylum

Children who meet the INA definition of refugee and are physically located in the United States are eligible for asylum; if they are abroad, they may qualify for refugee status. Generally, to qualify under this definition, an individual must be unwilling or unable to return to his or her home 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."[94] However, an individual otherwise qualifying under this definition may be prohibited from receiving asylum by certain statutory bars.[95] Children may apply as derivative applicants on a parent's application. This section, however, focuses on the unique issues involving UACs who apply in their own name.

UACs receive several procedural advantages over adults when seeking asylum. Unlike adults, UACs automatically receive initial jurisdiction for asylum claims with USCIS, even if they are already undergoing removal proceedings.[96] This allows them two chances at asylum: one through the application to USCIS, and if that is unsuccessful, they receive a *de novo* hearing of their asylum case from an immigration judge before they may be removed. UACs may also be eligible for asylum even if they could be removed, pursuant to a bilateral or multilateral agreement, to a third country where they would not face persecution and would have access to procedures by which to obtain asylum or equivalent temporary protection in that country.[97] In addition, UACs' asylum applications, unlike those of adults, generally need not be filed within one year of arriving in the United States.[98] Finally, in light of the increased number of UACs who have entered the country in the last several years, the government has prioritized action on UAC asylum cases over most adult cases.[99] This shift in staffing priority means their cases are heard more quickly than most adult asylum cases.

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91 *See* INA §§ 245(h)(2)(B), 212(a). *See also* ILRC, *Grounds of Inadmissibility for Special Immigrant Juveniles* (n.d.), https://www.ilrc.org/sites/default/files/resources/inadmissibility_2009.pdf.

92 See INA §§ 245(h)(2)(B), 212(a)(2)(A)-(C), 212(a)(3)(A)-(C), (E). *See also* ILRC, *Grounds of Inadmissibility for Special Immigrant Juveniles*, *supra* n.91.

93 INA § 212(a)(3)(C).

94 INA § 101(a)(42)(A).

95 INA § 208(a)(2), (b)(2).

96 INA § 208(b)(3)(C); 8 C.F.R. § 208.2(a).

97 TVPRA 2008 § 235(d)(7)(A); INA § 208(a)(2)(E).

98 INA § 208(a)(2)(E), as added by Section 235(d)(7)(A) of the TVPRA 2008.

99 Statement of Juan P. Osuna, Director, Exec. Office for Immigration Review, U.S. Dep't of Justice, Before the U.S. S. Comm. on Appropriations (July 10, 2014), http://www.appropriations.senate.gov/imo/media *(cont'd)*

As seen in the definition above, a child must satisfy each of several elements to qualify for asylum: (1) well-founded fear, (2) of persecution, (3) in connection with, (4) their race, religion, nationality, membership in a particular social group, or political opinion, (5) that the "home" government is the cause of or is unable or unwilling to protect. Because many of these elements are subjective and children experience their circumstances differently from adults, the government analyzes UAC asylum claims somewhat differently from adult applications. As an evidentiary matter, fact-finders are expected to consider the child's ability to express him or herself and remember events from early childhood, and thus generally give children more "benefit of the doubt" when considering their testimony.[100]

USCIS and some other courts have recognized that harm that may not rise to the level of persecution for an adult may constitute persecution for a child "because children, dependent on others for their care, are prone to be more severely and potentially permanently affected by trauma than adults, particularly when their caretaker is harmed."[101] In one case, the U.S. Court of Appeals for the Second Circuit considered an appeal regarding the denial of asylum for an adult who, when he was seven, fled his home village with his immediate family after his home country's military killed his sister, brother-in-law, and other relatives.[102] The court determined that even though these events took place 11 years before he entered the United States, he had demonstrated past persecution (which creates a presumption of future persecution) in part because the circumstances "could well constitute persecution to a small child totally dependent on his family and community."[103] The U.S. Court of Appeals for the Seventh Circuit similarly has recognized that "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 or whether she holds a well-founded fear of future persecution."[104] Several other circuits have reached the same conclusion.[105] The U.S. Court of Appeals for the Ninth Circuit, for instance, has instructed that asylum fact-finders must "look at the events from [the child's] perspective" and evaluate the degree of harm by their impact on a child of that age.[106] It has also emphasized that harm to the child's community or family could constitute persecution of the child.[107]

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/doc/hearings/Osuna%20EOIR%20Emergency%20Supplemental%20Testimony%20%28SAC%2010July14%29_CLEAR.pdf.

100 U.S. Citizen and Immigration Servs., RAIO, Asylum Div., Guidelines for Children's Asylum Claims in Asylum Officer Basic Training Course 34-35 (2009), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf.

101 *Id.* at 37.

102 *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d. Cir. 2006).

103 *Id.* at 150.

104 *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

105 *See, e.g., Ordonez-Quino v. Holder*, 760 F.3d 80 (1st Cir. 2014).

106 *See, e.g., Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1046 (9th Cir. 2007).

107 *Id*. at 1045-1046.

A common impetus for UAC asylum-seekers is gang violence in their home countries. Facts may reasonably support a finding that the UAC has a well-founded fear of persecution by the gang and that the "home" government is unable to offer protection. But many UACs struggle to demonstrate the required nexus between the persecution and their race, religion, nationality, membership in a particular social group, or political opinion. UACs may attempt to link the persecution to their membership in a particular social group or their political opinion (*e.g.*, anti-gang ideology), but so far this theory has had limited success.[108] Under a Bureau of Immigration Appeals standard, a social group must have "particularity" and "social distinction"[109] – a standard that creatively-delineated groups like "gang recruitment targets" typically fail to meet. In recent years, however, asylum-seekers have had some success arguing that their families qualified as a particular social group.[110] The Ninth Circuit accepted a particular social group it characterized as "a family who actively opposes the gang because its members killed [applicant's] sister."[111] That may be a promising way forward if supported by the facts.

(c) Rights in Removal Proceedings

If DHS seeks to remove a UAC from the United States, regardless of whether the UAC is just arriving or encountered while in the country, DHS must place the child in removal proceedings before an immigration judge.[112] UACs may examine evidence, contest the government's case against removability, present evidence, call witnesses, and cross-examine witnesses.[113]

As for the right to counsel, the INA provides that individuals placed in removal proceedings may be represented by counsel provided that it is at no expense to the government.[114] UACs in these proceedings must be provided access to counsel, but only to the extent practicable and consistent with statutory restrictions on the provision of counsel at the government's expense in immigration proceedings.[115] UACs have challenged the government's

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[108] *See, e.g.*, *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009) (anti-gang views did not qualify as a political opinion connected to gang persecution).

[109] *See Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014).

[110] *See Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (family qualified as particular social group when applicant and his uncle both testified against a gang).

[111] *Olmos Borja v. Holder*, 550 Fed. App'x 517, 519 (9th Cir. 2013).

[112] INA §240.

[113] INA § 240(b)(4)(B).

[114] INA § 292.

[115] 8 U.S.C. §1232(a)(5)(D), (c)(5). As described in a CRS report:

> Despite the reference to the "appointment" of counsel [in 6 U.S.C. § 279(b)(1)(A)], this provision has generally not been construed to require that [UAC] receive counsel at the government's expense because such representation is to be "consistent with the law regarding appointment of counsel that is in effect on November 25, 2002," and the INA at that time generally provided only for aliens' right to counsel at their own expense. ORR sought to meet this mandate by contracting with the Vera Institute of Justice in 2005 to develop and test ways to provide legal representation to UAC. *See* Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 5 HARV. J. LEG. 332, 340 (2013). The Institute, in turn, oversees

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corresponding failure to provide them with counsel on the ground that it violates the Due Process Clause of the U.S. Constitution. At least some federal appellate courts have indicated that the Due Process Clause could require the appointment of counsel on a case-by-case basis for individuals who are incapable of representing themselves due to "age, ignorance, or mental capacity."[116]

The issue is currently pending before the Ninth Circuit in *F.L.B. v. Lynch*.[117] In that case, the American Immigration Council and the American Civil Liberties Union, among others, argued that DOJ and other government agencies violated the Fifth Amendment Due Process Clause and INA provisions requiring a "full and fair hearing" before an immigration judge by failing to provide counsel to children who could not afford attorneys on their own. The named plaintiffs are 14 juveniles – three of whom are younger than five years old – who are currently scheduled to appear for deportation proceedings without any legal representation. The U.S. District Court for the Western District of Washington denied the government's motion to dismiss and certified a class of asylum-seeking children in the Ninth Circuit. On interlocutory appeal, a Ninth Circuit panel held that the district court lacked jurisdiction to hear the plaintiffs' claims. In December 2016, the plaintiffs petitioned the Ninth Circuit for rehearing and rehearing *en banc*. That petition remains pending.[118]

5. *Grounds for Inadmissibility and Deportation*

In general, people who wish to come to the United States must satisfy the eligibility requirements for one of the immigrant or nonimmigrant classifications. Having satisfied these criteria, however, they may still be denied admission to the United States if any grounds for

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programs at 26 nonprofit agencies that provide legal assistance to UAC throughout the country. Vera Institute for Justice, Unaccompanied Children Program, available at http://www.vera.org/project/unaccompanied-children-program (last accessed February 26, 2016). Among other things, these agencies make presentations about legal rights at local detention facilities before UAC's first court appearance, conduct individual screenings to identify UAC's legal needs and furnish information, and provide *pro bono* assistance and referrals.

Kate M. Manuel, Cong. Research Serv., R43613, *Aliens' Right to Counsel in Removal Proceedings: In Brief* 4 & n.25 (2016).

116 *See Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975); *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990); *Barthold v. INS*, 517 F.2d 689, 690-691 (5th Cir. 1975).

117 *See also* Am. Immigration Counsel, *Right to Appointed Counsel for Children in Immigration Proceedings* (n.d.), https://www.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings (discussing pending Ninth Circuit decision regarding recognition of a right to appointed counsel for children in immigration proceedings, *F.L.B. v. Lynch*, No. 2:14-cv-01026 (W.D. Wash. July 9, 2014)).

118 The case has garnered additional attention as one of the government's experts, longtime immigration judge Jack E. Weil, testified at his deposition that he has "taught immigration law literally to 3-year-olds and 4-year-olds," and while it "takes a lot of time," "[t]hey get it." *See* Jerry Markon, *Can a 3-year old represent herself in immigration court? This judge thinks so.*, Washington Post (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html?utm_term=.d815485e987d.

"inadmissibility" apply to them. Further, those who have been lawfully admitted to the United States may still be forced to leave based on one of the many grounds for "removal" (commonly called "deportation").[119] The following sections describe the specific exceptions applicable to juveniles (not just UACs) in the context of inadmissibility and removal.

(a) Criminal Offenses That May Lead to Inadmissibility and Juvenile Exception

There are certain criminal offenses that may lead to inadmissibility prior to being lawfully admitted to the United States.[120] For example, under the INA, any individual who, *inter alia*, commits a crime of moral turpitude may be denied admission to the United States.[121] However, this ground of inadmissibility will not apply if the person seeking admission committed the crime before the age of 18 and at least 5 years have passed since the end of any confinement, or if the maximum possible penalty for the crime was less than one year and the person was sentenced for no longer than six months.[122]

(b) Criminal Offenses That May Lead to Deportation and Juvenile Exception

An individual may be deported if he or she is convicted of committing certain criminal offenses.[123] The conviction must be final, and as a result, the individual cannot be deported while a direct appeal is pending. This outcome is in contrast to the inadmissibility grounds noted above, which apply even if an individual merely admits to committing a crime. With respect to juveniles, 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 for removability.[124]

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[119] Note that removal proceedings may only be commenced against a naturalized citizen after the successful completion of denaturalization proceedings to remove the individual's U.S. citizenship.

[120] INA § 212. In addition, the INA contains ten general categories of inadmissibility grounds: health-related grounds; criminal and related grounds; security and related grounds; public charge proscription; labor certification requirements and qualifications for certain immigrants; illegal entrants and immigration violators proscription; documentation requirements; ineligibility for citizenship; previous unlawful presence; and miscellaneous. *See* INA § 212(a).

[121] INA § 212.

[122] INA § 212(a)(2)(A)(ii).

[123] The INA lists six major categories of persons subject to removal. These categories cover non-citizens who (1) were inadmissible at time of entry or adjustment of status or have violated status, (2) have committed certain criminal offenses, (3) have failed to register or have falsified documents, (4) have engaged in terrorism or otherwise threatened national security or U.S. foreign policy, (5) have become a public charge, or (6) unlawfully voted. *See* INA § 237.

[124] *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) (en banc) (citing *Matter of C-M-*, 5 I&N Dec. 327 (BIA 1953) and *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981)).

(c) Unlawful Presence May Lead to Inadmissibility and Juvenile Exception

Anyone who has previously been removed or has accumulated one year or more of unlawful presence, and enters or attempts to enter the United States without being admitted, becomes permanently inadmissible.[125] The INA defines "unlawful presence" as (1) being present in the United States without being admitted or paroled; or (2) being present after the non-citizen's nonimmigrant status expires (an "overstay").[126] "Unlawful presence" is triggered when immigration authorities commence removal proceedings or when either the Bureau of Border Security or an immigration judge determines that an individual has violated the terms of nonimmigrant status.[127] Without such a determination, a violation of status other than an overstay will not trigger unlawful presence. Non-citizens in removal proceedings continue to accumulate unlawful presence unless they ultimately prevail in the proceedings.

Some exceptions apply to this ground of inadmissibility. Minors do not accumulate unlawful presence.[128] In addition, the permanent bar against individuals who attempt to enter the United States without being admitted may be waived for battered women and children.[129] Further, certain other bars to admissibility may be waived for an immigrant who is a son or daughter of a U.S. citizen or LPR if excluding the immigrant would cause extreme hardship to the citizen or LPR parent.[130]

ADDITIONAL RESOURCES

- Immigrant Legal Resource Center, *Best Practices for Representing Unaccompanied Children in Removal Proceedings* (Jan. 6, 2015), http://www.americanbar.org/content/dam/aba/administrative/immigration/UACBestPractices.authcheckdam.pdf (slide deck regarding how to work with UACs, the detention and removal process, and immigration relief options for UACs).

- CAIR, *Practice Manual for Pro Bono Attorneys: Representing Unaccompanied Immigrant Children* (Jan. 2014), https://www.caircoalition.org/sites/caircoalition2016/files/PracticeManualforRepresentingUnaccompaniedImmigrantChildrenJan312014.pdf (detailing the requirements for Virginia, Maryland, and the District of Columbia).

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[125] INA § 212(a)(9)(C). An entry or attempted entry after being removed can also trigger criminal penalties under INA § 276.

[126] INA § 212 (a)(9)(B)(ii).

[127] *See* 74 Interp. Rel. 562.

[128] INA § 212(a)(9)(B)(iii).

[129] INA § 212(a)(9)(B)(iii).

[130] INA § 212 (a)(9)(B)(v). An example of the bars that may be waived includes one that bars as inadmissible an individual who was removed after any other removal proceeding, or who left the United States while in removal proceedings, for a period of 10 years. INA § 212(a)(9)(A).

- Kate M. Manuel, Cong. Research Serv., R43716, *Asylum and Gang Violence: Legal Overview* (2014).

- Mem. from Ted Kim, Acting Chief, Asylum Div., U.S. Citizenship & Immigration Servs., Updated Procedures for Determination of Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Alien Children (May 28, 2013), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf.

- U.S. Citizenship & Immigration Servs., Asylum Div., Affirmative Asylum Procedures Manual (May 2016), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf.

- William A. Kandel, Cong. Research Serv., R43599, *Unaccompanied Alien Children: An Overview* 5 (2016).

B. Trafficking Victims Protection Reauthorization Act

The TVPRA provides special provisions for victims of trafficking, as well as children who enter the United States unaccompanied by a parent or guardian. The TVPRA was first passed as the Trafficking Victims Protection Act of 2000. When it was first adopted, it served as the cornerstone of federal anti-human-trafficking legislation. Congress reauthorized the TVPRA as the Trafficking Victims Protection Reauthorization Act in 2003, 2005, and 2008, adding additional protections to combat trafficking and protect unaccompanied children with each new authorization.[131] In 2013, the TVPRA passed as an amendment to the Violence Against Women Act.[132]

The TVPRA includes provisions that provide entry to the United States for two groups of children: (i) unaccompanied alien children and (ii) child victims of trafficking.

1. *Unaccompanied Alien Children*

Parts of the TVPRA pertain specifically to UACs. As noted above, UACs are children who (i) lack lawful immigration status in the United States; (ii) are under the age of 18; and (iii) are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide immediate care and physical custody.[133] The TVPRA directs federal agencies to abide by particular rules governing the treatment of UACs

[131] Historical versions of the TVPA and TVPRA are available at Dep't of State, *U.S. Laws on Trafficking in Persons*, https://www.state.gov/j/tip/laws/.

[132] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. XII, 127 Stat. 54, 136-160 (2013).

[133] 6 U.S.C. §279(g)(2) (2012).

upon arrival at a border of the United States. It does not, however, provide for a UAC to remain in the United States simply by virtue of being a UAC.[134]

The determination that a child is a UAC is generally made by an agent of CBP or ICE, which are both agencies of DHS. Federal government accountability investigations have revealed, however, that border agents often fail to comply with these screening procedures.[135] Moreover, critics argue that CBP agents (and, to a lesser extent, ICE agents) – as federal law enforcement officers who are often armed, uniformed, and primarily focused on the apprehension and detention of unlawful entrants at border crossings and ports of entry to the United States – are not adequately trained to recognize or screen UACs.[136] As a result, many UACs, particularly those who enter over land at the U.S.-Mexico border, do not receive the screening required by TVPRA. To determine whether a child is a UAC, and assess the child's potential rights under the TVPRA, the determining agent must ascertain the child's age,[137] whether the child is unaccompanied,[138] and the child's country of origin.[139] Although the law may provide a remedy for the wrongful determination that a child is a UAC,[140] there may be no cognizable legal remedy for a child who is unable to legally enter the country because the United States failed to classify them as a UAC. The policy for detention, treatment, and release of minors in CBP custody is also set forth in the *Flores v. Reno Settlement Agreement*, addressed later in this guide.

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134 *See* Manuel & Garcia, *supra* n.85, at 4.

135 U.S. Gov't Accountability Off., No. 15-521, Report to Congressional Committees, Unaccompanied Alien Children (2015); Dep't of Homeland Sec., OIG, *CBP's Handling of Unaccompanied Alien Children* (Sept. 2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

136 Appleseed, *Children at the Border: The Screening, Protection, and Repatriation of Unaccompanied Mexican Minors* 32-33 (2011), http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

137 8 U.S.C. § 1232(b)(4). In the absence of a reliable form of identification, the age of a person is difficult to determine. Many children do not travel with official documents and provide inconsistent answers when asked about their age. DHS allows CBP agents to use forensic age determination techniques only as a last resort, and only the lowest age in a range they generate may be considered. *See* Dep't of Homeland Sec., Admin. for Children & Families, *Program Instruction*, Log No. 09-02 (Sept. 15, 2010), https://www.acf.hhs.gov/sites/default/files/orr/orr_program_instructions_on_age_determination_of_uac.pdf.

138 Although 6 U.S.C. § 279(g)(2) implies that a child is not a UAC if the child has a parent or guardian physically present in the United States, case law has found that a child may be a UAC even if a parent is present but not available to provide necessary care for the child. *See D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (finding that HHS properly determined that child was a UAC because child's mother, who was present in the US and physically available to take the child in, was not "available to provide care" for child under the law, which requires a parent to "be available to provide what is necessary for the child's health, welfare, maintenance, and protection"). Moreover, CPB may find that a child entering with apparent guardians is a UAC where an apparent guardian cannot provide paperwork showing a legal or familial relationship with the child. *See United States ex rel. K.E.R.G. v. Sec'y of Health & Human Servs*., 638 F. App'x 154, 157 (3d Cir. 2016).

139 *See generally* 8 U.S.C. § 1232.

140 *See, e.g.*, *Cardall*, 826 F.3d 721 (denying habeas corpus and due process claims).

(a) UACs From Non-Contiguous Countries

The TVPRA states that UACs from countries non-contiguous to the United States (all countries except for Canada and Mexico) shall be transferred to the custody of HHS.[141] As such, it could be seen as implicitly providing entry into the United States for all UACs from non-contiguous countries.[142] "Entry" is generally defined as the "coming of an alien in to the United States."[143] Entry is distinguishable from "admission," which is the "lawful entry into the United States after inspection and authorization by an immigration officer."[144] Therefore, a child who enters the United States by virtue of UAC status has not necessarily reached admission to the United States.

Under the TVPRA, the agency responsible for the identification and transfer to HHS of UACs is generally CBP. The agency must inform HHS within 48 hours of the discovery or apprehension of a UAC. Within 72 hours, the UAC must be transferred to the custody of HHS.[145] This transfer of custody provision is generally interpreted to require that a UAC be retained in the custody of the federal government – and not released to families, community groups, or to any other non-federal entity – prior to transfer to HHS. Although these requirements may lead to the temporary detention of UACs, they also implicitly prohibit (a) detention of UACs for more than 72 hours;[146] and (b) return of UACs to their countries of origin prior to entry into the United States.

Upon obtaining custody of a UAC, HHS must ensure that the UAC is promptly placed in the least restrictive setting that is in the best interest of the child.[147] As discussed above, UACs in this situation must be provided access to counsel, but only to the extent practicable and consistent with statutory restrictions on the provision of counsel at the government's expense in immigration proceedings.[148]

(b) UACs From Contiguous Countries (Mexico and Canada)

At the border, CBP screens all unaccompanied children who are nationals of a country contiguous to the United States for evidence that (a) the child has been a victim of a severe form of trafficking or (b) the child fears return to his or her country of origin.[149] If neither is present,

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141 *See* 8 U.S.C. § 1232(b)(3).

142 *See* Manuel & Garcia, *supra* n.85, at 7.

143 *See id*. at n.34.

144 INA § 101(a)(13)(A); 8 U.S.C. § 1101(a)(13)(A).

145 *See* 8 U.S.C. § 1232(b)(3) ("Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.").

146 The UAC may be subject to detention by HHS; 8 U.S.C. § 1232(b).

147 *See* 8 U.S.C. § 1232(c)(2).

148 *See* 8 U.S.C. § 1232(c)(5).

149 *See* 8 U.S.C. §1232(a)(2)(A).

the child may be permitted to voluntarily withdraw his or her application and be returned to his or her country of origin at no cost to the child.[150] If a UAC from a contiguous country does not agree to voluntary removal, he or she is entitled to a removal proceeding and is not subject to expedited removal.[151] The provisions of the TVPRA requiring transfer of a UAC to the custody of HHS do not apply to children from Mexico and Canada.

2. *Child Victims of Trafficking*

The TVPRA requires that border agents interview all unaccompanied children to determine whether they have been victims of sex trafficking.[152] "Sex trafficking" is defined as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act," while "severe form of trafficking" means "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[153] The Secretary of HHS may permit a victim of "severe sex trafficking" to remain in the United States "to facilitate the investigation and prosecution of those responsible for such crime."[154]

ADDITIONAL RESOURCES

- *Coreas-Giron v. Holder*, 422 F. App'x 602, 603 (9th Cir. 2011) (a child living with a parent or guardian in the United States is not a UAC for purposes of the TVPRA 2008, even if the child entered the United States as a UAC).

- *D.B. v. Cardall*, 826 F.3d 721, 725 (4th Cir. 2016) (analyzing habeas corpus and due process claims of UAE detained by HHS despite presence of child's mother in United States).

- *United States ex rel. K.E.R.G. v. Sec'y of Health & Human Servs.*, 638 F. App'x 154, 157 (3d Cir. 2016).

- Am. Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf.

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150 *See* 8 U.S.C. § 1232(a)(2)(B).

151 *See* 8 U.S.C. § 1232(a)(5)(D).

152 *See* 8 U.S.C. § 1232(a)(2)(A).

153 *See* 22 U.S.C. § 7102(9)-(10), *amended by* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1212(b), 127 Stat. at 143-144 (2013). A separate provision of the TVPRA provides that T visas may be available to certain victims of severe sex trafficking.

154 *See* 22 U.S.C. § 7105(c)(3)(A)(i).

- Appleseed, *Children at the Border: The Screening, Protection, and Repatriation of Unaccompanied Mexican Minors* 32-33 (2011), http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

- Kate M. Manuel & Michael John Garcia, Cong. Research Serv., R43623, *Unaccompanied Alien Children—Legal Issues* n.34 (2016).

- Dep't of Homeland Sec., Admin. for Children & Families, *Program Instruction*, Log No. 09-02 (Sept. 15, 2010), https://www.acf.hhs.gov/sites/default/files/orr/orr_program_instructions_on_age_determination_of_uac.pdf.

- Lutheran Immigration & Refugee Serv., *At the Crossroads for Unaccompanied Migrant Children: Policy, Practice & Protection* (July 2015), http://lirs.org/wp-content/uploads/2015/07/LIRS_RoundtableReport_WEB.pdf.

- Deborah Lee et al., AILA, *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), https://www.ilrc.org/sites/default/files/resources/235_tvpra_practice_advisory.infonet.pdf.

C. Homeland Security Act

Congress passed the HSA, as part of the country's response to the terrorist attacks of September 11, 2001 and subsequent anthrax attacks.[155] The HSA provides the definition of UAC repeatedly referenced in this guide: a child under eighteen years of age (i.e., seventeen years of age or less) who (1) "has no lawful immigration status in the United States" and (2) has "no parent or legal guardian" who is both "present in the United States" and "available to provide

[155] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

care and physical custody."[156] In January 2017, a bill was introduced before Congress that would amend this definition but, to date, it has not been enacted.[157]

The HSA also transferred specifically enumerated functions related to the care of UACs from the Commissioner of INS to the Director of ORR.[158] The responsibilities assigned to ORR include:

- Implementing policies for the care and placement of UACs;[159]
- Coordinating the care of UACs in federal custody and "ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of [a UAC]";[160]
- Developing a plan for submission to Congress on how to ensure qualified legal counsel is "timely appointed to represent the interests of each such child";[161]
- Making and implementing placement determinations;[162]
- "[R]euniting unaccompanied alien children with a parent abroad in appropriate cases";[163]

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156 6 U.S.C. § 279(g)(2). In *Cortez-Vasquez v. Holder*, 440 Fed. Appx. 295 (5th Cir. 2011), the Fifth Circuit ruled that the petitioner did not satisfy the definition of an unaccompanied alien child for a number of stated reasons, including that "[h]e was accompanied by his adult sister, who assumed custody for him upon his release." *Id*. at 298. Because the court also concluded that the petitioner was not an unaccompanied alien child because "his parents lived in the United States and had legal immigration status," it is unclear whether the court deemed the adult sister to be a "legal guardian" within the meaning of the statute. *Id.* A bill was recently introduced in Congress, *see infra* n.157, that would amend the definition of a UAC to exclude a child who has a sibling, aunt, uncle, grandparent, or cousin in the United States, over 18 years of age, who is able to provide care and physical custody.

Another more recent case involved a mother's attempt to gain custody of her child who was being detained as a UAC. *See D.B. v. Poston*, 119 F. Supp. 3d 472 (E.D. Va. 2015), *affirmed in part, vacated in part, and remanded sub nom. D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016). The district court upheld the HHS determination that the mother was not a suitable custodian. The Fourth Circuit affirmed with respect to the mother's statutory and substantive due process claims but remanded on the procedural due process claim.

157 On January 10, 2017, Rep. Jason Chaffetz (R-Utah) introduced a bill called the "Asylum Reform and Border Protection Act of 2017." The stated purpose of the bill is "[t]o modify the treatment of unaccompanied alien children who are in Federal custody by reason of their immigration status, and for other purposes." *See* H.R. 391, 115th Cong. (1st Sess., 2017) ("Chaffetz Bill").

158 6 U.S.C. § 279(a); *see also* Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1652 (2012) ("The HSA transferred the responsibility for all unaccompanied minors in "federal custody" to the Office of Refugee Resettlement (ORR) under the Department of Health and Human Services (DHS).").

159 6 U.S.C. § 279(b)(1)(E).

160 *Id*. § 279(b)(1)(A)-(B).

161 *Id*. § 279(b)(1)(A). Note that the Chaffetz Bill proposed amendments related to legal counsel for UACs.

162 *Id*. § 279(b)(1)(C)-(D).

- Conducting investigations and inspections of facilities providing care and housing for UACs;[164] and

- Collecting statistical information on UACs.[165]

As this list demonstrates, ORR serves several important functions, but foremost in this context is the placement of UACs "who are in Federal custody by reason of their immigration status."[166] For any placement decision, ORR must place the UAC in the "least restrictive setting that is in the best interests of the child."[167] ORR must follow the placement order of priority as set by the *Flores* settlement agreement (discussed below),[168] which may involve placing UACs in a shelter facility, foster care or group home, staff-secure or secure-care facility, residential treatment center, or a special needs care facility.[169] ORR considers multiple factors when making placement decisions, including: (1) trafficking or other safety concerns, (2) special needs or issues requiring specialized services (for example, a child with language needs, mental health or medical concerns, or a youth who is pregnant or parenting), (3) possibility of heightened vulnerability to sexual abuse due to prior sexual victimization, (4) prior sexual abusiveness, (5) identification as lesbian, gay, bisexual, transgender, questioning or intersex, or gender non-conforming appearance or manner, (6) location of potential sponsor and family sponsorship options, (7) siblings in ORR custody, (8) immigration issues (for example, legal representation needs, immigration proceedings), (9) behavior, (10) criminal or juvenile background, (11) danger to self, (12) danger to the community, (13) escape risk, (14) age, (15) gender, (16) length of stay in ORR custody, and (17) location where the child or youth was apprehended.[170]

Generally, the range of services for UACs must parallel the range of child welfare benefits and services available to children in foster care.[171] These benefits include room, board, clothing, medical assistance, support services, and various services identified in the Social

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163 *Id*. § 279(b)(1)(H).

164 *Id*. § 279(b)(1)(F)-(G), (L).

165 *Id*. § 279(b)(1)(I)-(K).

166 *Id*. § 279(b)(1)(A).

167 8 U.S.C. §1232(c)(2)(A).

168 ORR, *Sponsors & Placement*, *Release of Unaccompanied Children to Sponsors in the U.S.* (Sept. 10, 2015), https://www.acf.hhs.gov/orr/about/ucs/sponsors ("The first preference for placement would be with a parent of the child. If a parent is not available, the preference is for placement with the child's legal guardian, and then to various adult family members."). Note that the *Flores* settlement is binding on the U.S. Government, including ORR. *See Ruiz ex rel. E.R. v. United States*, No. 13-CV-1241 KAM SMG, 2014 WL 4662241, at *7 (E.D.N.Y. Sept. 18, 2014) ("The *Flores* Agreement is a class action settlement agreement from *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. Sept. 16, 1996), and it is binding on the Department of Homeland Security . . . .").

169 ORR Manual, § 1.2.

170 *See* ORR Manual, § 1.2.1.

171 45 C.F.R. § 400.116(a) ("A State must provide unaccompanied minors with the same range of child welfare benefits and services available in foster care cases to other children in the State.").

Security Act plans of each State.[172] Additional services may be provided if the Director of HHS determines that such services are "reasonable and necessary for a particular child or children" and "provides written notification of such determination to the State."[173]

ORR also has issued guidance on the placement of UACs during influx emergencies, defined as those times when "[a]n increase in the number of unaccompanied children that exceeds the standard capabilities of responsible federal departments and agencies to process and transport them timely and/or to shelter them with existing resources."[174] During an influx, ORR may place UACs in specially-designated Influx Care Facilities and can establish HHS Processing Centers to speed up mandatory 72-hour waiting periods at the Influx Care Centers.[175]

III. Enforcement Memoranda

In recent years, executive branch agencies have issued several memoranda setting forth agency priorities with respect to the apprehension, detention, case processing, and removal of undocumented individuals.[176] This section highlights several such memoranda containing specific provisions that could affect children. Some of these memoranda are potentially helpful for an attorney representing an undocumented child; however, it is important to note some of the memoranda contain other provisions that potentially could work against child clients.

A. Exercising Prosecutorial Discretion (Doris Meissner, Nov. 17, 2000)

Doris Meissner, a former Commissioner of INS, issued a memorandum entitled "Exercising Prosecutorial Discretion" on November 17, 2000 (hereinafter the "Meissner Memo").[177] DHS continues to follow this memorandum with respect to how and when

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[172] 45 C.F.R. § 400.116(a) ("Allowable benefits and services may include foster care maintenance (room, board, and clothing) payments; medical assistance; support services; services identified in the State's plans under titles IV–B and IV–E of the Social Security Act; services permissible under title XX of the Social Security Act; and expenditures incurred in establishing legal responsibility.").

[173] 45 C.F.R. § 400.116(b).

[174] ORR, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 21, 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms.

[175] ORR Manual, § 1.7. One such influx occurred in 2014, as the number of UACs entering along the Southwest Border of the United States spiked. *See* Dep't of Homeland Sec., *Unaccompanied Children at the Southwest Border*, https://www.dhs.gov/unaccompanied-children.

[176] Agency memoranda that constitute "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," as opposed to substantive rules, are exempt from the notice and comment requirement applicable to agency rulemakings under the Administrative Procedures Act. 5 U.S.C. § 553(b)(3)(A); *see also Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340–41 (4th Cir. 1995) ("[I]nterpretive rules simply state what the administrative agency thinks a statute means, and only remind affected parties of existing duties.... A rule is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion."). As such, interpretive rules or general statements of policy can also be revoked by the executive branch at any time without a notice and comment period. *See id*. at 1340. Attorneys should therefore confirm the continued applicability of these memoranda before citing them.

[177] Mem. from Doris Meissner, Comm'r, Immigration & Naturalization Serv., to Regional Directors et al., Exercising Prosecutorial Discretion (Nov. 17, 2000), http://iwp.legalmomentum.org/reference/additional-

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immigration officers may exercise prosecutorial discretion in the federal government's interest at all stages of the enforcement process, including planning investigations, charging, prosecuting, and enforcing final removal orders.[178] Attorneys can utilize this memorandum to support an argument that an immigration officer should exercise prosecutorial discretion against removal by considering a child's juvenile status.[179]

The Meissner Memo sets forth several discretionary factors that may impact children, including:

- the individual's age at the time a crime was committed (if the individual has a criminal history),
- humanitarian concerns including family ties in the United States,
- the fact that an individual entered the United States at a very young age, and
- "extreme youth" (undefined by the memo) of the individual.

In addition, the Meissner Memo allows District Directors and Chief Patrol Agents, if they so choose, to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. Examples of such triggers include several that may impact children: whether the individual is a juvenile, whether the individual is an adopted child of U.S. citizens, and whether the individual has been present in the United States since childhood.

The Meissner Memo stresses that immigration officers should consider exercising favorable prosecutorial discretion "if no substantial Federal interest would be served by prosecution." The Meissner Memo defines "favorable prosecutorial discretion" as a "discretionary decision not to assert the full scope of the [agency's] enforcement authority as permitted by law." Examples of favorable exercise of prosecutorial discretion include:

- a decision not to investigate;
- a decision not to stop, question, or arrest an individual;
- a decision not to serve or file a Notice to Appear ("NTA");
- a decision not to detain an individual placed in proceedings;

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materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view.

[178] *See* Am. Immigration Counsel, *Practice Advisory: Prosecutorial Discretion: How to Advocate for your Client* 15 (Mar. 18, 2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/pd_overview_final.pdf.

[179] *See id.* at 9.

- a decision to defer action with respect to an individual;
- a decision not to seek removal of an individual;
- settlement or dismissal of a removal proceeding;
- a decision not to pursue appeal of a favorable removal decision; and
- a decision not to execute a removal order.[180]

B. Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (John Morton, June 17, 2011)

John Morton, a former Director of ICE, issued a memorandum entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" on June 17, 2011 (hereinafter the "Morton Memo"),[181] which provided guidance to ICE personnel on the exercise of prosecutorial discretion under the Secure Communities program. Although the Morton Memo was rescinded in 2014, a recent executive order may have resuscitated it.[182] The Secure

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[180] *See also* Am. Immigration Counsel, *supra* n.178, at 2 (listing areas of prosecutorial discretion that an attorney could request on behalf of a client).

The American Immigration Counsel ("AIC") encourages attorneys to "specifically request[] favorable prosecutorial discretion in meritorious cases, and build[] a case for this relief on behalf of clients, just as [they] would for affirmative relief." *Id.* AIC explains that "[i]n immigration cases, prosecutorial discretion primarily is exercised with respect to removal proceedings (including the decision whether to place a person in proceedings); detention; parole; and the execution of removal orders." *Id.*

[181] Mem. from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Field Off. Dirs., et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf, *rescinded and superseded by* Memorandum of Jeh Charles Johnson, Sec., Dep't of Homeland Security, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (hereinafter the "Johnson Memo"), *reinstated by* Interior Enforcement EO.

[182] A brief description of the Morton Memo's current status and relationship to other executive actions is in order. The Morton Memo and the Secure Communities program were rescinded as of November 20, 2014 by a memorandum entitled "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," issued by Jeh Charles Johnson, Secretary of Homeland Security, and the implementation of the DHS' Priority Enforcement Program ("PEP"). Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf, *rescinded by* Interior Enforcement EO.

PEP set forth a discretionary approach to tiered removal priorities: Priority 1 included threats to national security, border security, and public safety; Priority 2 included misdemeanants and new immigration violators; and Priority 3 included other immigration violators. It also encouraged DHS personnel to exercise discretion with respect to individuals who did not fall within the enumerated categories and whose removal would not otherwise serve an "important federal interest." The Johnson Memo also instructed DHS personnel to consider mitigating factors in exercising their prosecutorial discretion with respect to apprehension, detention, and

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Communities program instructs ICE personnel to consider whether an individual is a child or came to the United States as a young child as potential affirmative factors when exercising favorable prosecutorial discretion.[183]

The Morton Memo instructs ICE personnel to consider relevant factors when exercising prosecutorial discretion, including three that may impact children:

(1) The circumstances of the person's arrival in the United States,

(2) The manner of entry, particularly if the person came to the United States as a young child; and

(3) The person's age, with particular consideration given to minors and the elderly.

The memorandum also lists positive factors that should prompt particular care and consideration, some of which may impact cases involving children: whether the person is a minor and whether the person was present in the United States since childhood.

C. Enforcement Actions at or Focused on Sensitive Locations (John Morton, Oct. 24, 2011)

John Morton issued another memorandum, entitled "Enforcement Actions at or Focused on Sensitive Locations" on October 24, 2011 (hereinafter the "Sensitive Locations Memo").[184]

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removal, specifically enumerating several mitigating factors that would impact children including family or community ties, as well as compelling humanitarian factors such as pregnancy or a child's youth.

However, an executive order issued on January 25, 2017 rescinded the Johnson Memo and reinstituted the Secure Communities program. *See* Interior Enforcement EO, Section 10(a), https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united. Accordingly, the Morton Memo is presumably once again in effect, although the Interior Enforcement EO did not explicitly address the Morton Memo and simply stated that "[t]he Secretary [of Homeland Security] shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as 'Secure Communities' referenced in that memorandum."

[183] However, counsel should note that the Secure Communities program provides for minimal prioritization with respect to ICE arrests of unauthorized residents. According to David A. Martin, former principal deputy general counsel of DHS from January 2009 to December 2010 and former general counsel of the INS under President Clinton, this may lead to an increase in ICE arrests of long-resident unauthorized residents, "often based on mere traffic offenses." *See* David A. Martin, *Trump's order on the deportation of undocumented residents, annotated by an immigration law expert*, VOX (Jan. 31, 2017), http://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump. In contrast, under PEP, ICE officials would not ask a local law enforcement agency to continue holding a migrant in detention unless the migrant had been convicted or was a national security threat. *See* César Cuauhtémoc García Hernández, *PEP vs. Secure Communities* (July 7, 2015), http://crimmigration.com/2015/07/07/pep-vs-secure-communities/. By comparison, under Secure Communities, "[p]eople suspected of violating civil immigration law alone frequently ended up in the immigration detention and deportation pipeline." *Id.*

[184] Mem. from John Morton, Dir., U.S. Immigration and Customs Enforcement, to Field Office Dirs. et al., Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011), https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf.

This document sets forth the ICE policy regarding enforcement actions in sensitive locations such as schools, churches, and hospitals. ICE agents must receive prior approval before conducting a planned enforcement action – meaning arrests, interviews, searches, or surveillance – at a sensitive location, unless there are exigent circumstances related to a national security or terrorism matter; situations involving imminent risk of death, violence, or physical harm to any person or property; immediate arrest or pursuit of a dangerous felon, terrorist suspect, or individuals presenting an imminent danger to public safety; or situations where there is an imminent risk of destruction of evidence material to an ongoing criminal case.

One category of sensitive locations that particularly impacts children is schools, including preschools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools. CBP has clarified that the concept of "schools" includes "scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop."[185]

D. Case Processing Priorities (MaryBeth Keller, Chief Immigration Judge, Jan. 31, 2017)

Beginning in 2014, the EOIR implemented a policy by which all undocumented children and undocumented families with children were priorities for EOIR removal proceedings. The policy was put in place to deter additional immigration from Central America, as large numbers of people were fleeing from the area into the United States at that time.[186] On January 31, 2017, a memorandum entitled "Case Processing Priorities" issued by MaryBeth Keller, Chief Immigration Judge for the EOIR (hereinafter the "Keller Memo"),[187] limited case processing priorities to three categories of cases:

(1) all detained individuals,

(2) unaccompanied children in the care and custody of HHS or ORR who do not have a sponsor identified, and

(3) individuals who are released from custody on a *Rodriguez* bond.[188]

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185 *See* U.S. Customs and Border Protection, *Sensitive Locations FAQs* (n.d.), https://www.cbp.gov/border-security/sensitive-locations-faqs.

186 *See* Caitlin Dickerson & Liz Robbins, *Justice Dept. Reverses Policy That Sped Up Deportations*, N.Y. Times (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/justice-department-deportation-trump.html; Julio R. Varela, *DOJ Rescinds Obama "Rocket Docket" Immigration Policy for Unaccompanied Minors with Sponsors*, Latino USA (Feb. 1, 2017), http://latinousa.org/2017/02/01/doj-rescinds-obama-rocket-docket-immigration-policy-unaccompanied-minors-sponsors/.

187 Mem. from MaryBeth Keller, Chief Immigration J., to Immigration Judges et al., *Case Processing Priorities* (Jan. 31, 2017), http://www.aila.org/infonet/eoir-memorandum-case-processing-priorities ("Keller Memo").

188 In *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), the Ninth Circuit held that noncitizens detained pending their removal cases are entitled to an automatic bond hearing before an immigration judge at six *(cont'd)*

The Keller Memo ends the so-called "rocket docket" approach under the prior EOIR policy, which had expedited case processing and removal with respect to unaccompanied children with sponsors and children not currently in detention,[189] but it continues to prioritize unaccompanied children for deportation who are detained and do not have sponsors in the United States, "as they will remain in HHS's long-term care at the expense of the government."[190] Immigration attorneys have praised the memorandum for eliminating the prioritization of most cases involving unaccompanied children, but are concerned that the policy still includes unaccompanied children without sponsors as a priority, as this group is among the most vulnerable and includes unaccompanied children who arrive at the border alone without a parent or guardian.[191]

IV. ***Flores* Agreement**

In 1997, the government entered into a settlement agreement (the "Agreement") to resolve *Flores v. Reno*, a long-running class action brought by UACs challenging restrictive detention policies.[192] The Agreement's scope is broadly defined: it "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS."[193] Pursuant to a 2001 stipulated order, the Agreement remains in force until 45 days after the federal government publishes final regulations implementing the Agreement.[194] Because the government has never done so, the Agreement continues to bind INS successor agencies, chiefly DHS, HHS, and ORR.[195]

Importantly, the Agreement protects both accompanied minors (who do not enjoy the protections of the TVPRA) and UACs. In fact, the Agreement defines the plaintiff class as "***[a]ll minors*** who are detained in the legal custody of the INS."[196]

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months of detention. At a *Rodriguez* hearing, the government bears the burden of justifying their continued detention. *Id.*

189 *See* Dickerson & Robbins, *supra* n.186.

190 *See* Keller Memo at 3.

191 *See* Keegan Hamilton, *Immigration Double-Down*, Vice News (Feb. 2, 2017), https://news.vice.com/story/new-doj-immigration-memo-targets-most-vulnerable-kids-and-asylum-seekers-attorneys-say.

192 Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Jan. 17, 1997).

193 *Id.* ¶ 9.

194 *See* Stipulation Extending the Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (C.D. Cal. Dec. 12, 2001).

195 *See, e.g.*, *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016), *cert. granted sub. nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); *Bunikyte, ex rel. Bunikiene v. Chertoff*, No. A-07-CA-164-166-SS, 2007 WL 1074070, at *2 (W.D. Tex. Apr. 9, 2007); Agreement ¶ 1. The Homeland Security Act of 2002 transferred most INS responsibilities to ICE/DHS, but gave responsibility for care of UACs in federal custody to ORR. *See* 6 U.S.C. § 279(b)(1)(B).

196 Agreement ¶ 10 (emphasis added); *see, e.g.*, *Flores v. Lynch*, 828 F.3d at 905-07 (expressly rejecting government arguments that the Agreement's scope is limited to UACs); *Bunikyte*, 2007 WL 1074070, at *3 (same).

The Agreement contains important provisions designed to protect undocumented minors who are apprehended by federal authorities. Some of these provisions are, however, subject to broad exceptions. These exceptions and other limitations of the Agreement may help explain why few cases have been brought to enforce its terms, leaving uncertainty as to how courts might address the Agreement if the Trump administration were to pursue policies that violate its terms.

A. Protections for Undocumented Minors (and Key Exceptions)

The Agreement provides three major categories of protection to all undocumented minors apprehended by the U.S. government. At least two of these types of protection are, however, subject to significant exceptions.

1. *A "General Policy Favoring Release" From Detention While Cases Are Pending*

The Agreement requires the government to "release a minor from its custody without unnecessary delay" ***unless*** detention of the minor is required either "to secure his or her timely appearance before INS or the immigration court, or to ensure the minor's safety or that of others."[197] If detention is not required for one or both of these exceptions, minors are to be released to (in order of preference):

- A parent;
- A legal guardian;
- An adult relative (brother, sister, aunt, uncle, or grandparent);
- An adult or entity designated by the parent or guardian;
- A licensed program willing to accept legal custody; or
- In certain circumstances, another adult or entity seeking custody.[198]

This policy is one facet of the Agreement's requirement to "place each detained minor in the least restrictive setting appropriate."[199] While the TVPRA adopted a similar requirement for UACs[200] and provided for alternatives to detention in general terms,[201] the Agreement's release provisions are more specific.

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197 Agreement ¶ 14.

198 *Id.*

199 *Id.* ¶ 11.

200 8 U.S.C. § 1232(c)(2)(A).

201 6 U.S.C. § 279.

2. *Expeditious Processing*

The government is required to transfer minors to licensed facilities upon apprehension "as expeditiously *as possible*."[202] Specifically, if no exception applies, the government is required to transfer each minor from his or her initial DHS placement to a facility licensed to provide services for dependent children within three days of apprehension (if there is a vacancy in such a facility nearby) or five days (if not) unless a release from government custody is accomplished within that period.[203]

Upon apprehension, minors must also be provided upon apprehension with a notice of rights, including the right to a bond redetermination hearing if applicable.[204]

The three-to-five-day requirement is subject to two exceptions. One exception applies when there is an "influx of minors into the United States," defined as when the government has more than 130 minors eligible for placement in a licensed program.[205] Given the current pace of immigration – in recent years the government has apprehended 38,000 to 68,000 unaccompanied children annually along the southern border alone[206] – the government is likely to be able to invoke this exception.[207] As a result, the government may argue that only the "as expeditiously as possible" standard applies. There is also an exception for an "emergency," broadly defined as "any act or event that prevents the placement of minors [in licensed facilities] within the time frame provided."[208]

3. *Conditions of Confinement*

The Agreement contains specific requirements regarding conditions of confinement for minors who remain held in facilities pending their release or the conclusion of immigration

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202 Agreement ¶ 12A (emphasis added). This language suggests broad discretion, though a recent Ninth Circuit decision suggests there are limits on the government's ability to relax the requirements categorically for some categories of minors but not others. *See Flores v. Lynch*, 828 F.3d at 910 (rejecting government's attempt to exempt migrants crossing the southern border from the Agreement's provisions and suggesting that a more "suitably tailored" response might be to "relax[] certain requirements applicable to all migrants").

203 Agreement ¶ 12A. The government's obligation to secure a timely release (unless an exception applies) continues after transfer to a licensed facility. *See id.* ¶ 18 (requiring "prompt and continuous efforts . . . toward family reunification and the release of the minor").

204 *Id.* ¶ 24A.

205 *Id.* ¶ 12B.

206 Dep't of Homeland Sec., U.S. Customs and Border Protection, *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016* (Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016; *see also Walding v. United States*, 955 F. Supp. 2d 759, 765 (W.D. Tex. 2013) (describing government official's 2003 letter noting the number of children in custody had risen to 650 per day).

207 There appears to be no case challenging the use of this exception to avoid the time limits on transfer. The Ninth Circuit's recent decision noted that the Agreement provides the government "more time to release minors or place them in licensed programs" as its remedy for an influx of immigrants. *Flores v. Lynch*, 828 F.3d at 910.

208 Agreement ¶ 12B.

proceedings. The government must treat "all minors in its custody with dignity, respect, and special concern for their particular vulnerability as minors."[209] Facilities at which minors are held pending transfer to a licensed facility or release must be "safe and sanitary and . . . consistent with INS's concern for the particular vulnerability of minors."[210] They also must "provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor," and must promptly segregate unaccompanied minors from unrelated adults.[211]

Licensed facilities receiving transfers must also meet standards governing the provision of food, clothing, personal grooming items, medical and dental care, individualized needs assessments, educational services, recreation and leisure time, counseling, access to religious services, contact with family members, a reasonable right to privacy, and standards for preventing abuse.[212]

The Agreement does not provide exceptions to this set of requirements. It does, however, allow for a minor to be held in juvenile detention facilities or federal facilities with separate accommodations for minors – neither of which may be subject to these requirements – if the minor is the subject of certain criminal or delinquency proceedings, has been violent or disruptive, or is an escape risk or threat to his or her own safety.[213]

B. Potential Barriers to Enforcement

In addition to the exceptions noted above, there are some other potential barriers to full enforcement of the Agreement.

First, while the Agreement is binding and provides for judicial enforcement of its terms,[214] courts have held that the Agreement does not guarantee individual rights or recourse for specific wrongs.[215] Therefore, monetary damages are not available for violations; the Agreement

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209 *Id*. ¶ 11.

210 *Id*. ¶ 12A.

211 *Id*.

212 *See Flores v. Lynch*, 828 F.3d at 903 (citing Agreement Ex. 1); *Bunikyte*, 2007 WL 1074070, at *10-15 (evaluating a facility's compliance with these standards). A facility granted a waiver from state licensing requirements has been held not to be a "licensed" facility for purposes of the Agreement. *See Bunikyte*, 2007 WL 1074070, at *9-10.

213 Agreement ¶ 21.

214 *See Id*. ¶¶ 24, 37. Before enactment of the TVPRA, one court noted the agreement was "the *only* binding authority setting standards for the detention of minor aliens." *Bunikyte*, 2007 WL 1074070, at *2.

215 *See, e.g.*, *Walding*, 2009 WL 890265, at *20 ("[T]he Agreement's intent was to create minimum guidelines and requirements regarding the minors' conditions of confinement to try to ensure their well being and safety. It does not purport to guarantee prevention of such episodic acts of abuse by program staff such as occurred here.").

may be enforced only through actions seeking compliance with its terms.[216] Very few such cases have been brought in the two decades since the Agreement went into effect.[217]

Certain practical realities of the immigration system also present challenges to obtaining effective relief. Although the Agreement establishes a preference for releasing minors to their parents if possible, courts have held that if the parents themselves are detained, the Agreement does not require the government to release the parents.[218] Children detained with their parents can, and as a practical matter often will, remain with their parents in family detention.[219]

Additionally, it can be difficult to determine whether detention centers run by private companies are complying with the Agreement because those centers are not subject to the Freedom of Information Act.[220]

Moreover, to the extent the Agreement does impose any significant constraints, the government could attempt to persuade a court to modify it on the grounds that under Federal Rule of Civil Procedure 60(b)(5), it is "no longer equitable" to apply it as written. To do so, the government would have to first meet its burden to establish that "a significant change in circumstances warrants revision" of the Agreement.[221] If the district court found that the government met its burden and that its proposed modification was "suitably tailored to the changed circumstance," the court could modify the Agreement.[222] One of the changed circumstances which could justify a modification is a change in statutory or decisional law that makes some provision of the Agreement "impermissible."[223]

The Ninth Circuit recently upheld the district court's rejection of an Obama administration request to modify the Agreement in ways that could have vastly expanded family detention.[224] The court found that (1) the recent influx of immigrants was contemplated by the Agreement and, to the extent not contemplated, would not justify exempting a particular category of immigrants from the Agreement; (2) neither the post-INS bureaucratic reorganization, nor Congress' pre-Agreement authorization of expedited removal, prohibited the government from adhering to the Agreement; and (3) to the extent some provisions of the TVPRA were inconsistent with the Agreement, that might support modification of the

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216 *See id.* at *21.

217 López, *supra* n.158, at 1644 ("The FSA has rarely been enforced.").

218 *See Flores v. Lynch*, 828 F.3d at 908-09; *Bunikyte*, 2007 WL 1074070, at *16.

219 See *Bunikyte*, 2007 WL 1074070, at *16 (noting that the government could release minors to others while continuing to detain their parents, but that minor plaintiffs did not seek that outcome and the government is not required to pursue it in light of the exceptions).

220 U.S. Comm'n on Civil Rights, *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities* 157 (Sept. 2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

221 *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

222 *Id.*

223 *Id.* at 388.

224 *Flores v. Lynch*, 828 F.3d at 910.

conflicting provisions but did not make application of the Agreement to accompanied minors impermissible.[225]

C. Implications of Potential Trump Administration Actions

The Trump administration's early executive orders have clearly signaled a more restrictive approach to immigration detention, but leave some uncertainty regarding its plans for detained minors. In the Border Enforcement EO signed January 25, 2017, President Trump directs DHS to end "catch and release" and detain aliens pending removal.[226] While this provision makes no explicit exception for children, another section of the Order directs DHS to train staff on statutory protections to ensure that children are "properly processed" and receive "appropriate care and placement."[227] This language may leave room to interpret the Order consistent with the Agreement, but much remains open to agency interpretation.

V. Deferred Action for Childhood Arrivals

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum announcing that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal.[228] Deferred action is the use of prosecutorial discretion to defer any removal action against an individual for a certain period of time.[229] While deferred action pursuant to DACA does not provide lawful status or a path to citizenship, approved individuals are eligible for work authorization and may apply for a Social Security number.

A. General Guidelines

Individuals may apply for DACA if they meet the following conditions:

1. Were under the age of 31 as of June 15, 2012;

2. Came to the United States before reaching their 16th birthday;

3. Have continuously resided in the United States since June 15, 2007, up to the present time;

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225 *See id.*

226 Exec. Order No. 13,767 § 6, 82 Fed. Reg. 8793 (Jan. 25, 2017).

227 *Id.* § 11(e).

228 *See* Mem. from Janet Napolitano, Sec'y, Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

229 *See* Mem. from John Morton, Dir., U.S. Immigration & Customs Enforcement, On Sec. Napolitano's Mem. Concerning the Exercise of Prosecutorial Discretion 1 (June 15, 2012), https://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf (directing "ICE agents and officers [to] immediately exercise their discretion, on an individual basis, in order to prevent . . . low priority individuals from being placed into removal proceedings or removed from the United States.").

4. Were present in the United States on June 15, 2012, and at the time of making their request;

5. Had no lawful status on June 15, 2012;

6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development ("GED") certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

7. Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.[230]

For the purposes of DACA, a "significant misdemeanor" is any misdemeanor as defined by federal law that meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or

2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.[231]

Anyone requesting consideration under DACA must also be at least 15 years or older at the time of their application, with an exception for individuals that are currently in removal proceedings or have a final removal or voluntary departure order.[232]

B. Filing Process

All DACA applicants must apply for both deferred action and employment authorization by completing the following process:

1. Collect documents as evidence that the individual meets the guidelines,[233] including:

    a. Proof of identity,

    b. Proof individual came to the United States before their 16th birthday,

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230 *See* Dep't of Homeland Sec., U.S. Citizenship & Immigration Services, *Consideration of Deferred Action for Childhood Arrivals (DACA)* (Dec. 22, 2016), https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#travel ("USCIS Guidance").

231 *Id*.

232 *Id*.

233 *See* Instructions to Form I-821D, Consideration of Deferred Action for Childhood Arrivals (Jan. 9, 2017), https://www.uscis.gov/sites/default/files/files/form/i-821dinstr.pdf.

c. Proof of immigration status,

d. Proof of presence in the United States on June 15, 2012,

e. Proof individual continuously resided in United States since June 15, 2007, and

f. Proof of student status at the time of requesting DACA or proof of honorable discharge.

2. Complete the required forms:

   a. I-821D (Consideration of Deferred Action for Childhood Arrivals)

   b. I-765 (Application for Employment Authorization)

   c. I-765WS (Worksheet)

3. Mail forms to USCIS.

4. Visit an Application Support Center for biometric services.

5. Check the status of request online.[234]

C. Travel Restrictions

Applicants for DACA are subject to various travel restrictions. Any unauthorized travel outside of the United States on or after August 15, 2012, interrupts continuous residence and prevents individuals from being considered under DACA. In addition, any travel outside of the United States that occurred on or after June 15, 2007, but before August 15, 2012, will be assessed by USCIS to determine whether the travel qualifies as brief, casual, and innocent.[235] Factors considered by USCIS include whether:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;

2. The absence was not because of an order of exclusion, deportation or removal;

3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before being placed in exclusion, deportation or removal proceedings; and

[234] USCIS Guidance.

[235] The "brief, casual, and innocent" standard appears to reference the Supreme Court's decision in *Rosenberg v. Fleuti*, which set forth the standard for analyzing when an immigrant made a new entry into the United States for purposes of the immigration laws. 374 U.S. 449, 461-62 (1963).

4. The purpose of the absence and/or actions taken while outside the United States were not contrary to law.[236]

Once deferred action is granted, individuals must apply for advance parole to leave the country by filing a Form I-131, Application for Travel Document, and paying the applicable fee ($575). USCIS will determine whether the purpose for international travel is justifiable on a case-by-case basis. Generally, USCIS will only grant advance parole if travel abroad will be in furtherance of:

1. Humanitarian purposes, including travel to obtain medical treatment, attending funeral services for a family member, or visiting an ailing relative;

2. Educational purposes, such as semester-abroad programs and academic research; or

3. Employment purposes such as overseas assignments, interviews, conferences, training, or meetings with clients overseas.[237]

Given the travel restrictions, individuals currently abroad and affected by the Foreign Nationals EO are not eligible to apply for consideration under DACA. If the individual has already been granted deferred action under DACA, the international travel must have been pre-approved as discussed above. Travel outside the United States on or after August 15, 2012, without first receiving advance parole, automatically terminates deferred action under DACA.[238]

D. Legal Authorities

DACA has been the subject of litigation since its introduction in 2012. Notably, in *United States v. Texas*, the U.S. Supreme Court, in a one sentence *per curiam* opinion, let stand a decision of the U.S. Court of Appeals for the Fifth Circuit.[239] The Fifth Circuit had upheld a district court decision[240] in an action brought by 26 states, temporarily enjoining the implementation of an expanded DACA program, as well as the new deferred action for parents of U.S. citizens and lawful permanent residents ("DAPA") program.[241] Hampered by the vacant seat, the Supreme Court's split-decision effectively upheld the lower court's injunction halting the expanded DACA program. The original DACA program, however, remained in effect.

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[236] Dep't of Homeland Sec., *Frequently Asked Questions*, U.S. Citizenship and Immigration Services (Jan. 19, 2017), https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivalsprocess/frequently-asked-questions.

[237] *Id*.

[238] *Id*.

[239] 136 S.Ct. 2271 (2016) ("The judgment is affirmed by an equally divided Court.").

[240] *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

[241] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (alleging the DHS directive expanding DACA and establishing DAPA violates the Take Care Clause of the Constitution, U.S. Const. art. II, § 3,7 and the Administrative Procedure Act APA, 5 USCA §§ 500 *et seq.*).

Other litigation derived from Arizona's attempts to deny DACA recipients valid state driver's licenses. In response to the program, Arizona instituted a policy that rejected the Employment Authorization Documents ("EADs") issued to DACA recipients as proof of authorized presence for the purpose of obtaining a driver's license. Five DACA recipients filed suit, and the district court ruled that Arizona's policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment.[242] The district court entered a permanent injunction against the state, which was upheld on appeal.[243]

E. Status of DACA Under the Trump Administration

On January 23, 2017, USCIS confirmed that it was still processing DACA applications.[244] However, given that President Trump campaigned on the immediate repeal of DACA, the future of the program remains in doubt. Indeed, several media outlets have published what purport to be draft executive orders yet to be signed by President Trump.[245] Among these drafts is an order entitled "Executive Order – Ending Unconstitutional Executive Amnesties."[246] If executed, the order would immediately rescind DACA, preventing any new applications or renewals from being processed. However, as currently drafted, EADs already issued would remain valid until their expiration date.

Considering the current state of uncertainty regarding DACA, immigration law practitioners and *pro bono* counsel should monitor updates and remain apprised of revisions to the policy. Some immigration law advisers are already counseling clients that they should not apply for DACA.[247] These advisers have determined that it is unlikely the current administration will process new applications, and clients may be exposing themselves to risk by affirmatively alerting ICE to their presence.[248] Counsel must consider these factors when advising clients.

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242 *Arizona Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015).

243 *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 901, 906 (9th Cir. 2016) (declining to decide the Equal Protection claim, but affirming "the district court's order that Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens.").

244 *See* Josh Gerstein, *Trump administration signals no immediate reversal on Dreamer program*, Politico (Jan. 23, 2017), http://www.politico.com/blogs/under-the-radar/2017/01/dreamers-applications-under-trump-administration-234046.

245 *See, e.g.*, Sara Lind, *A draft executive order would make DREAMers vulnerable to deportation*, Vox (Feb. 2, 2017), http://www.vox.com/2017/2/2/14470448/daca-trump-executive-order.

246 Mem. from Andrew Bremberg, Dir., White House Domestic Policy, on Draft Exec. Order: Ending Unconstitutional Executive Amnesties (Jan. 23, 2017), https://cdn2.vox-cdn.com/uploads/chorus_asset/file/7872553/Ending_Unconstitutional_Executive_Amenities.0.pdf.

247 *See, e.g.*, Mem. from KIND Legal Services Mgmt. Team to KIND Staff & Pro Bono Attorneys, Potential Impact of Presidential Election on KIND clients (Nov. 14, 2016), https://supportkind.org/wp-content/uploads/2016/11/KIND-Update-Elections-FINAL-11.14.2016.pdf; Immigrant Legal Resource Center, *DACA: Current Status and Options* (Feb. 2, 2017), https://www.ilrc.org/sites/default/files/resources/updated_daca_feb_2017.pdf.

248 *Id*.

ADDITIONAL RESOURCES

- Maria Baldini-Potermin, *Deferred Action for Childhood Arrivals*, Immigration Trial Handbook § 2:14 (July 2016)

- Elizabeth Carlson, *A Practitioner's Guide to Deferred Action for Childhood Arrivals*, 13-03 Immigration Briefings 1 (March 2013).

- Nat'l Immigration Law Center, *Issues, Deferred Action for Childhood Arrivals*, https://www.nilc.org/issues/daca.

- U.S. Citizenship & Immigration Servs., Forms, https://www.uscis.gov/forms.

- U.S. Citizenship & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals Flier*, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/daca-consider.pdf.

- U.S. Citizenship & Immigration Servs., *How Do I Request Consideration of Deferred Action for Childhood Arrivals*, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/daca_hdi.pdf.

VI. Central American Minors Program

CAM provides a pathway for certain children from El Salvador, Guatemala, and Honduras to enter the United States as refugees through USRAP for reunification with their parents. As noted above, the Foreign Nationals EO halted CAM through its provision suspending USRAP for 120 days. However, the TRO issued in *Washington v. Trump* has ceased enforcement of certain provisions of the EO, including the bar on refugee admissions. Therefore, it is unclear as of the publication of this manual, what impact the Foreign Nationals EO will ultimately have on CAM.

CAM was first announced in November 2014 and was established "to provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States" from El Salvador, Guatemala, and Honduras.[249] The program allows certain parents who are lawfully present in the United States to request access for their children in those countries.[250] CAM began accepting applications in December 2014, and was expanded on November 15, 2016 to include additional categories of applicants.[251]

[249] Dep't of State, *In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States* (Nov. 14, 2014), https://2009-2017.state.gov/j/prm/releases/factsheets/2014/234067.htm.

[250] Attorneys should note that CAM is a program distinct from derivative visas and asylum available in family-based immigration.

[251] Dep't of State, *Expansion of the Central American Minors (CAM) Program* (Nov. 15, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/11/264332.htm.

Approximately 2,000 people have been resettled through the program, either as refugees or parolees.[252]

A. Who Qualifies for CAM

CAM allows "qualifying parents" in the United States to request refugee status for their children in El Salvador, Honduras, and Guatemala via USRAP.[253] A "qualifying parent" is any individual who is at least 18 years old and is lawfully present in the United States as a result of one of the following categories at the time of application and at the time of admission or parole of the potential beneficiary: (i) Permanent Resident Status; (ii) Temporary Protected Status; (iii) Parolee; (iv) DACA; (v) Deferred Action (non-DACA); (vi) Deferred Enforced Departure; or (vii) Withholding of Removal.[254] Parolees and persons granted deferred action must have been issued parole or deferred action for a minimum of one year. For all categories, the qualifying parent's lawful presence or status must be valid and unexpired at the time he or she files the Affidavit of Relationship Form DS-7699 (discussed below).[255]

A "qualifying child" is: (i) a "child" of a qualifying parent as defined in the INA (*i.e.* biological child, step child or legally adopted child); (ii) unmarried; (iii) under the age of 21; (iv) a national of Guatemala, El Salvador, or Honduras; and (v) residing in his or her country of nationality.[256]

In addition, effective November 15, 2016, CAM was expanded to include the following categories of applicants who "may be considered for admission into the United States when accompanied by an unmarried, under 21 qualifying child," but only if they can "independently establish that they qualify as a refugee":

1. The child, regardless of age or marital status, of a U.S.-based lawfully present parent;

2. The in-country biological parent of a qualifying child that is not legally married to the U.S.-based lawfully present parent; and

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[252] *See* Kate Linthicum, *Also barred by Trump's executive order: These heavily vetted kids from Central America*, L.A. Times (Feb. 1, 2017), http://www.latimes.com/world/mexico-americas/la-fg-central-american-refugees-20170131-story.html.

[253] *See* Dep't of State, *Central American Minors (CAM) Program* (Nov. 2016), https://www.state.gov/j/prm/ra/cam/index.htm.

[254] *See* Refugee Processing Center, *CAM Program* (Nov. 2016), https://www.wrapsnet.org/s/CAM-Frequently-Asked-Questions-November-2016.docx.

[255] Parents who are American citizens cannot apply to bring their children to the United States through CAM, but rather should petition for relatives via consular mechanisms and visas. (*See supra* Section II.A.2 – Family-Based Immigration.) Refugees and asylees are also unable to apply through CAM and instead are eligible to apply for spouses and unmarried children to join them in the United States through the Form I-730, Refugee/Asylee Relative Petition, and those from designated countries may also apply for relatives through the P-3 Family Reunification Program, if their relatives have fled to another country.

[256] *See* Dep't of State, *Central American Minors (CAM) Program*, *supra* n.253.

3. The caregiver of a qualifying child who is related to either the U.S.-based lawfully present parent or the qualifying child.[257]

B. Process for Applying for CAM[258]

A qualifying parent must complete an Affidavit of Relationship Form DS-7699 ("DS-7699") in person at a designated refugee resettlement agency.[259] At that time, the applicant must present: (i) proof of qualifying parent's identity; (ii) proof of qualifying lawful presence in the United States; (iii) a current passport size photo of the qualifying child (and any eligible family members[260]) on whose behalf the Form DS-7699 is filed (*i.e.* the beneficiary); (iv) birth certificates for all potential beneficiaries; and (v) legal adoption papers if filing for an adopted child.[261]

Once the request is filed, the potential beneficiary will be contacted and assisted by the International Organization for Migration ("IOM"), which manages the U.S. Resettlement Support Center in America. The admission process then includes: (i) interviews; (ii) DNA testing; and (iii) medical exams.[262] Potential beneficiaries are typically screened while still in their home country,[263] although some beneficiaries facing additional threats have been allowed to go to Costa Rica while they await processing of their application.[264] If the child is approved for refugee status, he or she will travel to the United States to join his or her parent. If denied

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257 *Id*. In certain situations, a biological parent or caregiver of a qualifying child may also be considered for parole on a case-by-case basis, if found ineligible for refugee admission. In addition, married sons or daughters and/or sons or daughters aged 21 or older of a U.S.-based, lawfully present parent who are found ineligible for refugee admission may apply for parole by filing Form I-131, Application for Travel Document (available at https://www.uscis.gov/i-131), and including a Form I-134, Affidavit of Support (available at https://www.uscis.gov/i-134).

258 A more detailed flow chart of steps can be found at Dep't of State, *U.S. Refugee Admissions Program Central American Minors Flow Chart* (Jan. 22, 2015), https://static1.squarespace.com/static/580e4274e58c624696efadc6/t/583c496a20099ed67c51f2ea/1480345963566/CAM+Handout.pdf. Additional information is also available at Refugee Processing Center, *supra* n.254.

259 A list of resettlement agencies is available at Refugee Processing Center, CAM Program, https://www.wrapsnet.org/cam-program/ (under the link for "R&P Resettlement Affiliate Directory").

260 If the beneficiary is either an in-country biological parent of a qualifying child that is not legally married to the U.S.-based lawfully present parent or the caregiver of a qualifying child (see sub-paragraphs (2) and (3) above), a Form I-134, Affidavit of Support (available at https://www.uscis.gov/i-134) is required.

261 *See* Refugee Processing Center, *supra* n.254.

262 *See* Dep't of State, *Central American Minors (CAM) Program*, *supra* n.253.

263 Jorge Valencia, *Trump's Executive Order On Immigration Stops Program For Central American Children*, Fronteras (Feb. 2, 2017), http://www.fronterasdesk.org/content/10563/trump%E2%80%99s-executive-order-immigration-stops-program-central-american-children.

264 Linthicum, *supra* n.252.

refugee status, a child may submit a Request for Review within 90 days to USCIS,[265] and/or may apply for parole status.[266]

Refugees who come to the United States must adjust status to permanent residence after one year in the United States and may apply for citizenship after five years.[267] Parole is temporary and does not confer any permanent immigration status or a pathway to a permanent status. Parolees under this program will generally be authorized for parole for a period of two years after which they may apply for re-parole.

C. Retroactivity of November 2016 Expansion of CAM

A qualifying, lawfully present parent who filed a DS-7699 before the November 2016 expansion of CAM who now wishes to request access for expanded-category relatives, needs to complete an amended DS-7699 prior to September 30, 2017 at a designated refugee resettlement agency in person.[268] An amended DS-7699 filed on or before this date will be processed regardless of where the qualifying child is in the process, as long as the relationships of the expanded category relatives can be verified through DNA testing.

A qualifying, lawfully present parent will not be able to file an amended DS-7699 to retroactively request the admission of a family member whose relationship is not verifiable through DNA (*e.g.* non-biological caregiver or step/adopted siblings of qualifying child) if the qualifying child has already traveled to the United States.[269]

D. Impact of Recent Decisions on CAM

As mentioned, the Foreign Nationals EO directed the Secretary of State to suspend USRAP for 120 days, and thus suspended CAM, affecting "as many as 9,000 youngsters whose CAM applications are currently under consideration, or who have been accepted but are awaiting permission to travel to the United States."[270] On February 3, 2017, Judge James Robart of the Western District of Washington granted a TRO that temporarily halted enforcement of the travel

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265 Dep't of State, U.S. Citizenship and Immigration Services, *Request for Review Tip Sheet* (Apr. 9, 2014), https://www.uscis.gov/humanitarian/refugees-asylum/refugees/request-review-tip-sheet.

266 There are several significant differences between refugee and parole status. For instance, refugees are eligible for a travel loan, but parolees must book and pay for their own flight to the United States. *See* Refugee Processing Center, *supra* n.254. In addition, those granted refugee status will receive resettlement assistance once in the United States. Parolees are not eligible for resettlement assistance in the United States. However, parolees are permitted to remain in the United States for the duration of the authorized parole period, to attend school, and to apply for work authorization. For more information on applying for parole, visit Dep't of State, *Central American Minors (CAM) Refugee/Parole Program: Information for Conditionally Approved Applicants*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/humanitarian/humanitarian-parole/central-american-minors-cam-refugeeparole-program-information-conditionally-approved-applicants.

267 *See* Refugee Processing Center, *supra* n.254.

268 *See* Dep't of State, *Central American Minors (CAM) Program*, *supra* n.253.

269 *See* Refugee Processing Center, *supra* n.254.

270 Lakhani, *supra* n.15.

ban.[271] On February 4, DHS announced it had "suspended 'any and all' actions to implement the immigration order."[272] As of the date of publication of this source, it is not yet clear what affect this will have on the processing and acceptance of applications under CAM.

VII. International Law

While this guide has focused mainly on U.S. sources, there are several international authorities that may prove useful in representing minors in immigration- and refugee-related matters as well. As such, this section provides a brief overview of some of the primary international authorities that provide additional protections to children.

A. International Treaties and Agreements

Upon becoming a party to a treaty, the United States assumes an international obligation to follow the treaty's terms.[273] Notably, even if the treaty is not ratified, its terms may still be persuasive as a matter of customary international law. [274] While there is no overarching judicial or penal system to enforce an international agreement's provisions or settle disputes arising out of a failure to comply, such authorities offer helpful guidance and carry weight in the U.S. judicial process.[275] Additionally, several of these instruments are controlling in jurisdictions outside of the United States where minors could be held when they are in transit from one country to another.

1. *1963 Vienna Convention on Consular Relations*

The United States is a signatory to the 1963 Vienna Convention on Consular Relations, which provides, among other things, for the rights of consular officers to access and contact nationals of their state in the custody of the receiving state.[276] While the treaty is not geared specifically to children, it is included in this guide as an international authority attorneys should consult because a consular officer can assist in cases involving a minor by:

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271 Jarrett, *supra* n.30.

272 *Id*.

273 *See Medellin v. Texas*, 552 U.S. 491, 504 (2008) (a rule from a treaty to which the United States belongs "constitutes an *international* law obligation on the part of the United States").

274 Vienna Convention on the Law of Treaties art 2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United States has not ratified the Vienna Convention, it recognizes it as generally signifying customary international law. *See, e.g., Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423 (2nd Cir. 2001) ("[W]e rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties . . . [b]ecause the United States recognizes the Vienna Convention as a codification of customary international law . . . and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice.") (internal citations omitted).

275 Michael John Garcia, Cong. Research Serv., RL32528, *International Law and Agreements: Their Effect Upon U.S. Law* (2015).

276 Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force June 8, 1967) [hereinafter VCCR].

1. providing the parent with a better understanding of the U.S. legal system;

2. providing connections in the parent or child's home country;

3. obtaining helpful documents from their country, such as birth, marriage, or school records;

4. assisting the court in finding relatives who might be willing to take custody of the child;

5. facilitating communication between the parent and the child welfare agency if the parent is deported;

6. issuing travel documents or arranging for a consular official to accompany the child on a flight to the home country; and

7. ensuring the judge is not making decisions based on cultural bias.[277]

Courts in the United States do not generally view the VCCR as conferring individual rights. For example, in *United States v. Li*, the U.S. Court of Appeals for the First Circuit held that no remedy was available to a foreign criminal defendant who had not been notified of his right to consular access upon arrest.[278] As a result, other countries sought judgments against the United States from the International Court of Justice.[279] However, the U.S. Supreme Court in *Medellin v. Texas* held that the International Court of Justice's decision in one of those cases was not binding on U.S. courts, absent domestic legislation implementing it.[280] Further, once the right to consular notification has been disregarded, it is often too late to remedy the harm.

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277 *See* Sarah Grey McCroskey, *Expanding the Vienna Convention on Consular Relations: Protecting Children by Protecting Their Parents*, 46 Vand. J. Transnat'l L. 1423, 1429-32 (Nov. 2013).

278 *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

279 *See, e.g.*, Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 53-54 (Mar. 31) (finding numerous Article 36 violations by the United States, including for its failure to "inform [fifty-one] detained Mexican nationals of their rights under that paragraph"); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, 477-78, 494 (June 27) (finding that the United States violated Article 36 by failing to "inform the consular post of the sending State of [an] individual's detention 'without delay'" in the case of two brothers executed in the United States).

280 *See generally Medellin*, 552 U.S. 491 (2008). ("[W]hile the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law . . . ." *Id.* at 522.

2. *Model Agreement for the Repatriation of Mexican Nationals*

Like the VCCR, this bilateral agreement between the United States and Mexico[281] does not contain provisions exclusively for children; however, its general standards for the apprehension and repatriation of Mexican nationals at the border apply to minors.

The model agreement is codified in thirty separate Local Arrangements for the Repatriation of Mexican Nationals in jurisdictions along the border. The following provides a list of all offices and cities covered: https://www.ice.gov/doclib/foia/repatriation-agreements/local-arrangements-repatriation-of-mexican-nationals-full-list.pdf. These arrangements between DHS and the Mexican Consular Officials are designed to ensure safe, orderly, and humane repatriation of Mexican Nationals from the United States to Mexico. Generally, the local arrangements require CBP and ICE to:

- provide Mexican Nationals with consular access;
- ensure the unity of families;
- coordinate with the Consulate of Mexico to safeguard the wellbeing of juveniles;
- and provide repatriation for special needs persons (unaccompanied minors, pregnant women, or persons with children etc.) during daylight hours.

If your client is an unaccompanied minor and a Mexican national, please reference one of the agreements provided in the link above. Contacting the Mexican consulate office can assist in preventing an immediate repatriation and determination as to whether other protections afforded to children may apply.

ADDITIONAL RESOURCES

- Advocacy of Human Rights in the Americas (WOLA), *Not a National Security Crisis: The U.S.-Mexico Border and Humanitarian Concerns, Seen from El Paso* (Oct. 27, 2016), https://www.wola.org/analysis/not-national-security-crisis-u-s-mexico-border-humanitarian-concerns-seen-el-paso/.
- Appleseed, *Children at the Border: The Screening, Protection, and Repatriation of Unaccompanied Mexican Minors* (2011), http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf

[281] Press Release, U.S. Dep't of Homeland Sec., Secretaries Napolitano and Espinosa Announce Agreement on Mexican Repatriation (Apr. 3, 2009), https://www.dhs.gov/news/2009/04/03/agreement-mexican-repatriation-announced.

3. *The United Nations Convention on the Rights of the Child*

The United Nations Convention on the Rights of the Child[282] is a human rights treaty that sets out the civil, political, economic, social, health, and cultural rights of children. Currently 196 countries are a party to it, including every member of the United Nations except the United States.[283] Courts have noted that although the United States has not ratified the CRC, the CRC "has attained the status of 'customary international law'" and provides some weight in addressing matters arising under its purview.[284]

While the treaty is meant to be read as a whole, the articles most relevant to this guide are as follows: (1) Article 2: Nondiscrimination; (2) Article 3: Best Interests; (3) Article 9: Separation from Parents; and (4) Article 37: Torture and Deprivation of Liberty.

Article 2 provides that States "shall respect and ensure the rights set forth" in the CRC for every child "within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[285] The CRC defines a child as any human being under the age of 18, unless the age of majority is attained earlier under national legislation.[286] So far, the UN Committee on the Rights of the Child has identified 59 forms of discrimination against children based either on their identity or the identity of their parents.[287]

Article 3(1) of the CRC states that, "[i]n ***all actions*** concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary

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[282] *See* United Nations Convention on Rights of the Child, Preamble, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

[283] The United States is a signatory to the treaty, but has not ratified it. Noted opponents to ratifying the CRC include the Heritage Foundation and the Home School Legal Defense Association. *See* Patrick Fagan, *Executive Summary: How U.N. Conventions On Women's and Children's Rights Undermine Family, Religion, and Sovereignty* (Feb. 5, 2001), http://www.heritage.org/report/executive-summary-how-un-conventions-womens-and-childrens-rights-undermine-family-religion; *see also* Michael P. Farris, *Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child* (Jan. 2009), https://www.hslda.org/docs/news/20091120.asp.

[284] *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1009 (9th Cir. 2005); c*f. Sosa v. Alvarez–Machain*, 542 U.S. 692, 731 (2004) (reviewing a claim that the principles of a treaty not enforceable in federal courts had "attained the status of binding customary international law"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that, where no treaty exists, "resort must be had to the customs and usages of civilized nations"); *cf. also Mansour v. Ashcroft*, 390 F.3d 667, 681 n.10 (9th Cir. 2004) (Pregerson, J., dissenting) (noting that, because the United States signed the Convention, it is "obliged under international treaty law to refrain from acts which would defeat the objectives and purpose of the Convention") (internal quotation marks omitted).

[285] CRC art. 2.

[286] *Id.* art. 1.

[287] UNICEF, Implementation Handbook for the Convention on the Rights of the Child, Grounds for discrimination against children (2008), http://www.crin.org/docs/Discrim_grounds.doc.

consideration."[288] High courts in other nations have interpreted "all actions concerning children" broadly, applying it to proceedings involving the deportation of a parent as well.[289] U.S. law already allows an undocumented parent to seek cancellation of removal because of exceptional and extremely unusual hardship to a qualifying child.[290] As such, some courts have determined that no additional weight should be provided under the CRC.[291]

Article 3's "best interests of the child" standard also requires that States ensure "that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."[292]

Article 9 of the CRC ensures that States place the highest value on maintaining family unity when considering deportation proceedings. It states that separation should only occur if it is in the best interest of the child. [293]

Article 37 of the CRC addresses the deprivation of liberty for children. It holds that imprisonment of a child should be a last resort and for the shortest appropriate time. The U.S.

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288 CRC Art. 3(1); *see* Cynthia Price Cohen, *Introductory Note to the Convention,* 28 I.L.M. 1448, 1450 ("Implementation of the entire Convention is to be governed by the theory of the 'best interests of the child.'").

289 *See Minister of State for Immigration & Ethnic Affairs v. Teoh (Cth)* [1995] HCA 20 (Austl.) (holding that the phrase "actions concerning children" encompasses a parent's immigration proceeding, particularly where the parent's primary argument involves the hardship to his or her children); Baker v. Canada, [1999] 2 S.C.R. 817, 829, 831-32 (Can.) (holding that the Convention's "best interests of the child" principle was relevant to interpreting the deportation statute, despite the lower court's holding that "deportation of a parent was not a decision 'concerning' children within the meaning of [A]rticle 3" of the Convention); *see also* ZH v. Sec'y of State for the Home Dep't [2009] EWCA Civ. 691, [2011] UKSC 4 (appeal taken from Eng.) (holding that the best interests of the child would be a primary consideration in determining a non-citizen parent's removal).

290 *Cabrera-Alvarez*, 423 F.3d at 1012 (citing 8 U.S.C. § 1229b(b)(1)(D)).

291 *Id*.

292 CRC Art. 3(3).

293 CRC art. 9. The Board of Immigration Appeals' ("BIA") decisions tend to place varying weight on maintaining family unity in deportation proceedings, causing federal appellate courts to overturn decisions applying the "extreme hardship" requirement too stringently. *See* Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. Rev. 175, 176 (1984). Indeed, despite their limited standard of review – *i.e.*, for abuse of discretion – some court decisions have ordered the BIA to increase the weight given to the harms of family separation in its balancing of interests. *E.g.*, *Antoine-Dorcelli v. INS*, 703 F.2d 19, 20 (1st Cir. 1983) ("To fail to consider petitioner's separation from . . . as a separation from her own family is to ignore reality and distort the meaning of extreme hardship."); *Contreras-Buenfil v. INS*, 712 F.2d 401, 403-04 (9th Cir. 1983) ("On remand, the Board should consider the hardship separation from his California family will cause Contreras-Buenfil in addition to the hardship separation will cause his daughter Carol."). When seeking a waiver of deportation, it is important to develop evidence of hardship to the family, in particular to the children, by pointing to concrete evidence during the proceedings. The following resource provides detailed information regarding how to build a strong theory of the case for your client, as well as how to best document and submit evidence of extreme hardship. *See* Catholic Legal Immigration Network, Inc., *Filing Successful Provisional Waivers: A Practitioner's Guide* (2013), https://cliniclegal.org/sites/default/files/filing_successful_provisional_waivers_-_a_practitioners_guide_0.pdf.

Supreme Court has only once decided whether U.S. law violates Article 37, holding that juveniles could not be sentenced to life without parole for non-homicide offenses.[294]

The European Court for Human Rights ("ECHR") issued an important and highly relevant decision in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, concerning the rights of children under the CRC while detained when passing through Europe.[295] In that case, a five-year-old girl was traveling from the Democratic Republic of Congo ("DRC") through Belgium's international airport to join her mother in Canada, where the mother had been granted refugee status.[296] The girl was accompanied by her uncle, and neither he, nor the minor, had the appropriate travel papers to enter Belgium or Canada.[297] Belgian authorities detained the girl and later deported her to the DRC.[298]

The ECHR found numerous aspects of the authorities' actions illegal under the CRC. The most relevant parts of the opinion relate to the girl's deportation. Particularly, "as to the arrangements in her country of origin, the Belgian authorities merely informed [a different uncle who lived in the DRC] . . . . of her arrival, but did not expressly require his presence or make sure he would be at the airport."[299] This and other aspects of the girl's deportation amounted to a violation of Article 3, because they were "bound to cause her extreme anxiety and demonstrated such a total lack of humanity."[300]

Even more important were the ECHR's holdings concerning the Belgian authorities' rationale for detaining and deporting the girl: that the mother had not obtained refugee status for her daughter in Canada, which Belgian authorities assumed meant the girl could not legally be sent to Canada.[301] The court found that "[h]aving been informed at the outset that the [mother] was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter."[302] Although the mother and the uncle were at fault for failing to timely seek refugee status for the girl and for fraudulently telling Belgian authorities that the girl was the uncle's daughter, "in view of her young age, the [girl] cannot bear any responsibility" for the conduct of her adult family members.[303] As such, the court ordered Belgium to pay the mother and daughter

294 *Graham v. Florida*, 560 U.S. 48 (2010).

295 Mitunga v. Belgium, App. No. 13178/03, Eur. Ct. H.R. (2006).

296 *Id.* ¶¶ 9–10.

297 *Id.* ¶¶ 10–11.

298 *Id.* ¶¶ 30–31.

299 *Id.* ¶ 67.

300 *Id.* ¶ 69.

301 *See* ¶ 74.

302 *Id.* ¶ 82. The court later reiterated that "the Belgian State had positive obligations . . . [including] to facilitate the applicants' reunification." *Id.* ¶ 90.

303 *Id.* ¶ 84.

€35,000 combined (€10,000 for the mother and €25,000 for the daughter), in addition to €14,036 plus tax for costs and expenses.[304]

There are several practical lessons that can be drawn from the *Mubilanzila* case. One is the need for immediate and sustained communication between family members in the United States and the relevant immigration authorities both in the United States and abroad. The CRC and some EU directives obligate member states to begin tracing an unaccompanied minor's family as soon as the child arrives. However, as seen in *Mubilanzila*, authorities may stop short of a complete search once they find a relative to whom the child can be released, even if it is not in the child's best interests.[305] Therefore, families and their attorneys should not rely on European authorities and instead should make every effort to inform authorities of the child's relatives living abroad.

Additionally, families and their attorneys should demand and facilitate detailed communication between United States and European immigration officials regarding the legal status of both the family and the child. This will ensure that EU authorities do not improperly conclude that the child cannot legally join his or her family in the United States and therefore must be sent back to the origin country. This communication should be persistent and proactive. Even regular phone calls and other interactions between the mother in *Mubilanzila* and Belgian officials, in addition to the fact that the girl was provided with representation, was not enough to prevent the girl's deportation.[306]

It is also worth noting that the United Nations High Commission for Refugees played a significant role in providing accurate information to Belgian authorities regarding the mother and the girl's immigration statuses.[307] Non-profit organizations can also provide this sort of assistance and expertise for families unable to communicate effectively with the relevant authorities.[308]

B. European Union Law

While a fulsome review of the law of the EU is beyond the scope of this guide, there are two protections specifically for children found therein that must be included: the right to representation and the right to reunification. Both of these are worth a quick review in light of the Trump administration's executive orders that left many children stranded or separated from their parents while connecting through European airports.

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304 *Id.* ¶ 37.

305 *See id.* ¶ 67 (faulting Belgian authorities' releasing the girl to Uncle B. in the DRC, "who was the only relative they had managed to trace in Kinshasa," without having "considered or made alternative arrangements").

306 *Id.* ¶¶ 14–25; *see also id.* ¶ 52 ("The fact that the second applicant received legal assistance, had daily telephone contact with her mother or uncle . . . . was far from adequate.").

307 *See, e.g., id.* ¶ 66.

308 *See, e.g.*, Ana Fonseca et al., *Unaccompanied Migrant Children & Legal Guardianship in the Context of Returns: The Missing Links Between Host Countries & Countries of Origin*, Children on the Move 45-61 (2013).

1. *Right to Representation*

One of the most important protections provided by EU law – the right to a guardian/representative for unaccompanied minors – is found in multiple directives and regulations, including the Asylum Procedures Directive,[309] the Qualification Directive,[310] and the Dublin Regulation[311]. Upon a child's arrival in the EU, he or she is represented by a legal guardian appointed to serve as a link between the child and national authorities.[312] This provision has its limitations, however, as several member states have been sharply criticized for providing unqualified or ineffective guardians, especially in terms of their ability to communicate with children in a language they understand.[313]

2. *Reunification with Family*

Another important EU instrument is the Family Reunification Directive, which requires member states to allow the non-EU parents of unaccompanied minors to enter and reside in the country in which their children are being held.[314] This requirement applies whenever it is not in a minor's best interests to join his or her parents abroad. The ECHR has similarly held that authorities may not refuse parents' entry or deport them if there is an "insurmountable obstacle" to reuniting the family elsewhere.[315]

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309 Directive 2013/32/EU, art. 25(6), 2013 O.J. (L180) 60, 75-76. The Asylum Procedures Directive also sets the basic requirements for age assessments used to determine whether an individual is a minor. However, age assessment methods vary greatly across EU member states. See European Union Agency for Fundamental Rights & Council of Europe, Handbook on European Law Relating to the Rights of the Child 167, 167 n.437 (2015) [hereinafter Council of Europe Handbook], http://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF.

310 Directive 2011/95/EU, art. 31, 2011 O.J. (L 337) 9, 21 ("As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.").

311 Regulation 604/2013, art. 6 2013 O.J. (L 180) 31, 38-39 ("Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved.").

312 If formal legal proceedings are initiated regarding the child's immigration status, the representation guarantee mandates that the child be provided with an attorney as well. *See* Council of Europe Handbook 178–79.

313 *See* Fonseca, *supra* n.308, at 45–61; *see also* Human Rights Watch, *In the Migration Trap: Unaccompanied Migrant Children in Europe* (2010), https://www.hrw.org/world-report/2010/country-chapters/europe/central-asia-0.

314 Directive 2003/86/EC, art. 10(a), (c), 2003 O.J. (L 251), 12, 16.

315 *E.g.*, Bajsultanov v. Austria, App. No. 54131/10, 12 June 2012; Jeunesse v. The Netherlands [GC], App. No. 12738/10, 3 October 2014.

GLOSSARY OF TERMS

A File	Alien File
AIC	American Immigration Counsel
CAM	Central American Minors Program
CAT	U.N. Convention Against Torture
CBP	U.S. Customs and Border Protection
CRC	U.N. Convention on the Rights of the Child
CRS	Congressional Research Service
CSPA	Child Status Protection Act
DACA	Deferred Action for Childhood Arrivals
DAPA	Deferred Action for Parents of Americans and Lawful Permanent Residents
DHS	U.S. Department of Homeland Security
DOJ	U.S. Department of Justice
DOS	U.S. Department of State
EAD	Employment Authorization Document
EOIR	Executive Office of Immigration Review
HHS	U.S. Department of Health and Human Services
HPC	HHS Processing Center
HSA	Homeland Security Act
ICE	U.S. Immigration and Customs Enforcement
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IOM	International Organization for Migration
LPR	Legal Permanent Resident
NTA	Notice to Appear
ORR	Office of Refugee Resettlement
PEP	Priority Enforcement Program
SIJ	Special Immigrant Juvenile
TRO	Temporary Restraining Order
TVPRA	Trafficking Victims Protection Reauthorization Act
UAC	Unaccompanied Alien Children
USCIS	U.S. Citizenship and Immigration Services
USRAP	U.S. Refugee Admissions Program
VCCR	Vienna Convention on Consular Relations
VTVPA	Victims of Trafficking and Violence Protection Act

APPENDIX A

ACTIONS CHALLENGING THE TERRORIST ATTACKS BY FOREIGN NATIONALS EXECUTIVE ORDER AS OF FEBRUARY 3, 2017

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Al Homssi v. Trump, 1:17-cv-00801 (N.D. Ill.)	Plaintiff, a 24 year old medical resident in Oak Lawn, Illinois has been detained at the Abu Shabi International Airport in Dubai, where he was informed his valid J-1 visa is canceled. He risks losing his residence status in the UAE and being sent back to Syria, where he has never lived but where he is a citizen, if he does not return to the United States to complete his residency.	First Amendment Fifth Amendment INA United Nations Convention Against Torture (CAT) APA	Filed 1/31/2017 and pending.	Hearing is scheduled for 2/9/2017.
Al-Mowafak v. Trump, 3:17-cv-00557 (N.D. Cal.)	Class action brought by plaintiffs lawfully present in California but who are unable to travel to and from the United States and various public interest organizations whose clients have been affected by the EO.	First Amendment Fifth Amendment INA APA	Filed 2/2/2017 and pending.	
Ali v. Trump, 2:17-cv-00135 (W.D. Wash.)	Plaintiffs, who seek class action status, are a U.S. citizen and her six year old son—who is a Somali citizen with a pending immigrant visa application; a U.S. citizen and his 12 year old daughter—who is a Yemeni citizen with an approved immigrant visa application; and a lawful permanent resident and her 16 year old son—who is a Syrian citizen with a pending immigrant visa application. The plaintiffs seek to be reunited as families living in the U.S. But pursuant to the executive order, review of the pending visa applications has been suspended and the plaintiff with the approved visa application was not allowed to board a flight to the U.S.	INA 28 U.S.C. § 1361 (mandamus) Fifth Amendment	Filed 1/30/2017 and remains pending.	

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Arab Am. Civil Rights League v. Trump, 2:17-cv-10310 (E.D. Mich.)	Plaintiffs are the Detroit-based organization Arab American Civil Rights League and seven of its members, lawful permanent residents (LPRs) from Yemen and Syria, countries whose citizens are banned from traveling to the United States. The LPR plaintiffs were outside the United States when the Executive Order was issued and have been denied flights or fear being denied flights. The court granted a TRO preventing the application of Section 3(c) and 3(e) of the Executive Order against all LPRs.	APA Decl. J. Act, 28 U.S.C. § 2201 RFRA/RLUIPA	Granted TRO as to plaintiffs and other LPRs.	Motion for PI remains pending. The court did not rule on the TRO with respect to plaintiffs that were not LPRs, but denied visas or otherwise denied entry.
Asali v. Dep't of Homeland Sec.,, 5:17-cv-00447 (E.D. Pa.)	Plaintiffs are a family – 5 adults and a minor – from Syria with valid visas to enter the United States. They were detained and sent back to Syria upon landing at Philadelphia International Airport. They seek a TRO and writ of habeas corpus for their return to the United States.	INA First and Fifth Amendments APA	Filed 1/31/2017 and pending.	
Aziz v. Trump, 1:17-cv-116 (E.D. Va.)	Plaintiffs are 50 to 60 lawful permanent residents of the United States who have been detained at Dulles International Airport. Class action status is being sought for individuals with legal permanent resident status or who are traveling on valid U.S. immigrant visas who have been or will be either detained and/or coerced into signing a Form I-407.	APA Habeas Corpus, 28 U.S.C. §§ 2241-2253; 2254; 2255 INA RFRA/RLUIPA	The court issued a seven-day temporary restraining order granting detainees at Dulles International Airport access to counsel and prohibiting deportation of detainees.	The complaint asserted that CBP had so far refused to follow the court's TRO, refusing to permit lawyer access, and that CBP was stating that the affected individuals were not in "detention," but were rather undergoing "processing." The Commonwealth of Virginia moved to intervene in the case on 1/31/2017. On 2/1/2017, the parties jointly moved to put the case briefly on hold.

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Darweesh v. Trump, 1:17-cv-00480 (E.D.N.Y.)	Two individuals on behalf of class of all individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States, but who have been or will be denied entry to the United States on the basis of the Jan. 27, 2017 Executive Order.	Habeas Corpus, 28 U.S.C. §§ 2241-2253; 2254; 2255 Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq*.	Granted a nationwide stay of removal, enjoining the removal of individuals with refugee applications approved by USCIS and holders of valid immigrant and non-immigrant visas from the seven countries. Applied to petitioners and others similarly situated. On 2/3/2017, the stay was extended until 2/21/2017.	The Government was ordered to provide a list of individuals detained, pursuant to the Jan. 27, 2017 EO to Petitioner's counsel.
Farmad v. Trump, 2:17-cv-00706 (C.D. Cal.)	Amended complaint, filed 1/29/2017, brought on behalf of several individuals with valid entry documents that were detained at Los Angeles International Airport. The action is also brought on behalf of lawyers from public interest organizations that have been barred from attempting to assist detained individuals.	Fifth Amendment – Access to Counsel and Due Process INA First Amendment APA RFRA		Hearing is set for 2/7/2017.
Hagig v. Trump, 1:17-cv-00289 (D. Colo.)	Action brought on behalf of individual and those similarly situated. Plaintiff is a lawful resident in the United States who cannot exercise his right to travel to Libya, where his family resides, for a family emergency or otherwise.	Fifth Amendment Fourteenth Amendment First Amendment INA APA	Filed 1/31/2017 and pending.	

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Louhghalam v. Trump, 17-cv-10154 (D. Mass.)	Two lawful permanent residents of the United States detained at the airport in Massachusetts and Oxfam, an organization that works with refugees. No class action sought.	Admin. Procedure Act, 5 U.S.C. §§ 551 *et seq*. *Bivens* and *Ex parte Young* (federal or state officials) Habeas Corpus, 28 U.S.C. §§ 2241-2253; 2254; 2255 Religious Freedom Rest. Act/Religious Land Use and Inst. Persons Act (RFRA/RLUIPA)	TRO granted on 1/29/2017 ordering that secondary screening be limited to that authorized prior to EO, prohibited detention and removal of refugees, visa-holders, LPRs and other individuals from the seven countries legally authorized to enter the US for a period of seven days. Commonwealth of Massachusetts moved to intervene on 1/31/2017. Amended petition filed 2/1/2017. The court declined to extend the TRO on 2/3/2017.	
Mohammed v. Trump, 2:17-cv-00786 (C.D. Cal.)	Class action filed by Yemeni born U.S. citizens and noncitizens. Some of the named plaintiffs currently live in the U.S. The others are family members who had been issued immigrant visas and had left Yemen for the U.S. before the Executive Order was announced; they were issued visas in Djibouti but prevented from boarding their plane to the U.S.	Motion unavailable.	Court granted TRO barring the defendants from enforcing the EO by removing, detaining, or blocking entry of the plaintiffs or any person from the seven listed countries holding a valid immigrant visa. It also ordered the defendants to return to the plaintiffs any confiscated visas and immediately inform all relevant airport officials that they are permitted to travel to the U.S. Finally, the order barred defendants from further canceling any of the plaintiffs' validly obtained visas.	Supplemental briefing ordered and hearing for permanent injunction scheduled for 2/10/2017.

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Sarsour v. Trump, 1:17-cv-00120 (E.D. Va.)	Class action brought by individual Muslim-Americans across the United States including citizens, some visa-holders and asylees, seeking injunctive relief.	First Amendment Fifth Amendment APA	Filed 1/30/2017 and remains pending.	
State of Washington v. Trump, 2:17-cv-00141 (W.D. Wash.)	The complaint argues that the State has an interest in protecting the "health, safety, and well-being of its residents" as well as "ensuring that its residents are not excluded from the benefits that flow from participation in the federal system." The State's request for temporary restraining order, filed separately, sought to enjoin defendants nationwide from barring entry into the U.S. of immigrants and nonimmigrants pursuant to the executive order.	First and Fifth Amendments APA INA RFRA/RLUIPA	Temporary stay blocking enforcement of entire EO nationwide was issued 2/3/2017.	On 2/4/2017, the federal government filed a notice of appeal and moved for an emergency stay, including an immediate stay while its emergency stay motion was under consideration. The Ninth Circuit denied the federal government's motion for an immediate stay and set a briefing schedule for the emergency stay motion, hearing oral argument on 2/7/2017. It denied the motion in a 29-page opinion on 2/9/2017. An appeal to the Supreme Court is likely but has not yet been filed.
Unite Oregon v. Trump, 3:17-cv-00179 (D. Or.)	Brought on behalf of Portland-based membership organization led by people of color, immigrants and refugees, rural communities and people living in poverty. The action seeks injunctive relief and access to counsel for those detained at Portland International Airport.	Fifth Amendment INA RFRA APA	Filed 2/1/2017 and pending.	

Case	Scope	Causes of Action	Ruling (if available)	Next Steps
Vayeghan v. Kelly, 17-cv-0702 (C.D. Cal.)	Iranian citizen with a U.S. visa issued pursuant to a petition filed by his son, who was detained at Los Angeles International Airport on the evening the executive order was issued. He was then put on a flight back to Iran. No class action is sought.	APA *Bivens* Habeas Corpus, 28 U.S.C. §§ 2241-2253; 2254; 2255 INA RFRA/RLUIPA	The plaintiff filed an amended application on 1/29/2017, and Judge Dolly Gee granted the temporary restraining order that same day. The order requires the federal government to transport the plaintiff back to the U.S. and permit him to enter the country.	A status conference is set for 2/10/2017 to discuss compliance with the temporary restraining order.