Immigrant Children: Pro Bono or Pro Se?
Representing Unaccompanied Immigrant and Refugee Minors in Removal Proceedings

2004 ABA Midyear Meeting
San Antonio, Texas
Saturday, February 7, 2004

A CLE Program Presented by:

The American Bar Association
Commission on Immigration Policy, Practice and Pro Bono
Section on International Law and Practice
Section on Individual Rights and Responsibilities
Section of Litigation

For more information please contact: immcenter@abanet.org or (202) 662-1005
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- “Cutting Edge Children’s Asylum Claims,” Florence Immigrant & Refugee Rights Project,
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Maureen Dunn, *Director*, Division of Unaccompanied Children's Services, Office of Refugee Resettlement, Department of Health and Human Services, Washington, D.C.

Honorable Margaret D. Burkhart, *Immigration Judge* presiding in Harlingen, TX

Meredith Linsky, *Coordinator*, ProBAR, Harlingen, TX

Lisa Villareal-Rios, *former Children's Attorney*, ProBAR, Harlingen, TX


Wafa Abdin, *Supervising Attorney*, Cabrini Center for Immigrant Legal Assistance, Catholic Charities, Houston, TX
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WORKING WITH CHILDREN
Topic 1
The Importance of Skills in Communicating with Children

KEY LEARNING POINTS

- Various categories of personnel working with refugees or the displaced require skills in communicating with children.
- The implementation of various articles in the CRC require skills in communicating with children.
- Staff who frequently need to communicate with children will need in-depth, specialised training in this field.
- Communicating with children requires different skills from communicating with adults.
- Communicating through an interpreter raises a number of difficulties.

WHY ARE SKILLS IN COMMUNICATING WITH CHILDREN IMPORTANT?

It is a common mistake to assume that children (from age of about 6 and over) are too young to be aware of what is going on around them or too young to be adversely affected by dangerous or distressing experiences. Communicating with children and adolescents, for a variety of purposes, can be difficult and demands skills significantly different from those used when communicating with adults.

Child participation is strongly emphasised in the UN Convention on the Rights of the Child (CRC) and several articles are important in the context of communicating with children.

- Article 13 refers to the child's right to freedom of expression - including the right to seek, receive and impart information and ideas of all kinds.
- Article 12 emphasises the right of the child, who is capable of forming his or her own views, to express those views in all matters affecting him or her.
- Separated children (articles 9 and 10) require effective communication if their care and protection needs are to be met.
- Children who are seeking refugee status need to be interviewed by staff who have good skills in enabling children to articulate their claims, needs and rights (article 22).
- Article 3 states that in all actions concerning children, the best interests of the child shall be a primary consideration.
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The ability to communicate effectively with children is hugely important whether for the purposes of imparting or gaining information, enabling the child to communicate his or her concerns, or in protecting and assisting the child. The provision of accurate and truthful information can be empowering to children and facilitates their involvement in making appropriate decisions and choices. It is doubtful that the best interests of any particular child can be determined if it is not possible to effectively communicate directly with him/her.

Situations where effective communication will be important, and involve various categories of personnel, include the following:

- A child-centred situation analysis will require skills of communicating directly with young people.
- Separated children will need to be interviewed for the purposes of planning care, gaining life-history information for the purposes of family tracing and assisting the child with the many issues he or she faces.
- Children and adolescents need to be interviewed, sometimes separately from their families, in order to help determine refugee status.
- Children need to be interviewed in connection with particular assistance or protection needs which they may have - e.g. reproductive health, education etc.

In refugee and other situations of displacement, it may be necessary to communicate with individual children in many different situations and for many different purposes. Sometimes a fairly formal interview situation is required (e.g. for the purposes of documenting a separated child), while in other contexts, a more informal conversation may be used to obtain or impart information. In this resource pack, the term “interview” is used to encompass this range of encounters.

It needs to be emphasised that staff whose role regularly includes the need to communicate with children and adolescents will need detailed and in-depth training in the particular skills demanded.

**HOW IS COMMUNICATING WITH CHILDREN DIFFERENT FROM COMMUNICATING WITH ADULTS?**

Children are not just small adults: they have needs and abilities which are significantly different from those of adults. Communicating with children has some particular requirements which include the following:

- the ability to feel comfortable with children and to engage with them in whatever style of communication suits the individual - e.g. by sitting on the ground, through play etc., and to be able to tolerate expressions of distress, aggression etc.;
- the ability to use language and concepts appropriate to the child’s age and stage of development, and culture;
- an acceptance that children who have had distressing experiences may find it extremely difficult to trust an unfamiliar adult. It may take a great deal of time and patience before the child can feel sufficient trust to communicate openly;
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- an ability to appreciate that children may view their situation in ways
distinctively different from that of adults: children may fantasise, invent
explanations for unfamiliar or frightening events, express themselves in
symbolic ways, emphasise issues which may seem unimportant to adults, and
so on.

CULTURAL ISSUES IN COMMUNICATING WITH CHILDREN

Different cultures have different norms about inter-personal communication. In many
societies there are rules about what topics can be discussed with particular adults
- for example, girls in some cultures may only discuss sexual topics with aunts or
grandmothers and may be even be forbidden from having contact with anyone
outside of the family. Professionals who need to communicate with children need
to understand the cultural norms for expressing feelings and emotions: in some
societies, for example, it would be a source of great shame for children - especially
boys - to cry. It is important that those trying to help children do not make matters
worse by encouraging them to talk and express feelings in a way which
contravenes such norms. There are also cultural norms about what forms of
expression are appropriate - the use of physical touch, or eye contact, for example,
will vary between cultures, while the degree of formality and social distance between
adults and children may, in some societies, limit the exchange of personal information
and feelings.

LANGUAGE AND THE USE OF INTERPRETERS

There are obvious advantages in communicating in the child’s mother tongue:
where the adult is not from the same culture as the child, it may be more difficult to
interpret the child’s gestures and body language, and to grasp the nuances of
words and expressions.

Where the use of an interpreter is unavoidable, it is vital that the interpreter is
fluent in both languages, understands any specialist terminology and is able to use
words which the child can understand. He or she needs to be acceptable within
the community and be seen as impartial. It is vital to ensure that the interpreter
has good skills at communicating with children, can cope with any emotions being
expressed and does not influence the conversation by mis-translating,
summarising or omitting selected sections of what is said.

COMMUNICATION IN THE CONTEXT OF DISPLACEMENT

Very often, effective communication is impeded in these situations by an
atmosphere of mis-trust and suspicion. There may be real fears regarding the way
in which information might be used, especially when the interviewer is perceived
as a public or authority figure. Moreover, some children will have had experiences
(such as some form of exploitation) which will have demonstrated that adults are
not always reliable or trustworthy: hiding information, or revealing incomplete or
inaccurate information may have been used as a survival strategy. Opening an
effective and transparent line of communication with a child may take a great deal
of time and trust-building.
**TRAINING MATERIALS FOR TOPIC 1**

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**FURTHER SUGGESTIONS FOR TRAINING**

Ask participants to identify situations in which they need to communicate directly with children and adolescents. What particular issues emerge in communicating with these young people?
KEY LEARNING POINTS

- The physical location of an interview has an important bearing on its effectiveness.
- There are particular attitudes and approaches which facilitate communication with children, though there are some cultural variations.
- There are also some specific skills and techniques which enable children to express themselves.

PROVIDING AN APPROPRIATE LOCATION AND ENVIRONMENT

Selecting an appropriate location for interviewing children, or having an informal conversation, can have an important bearing on the effectiveness of the communication. For most young people, a quiet space with comfortable and culturally appropriate seating may be the ideal choice, though for others going for a walk, or playing or working together may provide the best opportunity for communication.

Privacy can be important, especially when the interview relates to personal or potentially painful information. Equally, some children may prefer to be accompanied by a trusted adult or friend.

A non-distracting environment can also be important - especially if the child has been exposed to an environment of uncertainty, change and anxiety.

Comfortable seating will help the child to feel relaxed. Different cultures will have different norms about the appropriate distance and relative seating arrangements for the child and the adult: in general, sitting on the same level is often found to be appropriate, with no barriers (such as desks etc.) between the two people.

ATTITUDE AND APPROACH

Communicating effectively with children requires a particular approach, and although some techniques will vary from culture to culture, a vital objective is to facilitate children’s self-expression. In general, the following guidelines should be followed.

Introductions are important so that the child knows who the interviewer is, what role he or she has, and what is the purpose of the meeting with the child.
Confidentiality should be respected: but it is also important to explain carefully why information is being collected, who will know about it and how it will be used.

Simple language should be used, and which the child can readily understand. If there is a suspicion that the child has not understood something you have said, it can be helpful to ask the child to repeat or paraphrase.

A friendly, informal and relaxed approach will help the child to feel at ease.

Adequate time needs to be given to help the child to feel relaxed, to develop mutual trust and to enable the child to feel that he/she is being taken seriously. Time for playing together may be helpful in developing rapport, and conversation about neutral issues (school, games etc.) may be appropriate before more personal or painful topics are discussed.

It is important to allow for children's limited concentration span: a series of shorter meetings may be more effective than a few longer ones.

A non-judgemental attitude which conveys acceptance of the child, whatever he or she has or has not done, is essential. It is important to convey respect for his or her beliefs, feelings etc. and not to judge his or her behaviour - for example in the case of former child soldiers.

Taking notes during the interview may be distracting for the child and raise questions and uncertainties about confidentiality. If it is necessary to take notes, it is important to explain the reason and seek the child's permission first.

Ending the interview or conversation appropriately is also important; providing the child with an opportunity to ask questions, say anything else which he or she would like to say etc and summarising what has been said or agreed may help the child feel that he or she has been taken seriously. It is also advisable to finish the interview on a positive element particularly where the child has been recounting traumatic events.

After the end of the interview, it is important to make sure that there is follow-up support available to the child, especially if painful and difficult issues have been discussed.

These points are summarised in Overhead 2.2.

VERBAL AND NON-VERBAL COMMUNICATION

People communicate through words (verbal communication) and through a wide variety of gestures, body language, tone of voice etc. (non-verbal communication). It is important to note that there are significant differences in the way different cultures use non-verbal communication such as gestures. It is particularly important when working with children to be sensitive to what they communicate non-verbally as this may give important clues to what they are really thinking or feeling, especially when it is difficult to put their ideas into words. Equally, children can be highly sensitive to adults' non-verbal behaviour so it is important for the adult to be aware of what he or she may be conveying to the child.
HELPING THE CHILD’S SELF-EXPRESSION

There are various techniques which may help the child to express himself or herself.

A quiet tone of voice can help the child to feel safe, and shows that the adult is being sympathetic.

Gestures such as nods of the head (or whatever is appropriate within the particular culture) can encourage the child to continue to talk.

An appropriate degree of eye contact also helps the child: again this will vary with culture.

Listening attentively and demonstrating that you have heard the child - e.g. by summarising what has been said, seeking clarification etc. confirms to the child that you are actively listening.

Showing respect for the child’s feelings is also important - e.g. by reflecting the feelings (“that must have made you feel very sad/angry”, etc.). This helps to convey empathy - the capacity to identify with the child’s situation and feelings.

Avoid interrupting the child.

Asking open questions generally will encourage the child to explain something in his/her own way: for example, an open question such as “tell me about life in your village” may elicit a more free response than a closed question such as “where did you live?” It is usually best to avoid leading questions - i.e. those which suggest an answer to the child such as “You like school, don’t you?”

These points are summarised as Overhead 2.3.

TRAINING MATERIALS FOR TOPIC 2

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FURTHER SUGGESTIONS FOR TRAINING

The facilitator can conduct a semi-rehearsed role play with a volunteer member of the group who plays the role of a child: the aim is for the facilitator, playing the role of interviewer, to demonstrate negative approaches and skills, which can be amusing as well as illuminating.
KEY LEARNING POINTS

- *Children's behaviour can give important clues about distressing events which have been experienced.*
- *Communicating with distressed children requires particular skills; and some professional workers will need specialised training in this area.*
- *Difficulties in helping children to communicate may have their roots in the child's experiences: they may also reflect the lack of skills on the part of the interviewer.*
- *Extreme caution should be exercised before distressed children are offered any form of psychological therapy or counselling: to be appropriate, such approaches must be rooted in the child's culture.*

IDENTIFYING CHILDREN'S DISTRESS

Many refugee or displaced children will have had experiences which are deeply distressing to them - separation from family members, witnessing frightening events, experiencing abuse, facing danger, disruption to their education, loss of friends, uncertainty about the future and so on. Many of the children who need to be interviewed by NGO or UNHCR staff will have had these kinds of experience. Very often, the way they behave in their day to day lives will reveal signs of their distress. These may include the following:

- lack of interest and energy – apathy;
- withdrawal from relationships with adults or other children;
- excessive clinging to familiar people;
- prolonged sadness or generalised anxiety;
- loss of appetite;
- sleep disturbances;
- headaches or other somatic complaints;
- poor concentration, restlessness, sudden changes in mood etc.;
- sexual behaviour inappropriate to age;
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- aggressiveness or destructiveness;
- preoccupation with violence, suffering or separation in their play.

Such reactions will vary from child to child and between different cultures. These points are summarised in *Overhead 3.2*.

Many of the children who need to be interviewed by staff of UNHCR or NGOs will have had distressing experiences: these staff members may need specialist training in working with children. The following sections are meant as an introduction to some of the considerations that are taken into account when working with distressed children.

**COMMUNICATING WITH DISTRESSED CHILDREN**

Distressed children may find it extremely difficult to talk to others about what they have experienced. Some will have had experiences which make it especially difficult to trust adults, especially those they do not know well. Some children will be afraid of being overwhelmed by their emotions if they express them to someone else. Some will probably try to avoid adults: others may use particular behaviours to "test out" whether adults will react critically or sympathetically towards them. Some children will be feeling guilty or ashamed - for example they may feel a sense of responsibility for what has happened: such feelings may make it doubly difficult to talk about what has happened.

In many societies, it does help distressed children if they can be helped to talk about their experiences with understanding and supportive adults, and to express their feelings in cultural appropriate ways - perhaps through singing, dancing, drawing or play. Where others have shared similar distressing experiences, group activities may be the most helpful way of helping the child.

In some societies, people are encouraged to "forget" painful experiences, but some children may find this impossible and may need to remember the experience and talk before they can "forget" or come to terms with it.

In situations where it is necessary to get children to talk about painful experiences (for example, the separated child may need to talk about the experience of separation in order to provide essential information to aid family tracing efforts) or where a child communicates a need or desire to talk, the following may help the staff in this difficult task.

1. **Allow the child to set the pace**: children should not be forced to discuss or reveal experiences and the lead should always come from the child. Allow the child to set the pace of the interview and take note of non-verbal signals which indicate that the child does not wish to continue. It may be necessary to stop the interview, or if it is critical to find out information, to have a break and come back to it.

2. **Give adequate time to the child**: don't expect him/her to reveal the whole story in one session: very often it is best for the child to reveal a little of his/her painful memories at a time. Don't rush to fill silences - these may provide important spaces for quiet reflection.

3. **Provide emotional support and encouragement to the child**, in whatever ways are appropriate to the child's culture and stage of development.
4. **Accept the child’s emotions, such as guilt and anger**, even if they seem to you to be illogical reactions to events. Talking through painful experiences may enable the child to view them in a different light - for example, to let go of a sense of responsibility for what has happened. Talking through events that led to the child being abandoned, for example, may enable him/her to understand the situation that was faced by his/her parents and this may lead to the child being able to let go of feelings of anger and bitterness. It is often helpful to convey to the child that the feelings he/she is experiencing are quite normal and understandable.

5. **Never give false reassurance**: telling a separated child that “we will soon find your parents” raises expectations which, if not met, may increase the child’s loneliness and lack of trust towards adults. Helping the child to face the reality of his/her situation is almost always preferable to avoiding it, provided this is done in an atmosphere of trust and support.

6. **Talking about difficult situations may enable children to work out their own solutions**: this is especially the case with older children and adolescents. Simply listening to the problem in an attentive and supportive way can be experienced as extremely helpful. If young people can arrive at their own decisions, this is often more satisfactory than being provided with advice from an adult. For example, it may be more helpful for a separated child who is not attending school to talk around his/her situation and discuss the advantages and disadvantages of attending school than for the adult simply to advise him/her to attend.

7. Sometimes it is **necessary to allow regression** - i.e. a return to behaviour typical of younger children: for example, children or adolescents may need personal care, affection and physical contact more characteristic of younger children in order to overcome the emotional problems they are facing.

These points are summarised in **Overhead 3.3**.

**RESPONDING TO THE UNCOMMUNICATIVE CHILD**

When distressed children continue to find it difficult to communicate, it is important to try to identify possible reasons for this - is the problem perhaps with the adult?

1. Is the adult expecting the child to confide in him/her before establishing mutual trust?

2. Has the child been given an explanation of the adult role and the purpose of the interview?

3. Is language being used which he or she doesn’t fully understand?

4. Is the adult uncomfortable or embarrassed by silence or the child’s emotions, or talking too much or responding in a way which is perceived by the child as critical?

5. Do the child’s experiences bring back painful memories for the adult from his or her own experiences that he or she is struggling to deal with?

If the adult is satisfied that the reasons lie within the child and his/her experiences, then the following may help to unblock communication.
1. Be patient and allow time to build up trust. Give lots of positive messages of warmth and acceptance.

2. Use games, activities, drawing, writing, outings etc. to help develop trust and open lines of communication.

3. Avoid pressuring the child to talk: continue to communicate but also continue to allow silences.

4. Find out more about the child from others who know him/her.

**WHEN IS IT APPROPRIATE TO SEEK COUNSELLING OR THERAPY?**

Children who have had distressing experiences are usually best helped by their families and communities. The following will be particularly important:

- the provision of support from their own (or substitute) families;
- the restoration of a structure to their daily lives (school and pre-school play a vital role here) and the provision of opportunities for play and recreation;
- the provision of support from other adults and children within their communities.

If children continue to display some of the signs of distress listed above, over prolonged time-scales, it may be that they need specialised professional help. However, *extreme caution* should be exercised in providing counselling or psychological therapy unless these are rooted in the local culture. Most approaches to counselling and psychological therapy have been developed in the West and cannot easily be translated into non-western societies. The inappropriate use of such approaches can be not only unhelpful, but potentially damaging to the child. On the other hand, in societies such as the former Yugoslavia which are familiar with counselling and therapeutic approaches, these may be appropriate, though there may be questions about the affordability of such individual treatment. The case of Dusan (Exercise 3.5) may raise the question of the appropriateness of psychological treatment.

If counselling or therapy is deemed to be appropriate, this should be undertaken in a stable environment which is not likely to be disrupted and where support and follow-up is available for the child.

**TRAINING MATERIALS FOR TOPIC 3**

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**FURTHER SUGGESTIONS FOR TRAINING**

Ask participants to identify problems and issues they experience in communicating with distressed children and use these as a basis of discussion. Compile case studies based on the participants’ own experience and use as role play exercises.
Topic 4
Psycho-social Intervention and Cultural Considerations

KEY LEARNING POINTS

- People in different cultural contexts perceive, understand and make sense of events and experiences in different ways. Traditional beliefs and practices, religious beliefs and political ideology may confer a sense of meaning on events and thereby contribute to healing and recovery.

- Different societies have different norms about responding to and dealing with distressing events such as loss and death.

- Understandings of, and responses to, distressing events are experienced collectively rather than individually in many cultures.

- Intervention strategies need to build on traditional norms and practices and to avoid inadvertently undermining them.

A central aspect, for any child, of recovering from distressing experiences is the task of understanding and making sense of their experiences, accepting and “processing” the feelings associated with them and integrating these understandings into their view of themselves and their world. Religious and spiritual beliefs can be an important source of meaning and can provide a vital form of expression of the feelings associated with traumatic experiences. Traditional healers can play a significant role in helping to confer meaning and help the individual to deal with his or her reactions to events. Carrying out culturally prescribed rituals can be extremely important - for example in mourning the dead, or in seeking forgiveness. Political ideology can also be significant in enabling people to understand and make sense of events: sometimes people who have been directly involved in conflict cope better than others if they can derive meaning through ideological commitment.

PSYCHO-SOCIAL INTERVENTION

Developing on issues raised in Topic 3, Topic 4 examines strategies for promoting the psycho-social well-being of refugee and displaced children. The CRC identifies a child’s right to appropriate measures to promote their psychological recovery and social reintegration as a result of their experiences of armed conflict (Article 39), but opinion is divided on the most appropriate means of achieving this.

Recent years have seen a dramatic growth in programmes designed to assist in children’s recovery from traumatic events and experiences: many of these have
uncritically applied western, individualised approaches to counselling and therapy to cultures in which they do not readily apply. The consequences can be not only wasteful of scarce resources but also potentially damaging to children.

This resource pack strongly advocates for community-based approaches which acknowledge, and build on, existing coping strategies within the community, and which seek to enhance the resilience of children and their families. An understanding of the culture is of fundamental importance in planning programmes: without recognising and valuing what already exists within the culture there is a great danger that programmes will undermine existing practices and traditions which may be of great importance in facilitating children's recovery.

The term “trauma” is the subject of some confusion. The Concise Oxford Dictionary defines the term as “morbid condition of body produced by wound or external violence”, but frequently it is used to describe an *event* which may have a traumatic effect rather than the effect itself. Many western approaches to therapy make assumptions that certain types of event have universal and predictable effects on people, but it is clear that frightening or dangerous experiences do not automatically lead to any particular human reaction, and that factors derived from individual characteristics, cultural factors and environmental differences mediate between the event and the individual’s response.

Facilitators are encouraged to look at the ARC Resource Pack on Child and Adolescent Development, Topic 3 which examines the concepts of risk and resilience and which is highly relevant to working with children who have had traumatic experiences. Reference can also be made to the ARC Resource Pack on Community Mobilisation.

**RESPONDING TO AND DEALING WITH DISTRESSING EVENTS**

Different societies have different traditional ways of responding to difficult life-events such as death and loss, and it is vital to understand them if interventions are to reinforce traditional means of coping rather than undermine them. In many societies, for example, it would be disrespectful or even insulting for a stranger to ask someone to talk about personal or painful events: in others, it would confer a great sense of shame for children to be seen to be crying. Many societies have rules about the expression of emotion: the direct expression of emotion is frequently discouraged, while discussions tend to centre on events rather than the emotions they arouse.

**UNDERSTANDINGS OF, AND RESPONSES TO, DISTRESSING EVENTS**

In many traditional societies, the socialisation of children emphasises compliance in the undertaking of roles and tasks. Children live in much more of a communal context than is typical of western societies, and their sense of identity may be not so much as that of an individual, autonomous person but rather what has been described as “self-embedded-in-community”. It has frequently been observed that in such collectivist cultures, people tend to experience traumatic events not so much in a private and individualistic sense but in a collective way. It is not surprising to find that many indigenous healing systems emphasise the community context and the spiritual dimension.
Katz and Wexler\(^1\) define healing as "a process of transition towards greater meaning, balance, connectedness and wholeness, both within the individual and between individuals and their environment". Many non-western ethnomedical systems do not distinguish body, mind and self, while social relations are understood as a key contributor to health and a sense of well-being. It follows that if people tend to experience events collectively, they are likely to use mechanisms to cope collectively.

In contrast individualised Western "talk-therapy" approaches aim to alter the individual's behaviour through gaining insight into his or her inner-self. This approach is based on a conception of the person as a distinct and independent individual who is capable of self-transformation in isolation from the social context - an approach that is alien to many cultures.

**INTERVENTION STRATEGIES**

The development of strategies to promote the psycho-social well-being of children and families needs to be based on a thorough understanding of existing cultural norms, traditions and practices. For this reason, there can be no universal prescription: rather an approach founded on community needs has to be developed. **Topic 5** of this Resource Pack explores further some of the principles and approaches which may be used in programme planning.

**TRAINING MATERIALS FOR TOPIC 4**

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ASYLUM, WITHHOLDING OF REMOVAL, AND UNITED NATIONS CONVENTION AGAINST TORTURE
MEMORANDUM FOR:
Asylum Officers
Immigration Officers
Headquarters Coordinators (Asylum and Refugees)

FROM:
Jeff Weiss
Acting Director
Office of International Affairs

SUBJECT: Guidelines For Children's Asylum Claims

This memorandum is written to provide the Asylum Officer Corps (AOC) with background and guidance on adjudicating children's asylum claims. This guidance applies primarily to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own name. Many of these issues will also be relevant to overseas Immigration Officers in processing the refugee applications of children.

It should be noted that the United Nations and generally accepted international definition of "child" is every person under the age of 18. These Guidelines take the same approach, except (as noted below) that they also apply to those individuals between 18 and 21 for purposes of scheduling and derivative determinations for asylum claims only.

During the last 10 years, the topic of child asylum seekers has received increasing attention from the international community. Human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish age 15 as the minimum age for participation in armed conflicts, children under age 15 in some countries are forcibly recruited by regular or irregular armies to participate directly in military conflicts. Children who have had such experiences are referred to as "child soldiers" throughout this text. The protection needs of these and other children have commanded much international and domestic attention.

Because of the unique vulnerability and circumstances of children, the Immigration and Naturalization Service (INS) considers it appropriate to issue guidance relating to our youngest asylum seekers. These "Guidelines For Children's Asylum Claims" provide Asylum Officers with child-sensitive interview procedures and analysis regarding the most common issues that may arise in these cases. This guidance is similar in
approach to the "Considerations For Asylum Officers Adjudicating Asylum Claims From Women" (the "Gender Guidelines") memorandum issued on May 26, 1995. Like the Gender Guidelines, these Guidelines are designed to enhance the ability of INS Asylum Officers to address more responsively the substantive and procedural aspects of claims, irrespective of the child's country of origin. Increasing the understanding of and sensitivity to children's issues will improve U.S. asylum adjudications. In-Service training at all Offices will be critical to using this guidance effectively.

**Background and International Guidance**

Children and women represent approximately 80 percent of the world's refugee population. This section reviews the historical and human rights context in which guidance on children's refugee issues has evolved internationally.

Asylum and refugee status determinations are governed by United States law and regulations. Certain international instruments can provide helpful guidance and context on human rights norms.[1] For example, the internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition.

The following international instruments and documents contain provisions specifically relating to children. They recognize and promote the principle that children's rights are human rights, and that children's rights are universal:

**UDHR:** The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948. The Declaration is an authoritative statement by the U. N. General Assembly, reflecting a collective understanding of the rights which are fundamental to the dignity and development of every human being. Article 14 of the UDHR provides for the right to apply for asylum, and Article 25(2) refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.[2]

**UNHCR ExComm Conclusion No. 47:** Over the years, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children. Safeguarding the well-being of refugee children has long been a high priority of the UNHCR Executive Committee and the United States. The Executive Committee issued its first conclusion in 1987 devoted exclusively to young people (Conclusion No. 47).[3] This Conclusion urged action aimed at addressing the human rights and needs of children who are refugees, and highlighted the particular vulnerability of unaccompanied and disabled refugee children, as well as the need for action by UNHCR to protect and assist them. Conclusion No. 47
condemned the exposure of refugee children to physical violence and other violations of their basic rights, including sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, or arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims. It emphasized that all action taken on behalf of refugee children must be guided by the principle of the "best interests of the child."

**UNHCR ExComm Conclusion No. 59:** In 1989, in Conclusion No. 59, the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children; gave examples of how these needs could be assessed, monitored, and met; drew special attention to the UNHCR's particular need to endeavor to ensure the right of refugee children to education, as well as their protection from forced recruitment into armed forces and irregular adoption.

The internationally recognized guiding principal for refugee children is "best interests of the child." It is a useful measure for determining appropriate interview procedures for child asylum seekers, but does not play a role in determining substantive eligibility under the U.S. refugee definition.

**UNHCR Policies and Guidelines:** The UNHCR issued several sets of child-related guidelines in recent years.

The UNHCR "Policy on Refugee Children" issued in 1993 points out that governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group. The UNHCR stated that children and adolescents are entitled to special attention because their needs, and their legal and social status, can be significantly different from those of adults, and from each other as well, due to age-related developmental differences.

In 1994, UNHCR issued "Refugee Children: Guidelines on Protection and Care," incorporating international norms relevant to the protection and care of refugee children. The Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR's standards. In the introduction to the revised Guidelines, the High Commissioner wrote: "The ultimate value of the UNHCR Policy and Guidelines on Refugee Children will lie in their translation from words to concrete action."

The UNHCR published in 1997 the "Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum." The purpose of the Guidelines is threefold: 1) to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC; 2) to highlight the importance of a comprehensive approach to child refugee issues; and 3) to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are being met.
Canadian Guidelines: On September 30, 1996, the Canadian Immigration and Refugee Board (IRB) issued the ground-breaking "Child Refugee Claimants: Procedural and Evidentiary Issues," the first document of its kind issued by a country operating a refugee determination system. The Canadian Guidelines recognize that refugee claims of children pose a special challenge since they represent a particularly vulnerable group. The Guidelines acknowledge that children may not be able to articulate their claims to refugee status in the same way as adults, establish special procedures for adjudicating children's claims, and adopt the best interests of the child as the relevant standard for assessing a child's claim. The IRB developed the Guidelines after consultation with international, national, local, and legal organizations involved with refugee children.

Like the Canadian Guidelines, the INS Guidelines for Children's Asylum Claims are a collaborative effort developed after consultations with interested U.S. governmental and non-governmental organizations (NGOs) and individuals, as well as with the UNHCR. The Women's Commission for Refugee Women and Children initially raised these concerns with the INS and was instrumental in the development of this guidance.

II. Procedural Considerations for Asylum Officers

The INS recognizes the particular needs of children in various contexts.[10] The purpose of this section is to emphasize the importance of creating a "child-friendly" asylum interview environment that allows a child to discuss freely the elements and details of his or her claim.

As noted above, this guidance applies primarily to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own name. If the child does not appear at the interview with a parent or guardian, the Asylum Officer should routinely inquire into the location of the child's parents, whether the parents are aware of the child's whereabouts, and that the child has applied for asylum.[11] The majority of children who apply for asylum do so riding along with a parent's ("principal") application.

While these Guidelines are particularly relevant for children who raise independent asylum claims, the procedural sections may be useful for children's cases generally. These Guidelines will also apply to those individuals between the ages of 18 and 21 for purposes of interview scheduling and derivative determinations only. Asylum Officers should bear in mind that an applicant who is above the age of 18 at the time of the asylum interview, but whose claim is based on experiences that occurred while under the age of 18, may exhibit a minor's recollection of the past experiences and events.

Child asylum applicants may be less forthcoming than adults, and may hesitate to talk about past experiences in order not to relive their trauma. This section recognizes that children may not present their cases in the same way as adults, and suggests child-sensitive procedures intended to help Asylum Officers to interact more meaningfully with the child during the asylum interview. Many of the techniques are also applicable to
interviews with adults, and in all cases Asylum Officers should seek to ensure that the applicant feels comfortable and free to discuss the claim.

(a) Presence of Trusted Adult

It is generally in the child's best interests for Asylum Officers to allow a trusted adult to attend an asylum interview with the child asylum applicant. A trusted adult is a support person who may help to bridge the gap between the child's culture and the U.S. asylum interview. Testifying can be difficult for a child, and the presence of a trusted adult may help the child psychologically. The function of the support person is not to interfere with the interview process or coach the child during the interview, but to serve as a familiar and trusted source of comfort. The Asylum Officer may allow the adult to help the child explain his or her claim, but the Asylum Officer should at the same time ensure that the child is able to speak for him/herself and is given an opportunity to present the claim in his or her own words. The INS is not suggesting that the trusted adult necessarily serve as a substitute for an attorney or representative at the asylum interview, and the child may be accompanied to the interview by a support person in addition to an attorney or representative.

In many cases, the child's parent or other relative is a logical and appropriate support person. When the child arrives at an interview without a relative, however, the Asylum Officer in his or her discretion may allow another trusted adult to serve as the support person. If the Asylum Officer determines during the course of the interview that the child is not comfortable because of the support person or is afraid of the person (for example, the support person appears to be a smuggler or some other adult who may put the child in danger), the Asylum Officer should continue the interview without that person.

This is not a new practice. Asylum Officers have the discretion to admit to an interview an individual who can offer moral support to an asylum applicant. We will continue to work closely with the Asylum Offices, NGOs, and the UNHCR on the topic of support persons for children's cases. Additional guidance on the role of support persons will be issued as required.

(b) Asylum Officers

All INS Asylum Officers will be trained on child refugee issues, and may be called upon to conduct interviews of child asylum seekers. It is in the best interests of the child to be interviewed by an official who has specialized training in child refugee issues.

There may be some Asylum Officers who have unique backgrounds or experience dealing with children. Other Officers may share the culture or language of the child. To the extent that personnel resources permit, Asylum Offices should attempt to assign Asylum Officers with the relevant background or experience to interview children's cases.
(c) Interview Scheduling

Virtually all applicants who filed their asylum applications after January 4, 1995, have their cases decided within 60 days. This is one of the important results of the asylum reform regulations. Reform applicants normally do not have to file a request for an interview. They are automatically scheduled for interviews and sent interview notices after the filing of asylum applications.

For pre-reform cases in our backlog of unadjudicated asylum applications, the INS has long had a policy permitting any applicant to request in writing an asylum interview if one has not been scheduled. If a principal asylum applicant has a child who is close to reaching his or her 21st birthday, or if the child has filed a separate asylum application, a request for an asylum interview may be sent to the Asylum Office. Such requests should be given high priority in scheduling. For the sake of continuity, siblings of minor age should be interviewed as closely in time as possible and, to the extent that personnel resources permit, interviewed by the same Asylum Officer.

(d) General Interview Considerations

The atmosphere created during the non-adversarial asylum interview should allow the child to testify at a comfortable speed and should promote a full discussion of the child's past experiences. 8 CFR 208.9(b).

Interpreters play a critical role in ensuring clear communication between the child and Asylum Officer. Asylum Officers should confirm that the child and interpreter fully understand each other. Children who have been victims of sexual violence may feel more comfortable recounting their experiences to an interpreter and interviewer of the same gender. For example, it is not difficult to imagine the reluctance of a girl to testify about a sexual assault through a male interpreter, particularly if the interpreter is a family member or friend.[14]

Girls and young women, in many cases, may be more comfortable discussing their experiences with women Asylum Officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation (FGM). To the extent that personnel resources permit, Asylum Offices may have women Asylum Officers interview these cases. See, Gender Guidelines, at pg. 5.

The child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma. Asylum Officers may have to build a rapport with the child to elicit claims and to enable the child to recount his or her fears and/or past experiences.[15] Several steps described below may be helpful in building rapport with a child and encouraging communication. Keep in mind that, from the point of view of most applicants -- including children -- Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences which give him or her good reason to distrust persons in authority. A fear of encounters
with government officials in countries of origin may carry over to countries of reception. This fear may cause some children to be initially timid or unable to fully tell their story.[16]

Asylum Officers may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed (such as general interests, future career goals, school, pets, hobbies). Once the child appears comfortable, the Asylum Officer should make a brief "Opening Statement" before beginning the formal interview.[17] Asylum Officers can explain in very simple terms in the Opening Statement what will happen during the asylum interview.

**Child Asylum Applicant:**

**Build, Rapport With the Child**

**Use Opening Statement**

*OPENING STATEMENT FOR CHILDREN (Example[18])*

I am glad that you are here today, and that your friend Mr. (Ms.) [name of support person, if any] is here with you. Do you know what we are going to do today? We are going to talk about why you left [name of country of origin], and why you may not want to go back there. As we talk, we will both have jobs. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember, even the little things.

I will be asking you a few questions today. Some questions will be easy, but other questions you might not understand. It is OK if you do not understand a question. Just tell me that you do not understand and I will ask the question some other way. But please do not guess or make anything up. If you do not know the answer to the question, that is OK too. Just tell me that. No one can remember everything. There are no "right" or "wrong" answers to any of my questions.

As we talk today, I will write down what we say because what you tell me is important. Do not get nervous about my taking notes. Later, if I forget what we said, I can look it up.

I understand that you may be nervous or scared to tell me about what happened to you. I will not tell anyone in [name of country of origin] about what you tell me today. Also, none of your friends or, if you want, family here in the United States will know anything about what you tell me.
Before we start, do you have any questions that you would like to ask me? Or is there anything that you want to tell me? If you think of something while we are talking, let me know. If you have to go to the bathroom or want to stop for a while, also let me know.

The tone of the Opening Statement is intended to build trust and to assure the child that the Asylum Officer will be asking questions to help understand the claim. Note from a reading of the sample Opening Statement that a number of important points are made. The Statement clearly gives the child permission to tell the Asylum Officer when the child does not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that embarrassing or traumatic experiences from the past will not be shared with their friends or family members, if they wish, from their home country.

The Opening Statement is a rapport-building activity intended to create a relaxing atmosphere, to make the child feel secure and confident, and to provide the child with general information about the asylum interview.

During the interview Asylum Officers must take child understands the process and the particular questions. The Asylum Officer should watch for non-verbal cues, such as a puzzled look, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. These behaviors may signal something other than lack of comprehension, of course, but they may also serve as signals that a child is confused. In such circumstances, the Asylum Officer should pause, and if no appropriate response is forthcoming, rephrase the question.

Children in some cultures are taught to listen to adults but not to speak in their presence at all. Other children may have spent time in school or other environments where providing answers to questions is expected and saying "I don't know" is typically discouraged. If necessary, an Asylum Officer may explain to the child how to use the "don't know" response. An Asylum Officer might say, "If I ask you the question, 'How many windows are in this building?' and you don't know the answer to that question, you should say, 'I don't know.' Let's practice that. 'How many windows are in this building?' [Child responds, 'I don't know.']." This approach helps to ensure that the child understands when to provide a "don't know" response.

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, the Asylum Officer should offer verbal reassurances. The Asylum Officer may empathize with the child by saying, "I know that it's difficult to talk about this, but it is important for me to hear your story." Or, "I know that this may make you feel uncomfortable or sad. That's OK. I understand." Additionally, a simple expression of interest (e.g., "I see" or "uh huh") may be enough for the child to continue. The Asylum Officer may also shift the focus of the questioning to a non-threatening subject until the child regains his or her confidence. Reassurance, empathic support, carefully framed questions, encouragement, and topic-shifting are important techniques for these cases.
Reassurance, empathic support, carefully-framed questions, encouragement, and topic-shifting are important techniques for children’s cases.

Asylum Officers should also take the initiative when it comes to situations where a brief recess may be needed. Sometimes a child's way of coping with frustration or emotion is to shut down during the interview, to fall into silence or into a series of "I don't know" and "I don't remember" responses. Many children may not take the initiative to request a recess. A young child, for example, may stop answering questions or cry rather than interrupt the Asylum Officer with a request to go to the bathroom or rest. The responsibility may fall to the Asylum Officer to monitor the child's needs and best interests during the asylum interview, and to be proactive if a recess is needed.

As the interview draws to a close, the Asylum Officer should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child's sense of security at the conclusion of the interview. The Asylum Officer should ask the child if he or she has any final questions, and inform the child of the next steps in the application process.

(e) Child-Sensitive Questioning -- And Active Listening -- Techniques

This subsection reviews general child-sensitive questioning and active listening techniques. Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. An Asylum Officer's questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication.[19] In order to communicate effectively with a child asylum applicant, an Asylum Officer must ensure that the Officer's questions -- and the child's answers are clearly understood.

Asylum Officers should take care to evaluate the child's words from a child's point of view. Children cannot give adult-like accounts of their experiences and memories, and Asylum Officers may have to bridge the gap through an understanding of age-related or culturally related reasons for a child's choice of words. For example, "staying up late" may mean early evening for a child. Similarly, instead of saying that a relative died or was killed, a child may state that the individual "went away" or "disappeared" implying reversibility; that the individual may return. Children may not know what happened or feel betrayed by the adult who has died, and may not understand the permanence of death. Even older children may not fully appreciate the finality of death until months or years after the event.

Asylum Officers should take care to evaluate the child's words from a child's point of view.

Proper questioning and listening techniques will result in case assessments that are more complete and accurate. The Asylum Officer controls the number and content of the questions during the interview process and, as such, needs to be familiar with the following techniques in order to elicit the most information:
As a general rule, use short, clear, age-appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask "Who was the person?" rather than "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case ... ?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

Choose easy words over hard ones: use expressions like "show," "tell me about," or "said " instead of complex words like " depict, describe, " or " indicate.

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visualizable terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.

Avoid the use of legalistic terms in questions, such as "persecuted" or it persecution. " Instead of " Were you persecuted? ", ask "Were you hurt?"

Use the active voice when asking a question (e.g., "Did the man-hit your father?"). Avoid the passive voice (e.g., "Was your father hit by the man?").

Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say ... ?" should be avoided.

Keep each question simple and separate. For example, a question like "Was your mother killed when you were 12?" should be avoided. The question asks about the child's mother and child's age at the same time.

Generally avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.

Use open-ended questions to encourage narrative responses. Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children)
to mean that the first answer was regarded as a lie or wasn't the answer that was desired.

Coercion has no place in any interview. Children are never to be coerced into answering questions during the interview. For example, telling a child that she cannot leave the interview until she answers the Asylum Officer's questions should never occur.

Do not expect children to be immediately forthcoming about events which have caused great pain.

Children may not know the specific details or circumstances that led to their departure from their home countries. Children may also have limited knowledge of conditions in the home country, as well as their vulnerability in that country.

Asylum Officers should determine the child's ability to count before asking how many times something happened. Children may try to answer without the requisite skill, resulting in erroneous responses. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates). Imprecise time and date recollection may be a common problem for children, and is often a product of their culture.[20] The western mind typically measures time linearly, in terms of successive - and precise - named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events. In response to the question "When were you hurt?", it may not be uncommon for a child to state "During harvest season two seasons ago" or "shortly after the hurricane. " To be sure, these answers may appear vague and not conform to western notions of precise time and named dates, but they may be the best and most honest replies the child can offer.

Even in those cultures where time is measured by a calendar, it may not comport to our Gregorian calendar. Many Guatemalan Indians, for example, still use the Mayan calendar of 20-day months. In certain Asian cultures, a baby is considered to be "1" on his or her date of birth thereby causing, to the western mind at least, a 1-year discrepancy between the child's age and date of birth. In many Latin cultures, 2 weeks is often "15 days" because the first and last days are counted. Certain Asian cultures also count the first day or year, adding 1 day or year to the time of the event.

In certain cultures, "I don't know" is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question. For example, a child may respond "I don't know" when asked who killed his or her parents, but upon further inquiry may state, for example, that everyone in his or her home village believes that it was government forces. Asylum Officers should generally probe further regarding these opinions. The child's awareness of community opinion may provide information about the issue in question even though the child may initially state "I don't know."
For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults. This may require more probing and creative questioning. For example, the child may not know whether any family members belonged to a political party. The Asylum Officer should probe further and ask the child whether his or her parents attended any meetings and when the meetings were held. Asylum Officers should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

(f) Other Evidence

Apart from the child's verbal testimony, the Asylum Officer may consider other evidence where available, including:

- evidence from family members;
- evidence from members of the child's community;
- evidence from medical personnel, teachers, social workers, community workers, child psychologists, and others who have dealt with the child; and,
- documentary evidence of persons similarly situated to the child, or his or her group, physical evidence, and general country conditions information (See, INS Resource Information Center, subsection (i), infra).

(g) Credibility Issues

Inasmuch as Asylum Officers may deal with child and adult applicants from a diverse array of countries, cultures and backgrounds, cross-cultural sensitivity is required of all Asylum Officers irrespective of whether the applicant is a child or an adult. Nowhere is this sensitivity more needed than in assessing credibility and "demeanor." "Demeanor" refers to how a person handles himself or herself physically; for example, maintaining eye contact, shifts in posture, and hesitations in speech. Some children can appear uncooperative for reasons having nothing to do with the reliability of their testimony. For example, there may be cultural reasons why a child will not maintain eye contact with an Asylum Officer during an interview. In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility.

From the child’s point of view, INS Asylum Officers are authority figures and foreign government officials – Children may have had experiences which give them good reason to distrust persons in authority.
Poor interview techniques or weak cross-cultural skills may affect the Asylum Officer’s credibility finding. Officers should avoid misinterpreting certain emotional reactions or psychiatric symptoms as indicators of reliability. Children who have been subject to extreme abuse may be psychologically traumatized. Talking about such events generally does not come easily to anyone. Lengthy confinement in refugee camps or stays in first asylum countries can also greatly endanger the psychological well-being of children. Children who are separated from their families due to war or other refugee-producing circumstances are placed at greater psychological risk.

**Question demeanor can be the product of culture or trauma rather than a lack of credibility.**

Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability to present testimony. Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, long pauses before answering, as well as avoidance or disassociation. Some children may appear numb or show emotional passivity when recounting past events of mistreatment. Other children may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by the retelling. Inappropriate laughter can also be a sign of trauma or embarrassment. These symptoms can be mistaken as indicators of fabrication or insincerity.[24]

In reviewing the child's testimony, the Asylum Officers should consider the child's age and development at the time of the event and the time of the retelling, the impact of the lapse of time between the event and the retelling; a child's ability to recall/communicate; the needs of children with special mental, emotional, or developmental needs; and the possibility that a child has been protected by his or her parents/family and may not know all the relevant details.

When evaluating a child's testimony, the Asylum Officer may encounter gaps or inconsistencies. For example, a child may not know the political views of his or her family. The child may, due to age, gender, cultural background, or other circumstances, be unable to present testimony concerning every fact in support of the claim. Because vagueness and inconsistencies are likely to occur during the interview of a child, Asylum Officers must remember the possible developmental or cultural reasons for a child's vagueness or inconsistency, and not assume that it is an indicator of unreliability.[25]

Some children may have been coached by adults to tell a particular story at the interview, which the child repeats in order not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and the Asylum Officer should undertake a careful and searching examination of the underlying merits of the child's case. [26]

**(h) Derivative Status or Independent Claim**
The UNHCR Senior Coordinator for Refugee Children has noted that there is a tendency in some countries to think of children simply or only as dependents of adults.[27] The UNHCR believes that "invisibility" is a common problem for refugee children. In recognition of this problem, Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents. When a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate Form I-589 asylum application. As importantly, the fears and experiences of the child may help to enhance the strength of the parents' claim.

The UNHCR points out that invisibility is a common problem for refugee children.

(i) INS Resource Information Center

The INS Resource Information Center (RIC) regularly distributes to the Asylum Offices a wide variety of country conditions information in the following formats: profile series, perspective series, query series, information packet series, master exhibit series, and a bi-weekly news summary.[28] Asylum Officers also have access to the electronic CD-ROM database "Refworld" produced by the Center for Documentation and Research at the UNHCR in Geneva. Additionally, the UNHCR's website at www.unhcr.ch often contains updated information not yet available on the Refworld CD-ROM.

Asylum Officers must be able to rely on objective and current information on the legal and cultural situation of children in their countries of origin, on the incidence of exploitation, victimization, and other human rights violations against children, and on the adequacy of state protection afforded to them.[29] To this end, the RIC will continue to issue periodic papers and other documentation, including U.N. documents and State Department and non-governmental reports addressing human rights, including children's rights and country practices. Asylum Officers should consult all available hard copy and database information as needed.

The RIC will continue to ensure that comprehensive information concerning child-specific persecution and violations of the rights of children is distributed regularly and systematically to all Asylum Offices.[30]

III. Legal Analysis Of Claims

(a) Introduction

This section will focus on the particular legal issues an Asylum Officer may encounter when adjudicating the claim of a child who has filed a separate asylum application.[31] Unlike the child who is a derivative applicant under the parent's application,[32] the child who has filed a separate asylum application must recount his or her own story,
frequently without the support of familiar adults. The child may not even fully understand why or how the events leading to his or her arrival in the United States came about.

Consequently, the age, relative maturity, ability to recall events, and psychological make-up of the child will affect the quality of the answers an Asylum Officer is able to elicit from that child. While the burden of proof remains on the child to establish his or her claim for asylum, an Asylum Officer must take these and other factors into account when assessing the credibility of a claim and must also attempt to gather as much objective evidence as possible to evaluate the child's claim. Given the non-adversarial nature of the affirmative asylum adjudication, the special considerations associated with adjudicating a child's claim may require a closer working relationship with the child's representative and support person, if any, to ensure that the child's claim is fully explored.

This section does not create new law or alter existing law. Nor does it attempt to address all the legal issues that may arise in adjudicating a child's asylum claim. Instead, it identifies particular issues relevant to children that an Asylum Officer may encounter and places those issues within the context of United States law and UNHCR guidance.

(b) Children as Refugees

The standards governing claims of persons seeking asylum are set forth in statute and regulation, and are not expanded by the force of customary international law. Matter of Medina, 19 I&N Dec. 734 (BIA 1988); Matter of A-E-M-, Int. Dec. 3338 (BIA 1998). In order to be granted asylum in the United States, the child applicant must establish that he or she meets the definition of refugee contained at Section 101(a)(42)(A) of the Immigration and Nationality Act (INA), as interpreted by Board and Federal court precedent. Regardless of how sympathetic the child's claim may be, he or she cannot be granted asylum unless this standard is met. Consequently, the "best interests of the child" principle, while useful to the interview process, does not replace or change the refugee definition in determining substantive eligibility.

In discussing the treatment of unaccompanied minors, the UNHCR Handbook notes that, "[t]he same definition of a refugee applies to all individuals, regardless of their age." Sensitivity to the age of the child, however, may affect the analysis of his or her refugee status:

Although the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee Status, as well as his/her special vulnerability.
Thus, while a child's claim must contain all the necessary components of a claim to refugee status, the evidence a child is able to present regarding each component should be carefully evaluated on a case-by-case basis.

(c) Persecution

In assessing a child's claim of persecution, asylum adjudicators should follow the procedural considerations outlined above. As in all asylum cases, the Asylum Officer must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant international and domestic law.[38] The Board of Immigration Appeals (BIA) has interpreted persecution to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds, by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).[39] Physical or mental harm, including rape, has been considered persecution. *Matter of D-V-*, Int. Dec. #3252 (BIA 1993). In addition, though discriminatory practices and experiences are not generally regarded by themselves as persecution, they "can accumulate over time or increase in intensity so that they may rise to the level of persecution."[40] However, "'persecution' within the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. " *Matter of V-T-S-*. Int. Dec. 3308 (BIA 1997) citing *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). The Board has further found that, "[g]enerally harsh conditions shared by many other persons" do not amount to persecution. Acosta, 19 I&N Dec. at 222.

The harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution. Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. " UNHCR Handbook, supra note 18, at 152. The types of harm that may befall children are varied. In addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as FGM, may under certain circumstances constitute persecution. *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996).

These issues are also relevant to a determination that a child has a well-founded fear of persecution. A well-founded fear of persecution involves both subjective and objective elements such that an applicant is found to have a genuine fear of persecution and that fear is objectively reasonable. Acosta, 19 I&N Dec. at 224; Mogharrabi, 19 I&N Dec. at 446.[41] For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. Although there are no bright line tests, the UNHCR Handbook suggests that children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors. UNHCR Handbook, supra note 1, at Para. 215, 217. "Minors under 16 years of age...may have fear and a will of their own, but these may not have the same significance as in the case of an
adult. " Id. at 215. There is, of course, no hard and fast rule; "a minor's mental maturity must normally be determined in the light of his [or her] personal, family and cultural background. " Id. at Para. 216.

The adjudicator may also have to look to the circumstances of the parents and other family members, including their situation in the child's country of origin. See id. at Para. 218. The treatment of a child's family, for example, can support a well-founded fear. See Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)(concluding that evidence of mistreatment of one's family is probative of a threat to the applicant); UNHCR Handbook, supra note 18, at Para. 218. The treatment of a child's family, for example, can support a well-founded fear. See Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)(concluding that evidence of mistreatment of one's family is probative of a threat to the applicant); UNHCR Handbook, supra note 18, at Para. 218. Thus, if it can be determined that the parent had an objectively reasonable fear of persecution, this might be important to the analysis of the well-foundedness of the child's claim. When this information is unavailable, or it appears that the will of the parents and that of the child are in conflict, the adjudicator "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt. " Id. at Para. 219.

An adjudicator should attempt, in the course of the interview, to evaluate the child's level of maturity in order to determine the weight to give to the child's expressed fear. It is also incumbent on the adjudicator to evaluate the circumstances under which the child has raised a claim for asylum. For example, the circumstances of a child's arrival in the United States may provide clues to whether the child has a well-founded fear of persecution. ' If the child arrives in the company of other asylum seekers who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child's fear is well-founded. See id. at Para. 217. 8 CFR 208.13(b)(2).

Assessing the coherence and credibility of any applicant's account of events is a difficult and challenging responsibility for the adjudicator. Assessing a child's account of harm and possible persecution presents even greater challenges. Asylum Officers are encouraged to consult the Headquarters Asylum Office where necessary to resolve these issues.

(d) Nexus: the "On Account of" Requirement
(1) General Factors to Be Considered

One of the more complex analytical decisions an asylum adjudicator may face is the determination of whether a child's asylum claim involves persecution "on account of" one of the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. See 8 U.S.C. 1101(a)(42)(A). The "on account of" component is a critical part of the analysis under United States law, requiring the applicant to provide some evidence, either direct or circumstantial, that the harm he or she suffered is connected to the persecutor's intention to harm the applicant, based on the applicant's race, religion, nationality, political opinion, or membership in a particular social group. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1991).

In considering the asylum claim of a child who has filed a separate asylum application, the nexus requirement may be particularly difficult to determine because a child may express fear or have experienced harm without understanding the persecutor’s intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist. The Board has acknowledged that a persecutor may have mixed motives for inflicting harm. Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); Matter of S-P-, nt. Dec. 3287 (BIA 1996) ("Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases."); Matter of V-T-S-. Int. Dec. 3308 (BIA 1-097) ("An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur."). Consequently, because more than one factor may motivate a persecutor to inflict harm, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic. Fuentes, 19 I&N Dec. at 662. When a child applicant is involved, the child may be unable to identify all relevant motives, but a nexus can still be found if the objective circumstances support the child's claim that the persecutor targeted the child based on one of the protected grounds.

Similarly, the inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. In that context, it is important to remember that the Board of Immigration Appeals has held that a punitive or malignant intent is not required for a harm to constitute persecution on the basis of a protected ground. A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic. Kasinga Int. Dec. 3278 (involving persecution based on FGM); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (involving the use of psychiatric treatments to overcome homosexuality). Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

(2) Issues of Particular Relevance to Children

Regardless of the nature or degree of harm the child fears or has suffered, that harm must nonetheless be tied to a protected ground. For purposes of these Guidelines, this
discussion focuses briefly on the protected grounds in general and then turns to an analysis of "membership in a particular social group," because claims based on this ground are frequently difficult, novel, and analytically complicated.

Children, like adults, may raise one or more protected grounds as the basis for an asylum claim. The Asylum Officer must explore all possible grounds for asylum and should take into account the age and relative maturity of the child in assessing the child's ability to articulate his or her claims. Nonetheless, when a child asserts a claim based on race, nationality, or religion, the burden remains on the child to establish that he or she falls within the described category or is perceived as belonging to that category. Because children who have filed separate asylum applications may lack the necessary documents to establish their race, nationality, or religion, and may have more limited access to these documents than a similarly situated adult, the Asylum Officer may have to rely solely on testimony of the child to establish these elements. Although the Board has recently issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can still be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents. 8 CFR 208.13(a). See, Evidentiary Issues, subsection (f), infra.[42] This distinction may be particularly important in analyzing a child's claim, particularly if the child is unrepresented.

When the child claims asylum on the basis of political opinion, the age and maturity of the child must also be taken into account. Just as a younger child may have difficulty forming a well-founded fear of persecution, the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish. Because the level of children's political activity varies widely among countries, however, Asylum Officers should not assume that age alone prevents a child-from holding political opinions for which he or she may be persecuted. See Civil v. INS, 140 F.3d 52 (1st Cir. 1998). In Civil, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views." Id. at 56. Although the Court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by petitioner cast serious doubts on "the contention that '15-year-old children' are unlikely targets of political violence in Haiti." Id. at 56. This serves to remind adjudicators that a child's assertion of persecution based on political opinion cannot be rejected on the basis of age alone.

It may also be possible for a child's claim to be based on imputed political opinion. See, e.g., Matter of S-P-, Int. Dec. 3287. The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.
(e) Membership in a Particular Social Group

(1) General Considerations

In order to establish eligibility for relief based on membership in a particular social group, an applicant must establish that the group is cognizable as a particular social group under the Act and the individual possesses the traits that make the group cognizable. Matter of V-T-S-, Int. Dec. 3308 (BIA 1997)(citing Sanchez-Trujillo, 801 F.2d at 1573-75). The type of harm a child may suffer cannot serve to define the particular social group on account of which that particular harm was suffered. Persecution on account of membership in a particular social group encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. Acosta, 19 I&N Dec. at 233. The Board of Immigration Appeals noted:

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id.

The First, Third, and Seventh Circuits have adopted the Acosta analysis, endorsing "Acosta's 'immutable characteristics' definition as central to the determination of what constitutes a particular social group." Lwin v. INS, 144 F. 3d 505, at 511 (7th Cir. 1998); See also, Fatin, 12 F. 3d at 1239-41; Meguenine v. INS, 139 F.3d 25, 28 n. 2 (lst Cir. 1998).[43] Unlike the other Circuits, the Ninth Circuit emphasizes the "voluntary associational relationship" of persons who share a common bond. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). The Second Circuit has defined a particular social group as a group "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor or in the eyes of the outside world in general." Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

Even in those jurisdictions where the relevant standard is a variation on Acosta, the determination that a particular social group exists requires that the group must have some fundamental characteristic or bond that makes it sufficiently distinct from the general population. Identifying the group is only the first step, however, as the applicant must also establish that he or she is a member of the particular social group, and that persecution or a well-founded fear of persecution is based on membership in that group. Lwin, 144 F. 3d at 642 n. 3; Fatin, 12 F. 3d at 1240.

(2) Social Group Defined by Family Membership
Asylum seekers often claim to have suffered harm or to face the risk of harm because of a family relationship. See, Legal Opinion, Office of the INS General Counsel, "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA" (December 9, 1993). In Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993), the court concluded: "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family. " This appears to follow the pronouncement of the BIA in Acosta that "kinship ties" could be the shared characteristic defining a particular social group. Gebremichael concerned an Ethiopian applicant who had been imprisoned and tortured by Dergue Government officials seeking information about the applicant's brother. The court found that:

the link between family membership and persecution is manifest: as the record makes clear and the INS itself concedes, the Ethiopian security forces applied to petitioner the "time-honored theory of cherchez la famille ('look for the family')." the terrorization of one family member to extract information about the location of another family member or to force the family member to come forward. As a result, we are compelled to conclude that no reasonable fact finder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of "[past] persecution on account of ... membership in a particular social group. "

10 F.3d at 36. See also Ravindran v. INS, 976 F.2d 754, 761 n.5 (1st Cir. 1992), quoting Sanchez-Trujillo, 801 F.2d at 1576 ("a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being the focus of fundamental affiliational concerns and common interests for most people"). Without mentioning Sanchez-Trujillo, however, or exploring the question in depth, the Ninth Circuit later held that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family. Estrada-Posadas v. INS, 924 F.2d 916, 919 (9th Cir. 1991). It should be noted that the facts of Estrada may impose some limits on its application, as the asserted group membership was broader than that of the applicant's immediate family.

While the state of the law is therefore uncertain in the Ninth Circuit, there is nevertheless Board and Federal court support for the principle that family membership could define a "particular social group" under the asylum laws. Obviously all other elements of the definition must be satisfied for this to be the basis of eligibility as a refugee. There must be past persecution or a well-founded fear of future persecution, and the harm must be threatened or inflicted on account of the applicant's membership in the group.

(3) Social Groups Defined in Whole or in Part by Age

Domestic law with respect to age-based claims is scarce. The Second Circuit has noted that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." Gomez v. INS, 947 F. 2d
660, 664 (2d Cir. 1991). With respect to gender, Federal courts have taken different legal approaches regarding the possible breadth of a gender-based claim, but have yet to find as a factual matter that an applicant has established that a persecutor sought to harm the individual on the basis of gender alone. See, Gender Guidelines and cases cited therein. More often, while acknowledging the possibility of a broadly defined social group based on gender, courts have looked to narrowly defined subgroups in which gender is one of several factors used to determine the parameters of the particular social group. Id. See also Kasinga, Int. Dec. 3278; Fatin, supra.

By analogy, an age-based claim grounded solely in the applicant's status as a child or a child from a particular country is unlikely to be sufficiently discrete to establish persecution on account of that status. The Board and Federal courts have rejected claims based primarily or exclusively on age. For example, in Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985), the Board rejected as overly broad claims that young Salvadoran men, ages 18 to 3G,- who were urban, working class males of military age constituted a particular social group. The Board noted:

Historically, it has been the young who have primarily been involved in both the internal and external armed conflicts of a country. Although it may be an element of the proof, a purely statistical showing is not by itself sufficient proof of the existence of a persecuted group. It is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. In the context of the asylum and withholding provisions related to "membership in a particular social group" under the Act, there must be a showing that the claimed persecution is on account of the group's identifying characteristics.

Id. at 285-86.

On appeal, the Ninth Circuit affirmed, reiterating that the term "particular social group" does not "encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance." Sanchez-Trujillo, 801 F.2d at 1576. See also Civil, 140 F.3d at 56 (rejecting "Haitian youth who possess pro-Aristide political views" as overly broad); [44] Ravindran v. INS, 976 F.2d 754, 761 n.5 (1st Cir. 1991) (rejecting, argument that Tamil males between the ages of 15 and 45 were targeted for persecution on the basis of age and gender); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988).

(4) Private versus Public Actors

As the preceding discussion suggests, the claims of child asylum seekers may often involve forms of harm that have not traditionally been associated with government actors. Non-state actors generally inflict harms such as child abuse, forced labor, or criminal exploitation of children which may or may not be linked to one of the five protected grounds. Where such a nexus can be established, however, the applicant must still demonstrate both that the private persecutor has the requisite intent and that the government is unable or unwilling to protect the child from the alleged persecutor.
See Matter of Villalta, 20 I&N Dec. 142 (BIA 1990) (finding that "[t]he Salvadoran Government appears, at a minimum, to have been unable to control the paramilitary 'Death Squad'); Matter of V-T-S-, Int. Dec. 3308 (BIA 1997). [45] The fact that a child did not specifically seek protection does not necessarily undermine his or her case, but instead the adjudicator must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that the adjudicator will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to government efforts to address criminal activities relating to children.

When a non-state actor is involved, the question of internal relocation may also take on greater significance in assessing a well-founded fear of persecution. A determination that a government is unable or unwilling to protect a child should include an assessment of whether or not the lack of protection is limited to a specific geographic area or extends nationwide. Matter of A-E-M-, Int. Dec. 3338 (BIA 1998) (noting that "the respondents have not provided any evidence to suggest that their fear of persecution from the Shining Path would exist throughout that country"). An adjudicator should also take into account whether or not it is reasonable for the child to relocate by himself or herself,[46] as well as the possibility of return to protection of the state, as opposed to the protection of the parents.

(f) Evidentiary Issues

In evaluating the evidence submitted to support the application of a child seeking asylum, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The UNHCR Handbook advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution. UNHCR Handbook, supra note 18, at Para. 219. See, Matter of S-M-J-, supra, for a discussion of the benefit of the doubt doctrine.

A child, like an adult, is not required to provide corroborating evidence in all cases, and may rely solely on testimony when that testimony is credible, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the child's alleged fear. See Matter of M-D-, Int. Dec. 3339 (BIA 1998); Matter of S-M-J-, Int. Dec. 3303 (BIA 1997); Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); 8 CFR 208.13(a). The level of detail and consistency required of a child, however, should be appropriate to the child's age and maturity level. An adjudicator should also consider the child's emotional state in assessing testimony. For example, the Board has recognized that it may be appropriate to discount certain inconsistencies based on the trauma associated with persecution. Matter of A-S-, Int. Dec. 3336 (BIA 1998) (noting that an individual fleeing persecution may have difficulty "remembering exact dates when testifying before an Immigration Judge").
Certain elements of a child's claim, however, such as those relating to identity or verifiable incidents of persecution, may require corroborating evidence. A child, through his advocate or support person, should be expected to produce the relevant documents "where it is reasonable to expect corroborating evidence" or should be expected to offer an explanation as to why those documents cannot be produced. See, e.g., Matter of M-D-, Int. Dec. 3339; Matter of S-M-J-. Int. Dec. 3303. What is reasonable will, of course, depend on the child's individual circumstances, including whether or not the child is represented. A child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members. The adjudicator should carefully explore these issues with the applicant in assessing the strength of the evidence presented.

Given the additional difficulties associated with evaluating a child's claim, the adjudicator should carefully review relevant country conditions information. While the child, through his or her advocate or support person, has an obligation to produce relevant supporting material, the adjudicator should also supplement the record as necessary to ensure a full analysis of the claim. Matter of S-M-J-. Int. Dec. 3303 ("The more background information the Service has about the applicant's country, the more thorough and intelligent the examination will be.").

As with the substantive legal standard, evidentiary questions relating to child asylum seekers will pose special challenges for the adjudicator. Adjudicators are encouraged to seek assistance from the Headquarters Asylum Office to resolve difficult problems.

IV. Aged-Out Children

This section reviews the issue of children who reach the age of 21 ("age out") before the asylum interview, or who turn 21 after the interview but before adjustment of status.

(a) Children Who Age-Out Before Asylum Interview

Children who are included in their parents' asylum application age out of derivative status upon reaching their 21st birthdays, even though they may have been under 21 at the time of the filing of their parents' asylum application. INA 208(b)(3) and 8 CFR 208.19(a). If a child who is listed on an asylum application as a derivative reaches his or her 21st birthday before the asylum interview, he or she must be considered a principal applicant, and must file a separate Form 1-589 asylum application.

When a child has aged out of derivative status by the time of the asylum interview, a photocopy should be made of the parent's case assessment for inclusion in the non-record side of the former derivative's A-file. The former derivative may not have as much information as the parent regarding why the family left their home country. By placing a copy of the parent's case assessment in the aged-out child's A-file, we ensure that the interviewing Asylum Officer has the parent's case assessment -- before the interview -- to make a fuller evaluation of the aged-out child's case.[47] The parent's
case assessment will help the later interviewing Asylum Officer by providing more details of the family's background and experiences.

**Age-Out Children:**

Copy of parent’s case assessment in non-record site of former derivative’s A. File.

Inform the family that an asylum application should be separately filed now by the aged-out child, and if asylum is granted to the parent a Form I-130 can be filed for the aged-out child by the parent after adjustment

The Asylum Officer should inform the family that:

A separate Form I-589 asylum application should be filed now -- by the aged-out child;[48] and,

If the parent of an aged-out child is granted asylum, a Form I-130 relative petition can be filed for the aged-out child later -- by the parent after adjustment.

In situations such as this, the family may not understand how a child becomes disqualified from derivative asylum eligibility by operation of law (by reaching his or her 21st birthday); and also may not understand the Form I-130 option (in which reaching one's 21st birthday is not disqualifying). This approach will help to prevent the separation of a family.

**(b) Children Who Age-Out Before Adjustment**

If a child is granted asylum as a derivative, but the child turns 21 years of age before an application for adjustment to permanent residence is filed, a *nunc pro tunc* (retroactive approval) procedure is permitted.

To adjust to permanent residence as a derivative child of an asylee, the child must be under 21 years of age. The relevant date for determining status as a minor is the date the application for adjustment is adjudicated. The INS has developed specific procedures for asylees applying for adjustment who no longer qualify as derivative children. Such aged-out derivatives must file a Form 1-589 asylum application on their own. Provided that the aged-out child remains unmarried, the asylum application can then be approved by the Asylum Office, *nunc pro tunc*, to the date of receipt of the original derivative status.[49] The aged-out child does not have to independently meet the refugee definition of 101(a)(42), but he or she must still be interviewed by an Asylum Officer to confirm identity and to ensure that there are no disqualifications (e.g., a mandatory bar). A fingerprint check must be completed if the original fingerprint check is more than 15 months old.
V. Conclusions: Training and Monitoring/Follow-up

(a) Training

The INS Guidelines For Children's Asylum Claims are required reading for all interviewing and supervising Asylum Officers and overseas Immigration Officers adjudicating child refugee applications. Photocopies should be made for the fullest possible distribution among these Officers. Upon receipt of this guidance, each Asylum Office must initiate a minimum of 4 hours of in-Service training designed to help Officers to use this guidance, and reinforce their awareness of and sensitivity to children’s and cross-cultural issues. Training on these Guidelines will also be incorporated into future refugee training sessions for overseas Immigration Officers adjudicating child refugee applications. Training materials will be provided by Headquarters and, in certain instances, trainers may be drawn from the ranks of experienced NGOs and the UNHCR.

This guidance will be included in all future training sessions as a separate module. These training activities, and the information being gathered by the RIC, will enhance the ability of all Officers to make informed, consistent, and fair decisions.

Headquarters will continue to keep Officers abreast of the latest information on child refugee issues. Further training on these and related topics will take place as required. Training is critical to using this guidance effectively.

(b) Public Liaison

An important follow-up activity is public liaison. During their regular meetings with the NGO community, Asylum Office Directors should inform the public of this new initiative for children with asylum claims. The INS can benefit greatly from the help of the public and the NGO community. For example, pro bono representatives and qualified interpreters are always needed for asylum cases. Many volunteers may not have experience working with children. Representatives and interpreters with training or experience with children can be of great assistance during asylum interviews.

There are excellent community organizations and university law clinics that offer specialized training to lawyers who are willing to provide pro bono representation for child asylum applicants. Children also benefit greatly from the work of church, synagogue, and community-based groups. Volunteers without legal training are always welcome in these organizations, and can make a tremendous difference to children whose lives are affected by violence. Information-sharing, cooperation, and networking among these organizations, individuals, and INS may help to ensure that children have qualified representatives and interpreters at their asylum interviews.

(C) Monitoring
The ultimate value of the INS Guidelines For Children's Asylum Claims will lie in their translation from words to concrete action.[50] Asylum Officer interviewing and decision making should be monitored systematically by Asylum Office Directors and Supervisory Asylum Officers. The latter will be held accountable for ensuring that Asylum Officers fully implement this guidance.

As caselaw on child refugee issues evolves, this guidance will be revised from time-to-time. Headquarters will keep track of all developments in international and domestic policies relating to child refugees. At the same time, procedures will be established to ensure collection of statistics on various aspects of children's asylum claims adjudicated by the AOC.

INS Guidelines for Children's Asylum Claims is a public document and may be distributed outside INS.
FOOTNOTE:

[1] These instruments need not be ratified by the United States to provide guidance as a source of human rights norms. See, Asylum Officer Basic Training Course (AOBTC, August, 1998), Lesson: International Human Rights Law.

[2] Many of the components of international policy regarding refugee children also derive from the United Nations Convention on the Rights of the Child (CRC). Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children, including those who are refugees. Article 3(l) of the CRC provides that the "best interests of the child" should be the primary consideration in decisions involving children. Because the United States has signed but not ratified the CRC, its provisions, as noted above, provide guidance only and are not binding on adjudicators. Having signed the CRC, however, the United States is obliged under international treaty law to refrain from acts which would defeat the object and purpose of the Convention.


[5] Reflecting a more concerted effort to ensure the well-being of refugee children, the UNHCR established the position of a Senior Coordinator for Refugee Children in 1992. This was seen as a significant step toward improving UNHCR's protection of and assistance to minors.


[10] For example, most unaccompanied minors (children under the age of 18 who seek admission to the United States and who are not accompanied by a parent or guardian) are exempted from the expedited removal process. See, Memorandum, "Unaccompanied Minors Subject to Expedited Removal" (INS Office of Programs), August 21, 1997.
[11] Because the circumstances under which an unaccompanied minor may reach the United States can vary greatly, it is necessary to determine, if possible, the location of the child's parents. Children may have been separated from parents during their flight to the United States. Both children and parents may wish to know the location of relatives and whether they are safe. It may be in the child's best interests for the Asylum Officer to notify parents that their child has applied for asylum, provided that the child requests such parental notification in writing. 8 CFR 208.6(a).

[12] Some applicants may request that a relative or friend be present at the interview for 'moral support.' There is no prohibition against this and the Asylum Officer, in his or her discretion, may allow such individual to remain during the interview." AOBTC (August, 1998) Lesson: Part L Overview of Nonadversarial Inter-view, at pg. 23. At the same time, there is no requirement that a child bring an adult to the inter-view either to serve as a support person, attorney, or accredited representative.

[13] The UNHCR document "Refugee Children - Guidelines on Protection and Care" (see, Section 1, Background and International Guidance, supra) states that children should "have a trusted adult accompany the child during the interviewing process, either a family member of the child, a friend or an appointed independent person" (pg. 102).


[16] A person who, because of his experiences, was in fear of the authorities in his [or her] own country may still feel apprehensive vis-a-vis any authority. He [or she] may therefore be afraid to speak freely and give a full and accurate account of his [or her] case." United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992) ("UNHCR Handbook") at 1 198.

[17] If the principal on the case is an adult, an "Opening Statement" for adults should be used. See, Asylum Officer Corps Training, Inter-viewing Summary Of Techniques, HQ (July 14, 1994). See also, AOBTC (August, 1998) Lessons: Interviewing Part 1: Overview of Non-Adversarial Interview; Part 11: Notetaking; Interviewing Part III: Eliciting Testimony; Inter-viewing Part IV: Cross-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview; Inter-viewing Part VI: Working With an Interpreter; Interviewing Part V: Interviewing Survivors: Physical Abuse, Torture, and Trauma-Related Conditions.

[18] The sample Opening Statement is intended for young children, and may be modified for older children, depending on their developmental stage and level of sophistication. See, Working with Refugee and Immigrant Children, infra at note 21, pgs. 6-12, summarizing and reviewing the characteristics of children's developmental stages.
[19] A child’s "mental development and maturity" are important considerations when determining whether a child may qualify for refugee status, UNHCR Handbook at 1214. See also, the summary of developmental stages in Working with Refugee and Immigrant Children, infra at note 21, pgs. 6-12.


[22] For example, a report from a child psychologist who has interviewed the child may indicate post-traumatic stress, a conclusion that could support an Asylum Officer's determination regarding past or future persecution.


[26] Compare, "The fact that an applicant attempts to give a boilerplate story at an affirmative asylum interview should not foreclose further inquiry by the Asylum Officer. Many applicants have been the victims of unscrupulous preparers, of bad advice, and, commonly, of fear. It is this type of applicant who above all may require the careful and


[29] The INS will continue to work with attorneys, advocacy groups, academic institutions, NGOs, and other interested organizations and members of the public in developing appropriate human rights documentation resources. Individuals or organizations who wish to contribute information or documentation on children's or other refugee issues may mail it to: INS Resource Information Center, 425 1 St., N.W., Washington, D.C. 20536 (Attn: ULLICO Bldg., 3rd Floor). Information available in electronic format may also be sent by e-mail to John. D. Evans@justice.usdoj. gov.


[31] Although the discussion focuses on children who have filed separate asylum applications, the same issues are applicable in the case of a derivative applicant when the principal applicant is not granted asylum. UNHCR Handbook, Para. 184.

[32] Under INS regulations, the child of a refugee or asylee is usually afforded the same status as his or her parent. See, 8 CFR 207. 1 (e) (refugee status), 208.21 (a) (asylee status). With respect to firm resettlement, for example, the courts have reasoned that "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place." Lepe-Quitron v. INS, 16 F.3d 1021, 1025 (9th Cir. 1994). See also, Vang v. INS,1998 WL 334183 (9th Cir. 1998) (looking "to whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribut[ing] the parents' status to the minor").

[33] For further discussion of the basic framework of asylum adjudication, Asylum Officers should refer to the AOBTC training materials and Gender Guidelines. The Gender Guidelines provide a useful overview, and many of its points relating to gender may be useful in analogizing to claims based on youth.
[34] Where appropriate, the following discussion will incorporate relevant sections of the UNHCR Handbook. While the UNHCR Handbook does not have the force of law and does not bind the INS with respect to interpretations of Section 208 of the INA, the Supreme Court has noted that the Handbook provides significant guidance in construing the 1967 Protocol, to which Congress sought to conform in adopting the Refugee Act of 1980. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

[35] Under the INA, a refugee is: any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, ... The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion. 8 U. S. C. I 10 1 (a)(42).


[38] See, BLM; Asylum p. 23-27; See also, AOBTC (August, 1998), Lesson: Asylum Eligibility Part 1: Definition of Refugee: Definition of Persecution; Eligibility Based on Past Persecution.

[39] See, Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969) (persecution involves "the infliction of suffering or harm upon those who differ ... in a way regarded as offensive"); *Hernandez-Ortiz v INS*, 777 F.2d 509, 516 (9th Cir. 1985) (persecution can occur where "there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate").


[44] The First Circuit, in Civil, found that "[petitioner] presented ample documentary evidence that young people in Haiti were not exempted from the general violence and unrest that occurred in the aftermath of Haiti's military coup, but she presented no evidence that such persons constitute anything other than a general demographic segment of the troubled Haitian population. We thus reject petitioner's suggestion that the Board erred by not finding her eligible for asylum based on her status as a Haitian youth who supported Aristide."

[45] See also, AOBTC (August, 1998), Lesson: Asylum Eligibility Part I.

[46] See, supra note 32.

[47] Since the applicant had been previously included in the parent's application, there is no confidentiality issue in using the parent's application to explore the child's claim.

[48] Aging-out of derivative status can materially affect eligibility for asylum and may qualify as a changed circumstances exception to the 1-year deadline for filing asylum applications. See 8 CFR 208.4(a)(4)(i)(B); A013TC Lesson: Once Year Filing Deadline, pgs. 9-10 (November, 1998).


"Cutting Edge" Children's Asylum Claims
Florence Immigrant & Refugee Rights Project
February 20, 2002

Part I
Introduction and Overview To Past Persecution Claims

Although the concept of basing your child client’s claim entirely on past persecution may seem elementary, it is worthwhile to review the concept in light of the new asylum regulations. I have heard many attorneys screen a child for eligibility for political asylum by simply asking, “Are you afraid anyone will hurt you in your home country?” This question completely forecloses on a child’s ability to articulate an asylum claim based on past persecution.

Also, do not be deceived that the persecution the child endured had to be severe. Under the new regulations a child can have suffered non-severe past persecution and have no future fear and win asylum. The child need only show past persecution on account of one of the five protected classes AND show that he would suffer OTHER serious harm if s/he went back to his/her home country. See 8 C.F.R. § 208.13(b)(1)(iii)(B).

§1.1 Persecution: What is it and How do I Screen For It?

The first step in articulating an asylum claim based on past persecution is understanding what persecution is and is not. If you find your child client has suffered a harm, remember you still have to link it to a protected class before it amounts to a claim for asylum.

Persecution is typically a harm that one suffers. Courts have defined it as:

- the infliction of suffering or harm upon those who differ in a way that is regarded as offensive
- harm or suffering that punishes a child for possessing a belief or characteristic the persecutor seeks to overcome
- oppression inflicted on groups or individuals because of a difference the persecutor will not tolerate

Screening for Persecution (an unfortunatene check list)

- physical violence
- rape/sexual assault
- child abuse
- scars
- forced abortion/sterilization
- denial of food/water
- denial of medical treatment
- incarceration
- kidnapping
- detention
- confinement to orphanage
- confinement to mental institution
- forced marriage
- forfeiture of property
- denial of education
- forced labor
- recruited as child soldier
- mental suffering
- witnessing murder of family
- witnessing violence
- discrimination
- threats of violence
- humiliation
- forced prostitution
- vicarious harm
- forced to renounce religion
- severe economic sanctions
- statelessness

§1.2 What if the Child Was Persecuted But Has No Objectively Reasonable Fear of Returning?
undergo such procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded fear of persecution on account of political opinion."

If a judge grants political asylum under this subsection, your client will have conditional asylum status. The annual cap under this section is 1,000.

§2.1 If my child client fits into the subsection definition, can s/he still win regular asylum?

Always advocate for asylum on account of one of the protected grounds before asking the judge for asylum under the subsection. For example, if you client is a pregnant unwed teenage Chinese girl, you could conceivably argue for asylum on account of her social group. Thus, you avoid the annual cap of the subsection because the girl would win regular asylum.

§2.2 Can C-Y-Z extend to cover children?

In In re C-Y-Z., the BIA extended the subsection to cover the spouse whose wife was forcibly sterilized. The issue still remains open as to whether children may be covered under this subsection if their parents suffered under the family planning policies.

The rationale underlying this argument is that C-Y-Z. intended to extend coverage to the husband because the husband was allowed to "stand in the shoes" of his wife. Similarly, a child should be allowed to stand in the shoes of their parents when analyzing a claim for political asylum. Also, the restrictions imposed on the parents (i.e. fines, forfeiture of property, loss of employment) can directly impact the child.

Also children whose boyfriend or girlfriend suffered a harm described under this statutory subsection should also get coverage. The protection should extend to non-married couples as well because what Congress sought to protect was a person's fundamental right to procreate, etc. independent of whether that person was married or unmarried.

§2.3 Beyond China: Using the refugee subsection for street kids or mentally ill

Untapped is the potential to base asylum claims on a non-Chinese child's resistance to a coercive population control program. This argument may be a stretch, but nothing in this statutory subsection limits the relief to persons from China. For example, one could argue that Columbia seeks to eradicate the mentally ill from its streets, or Honduras seeks to purge its streets of unwanted homeless children. If your local immigration judge is hesitant to extend social group to cover street kids or mentally ill or mentally retarded kids, then you may try some creative advocacy with this subsection.

§2.4 Procedural aspects of conditional asylum

If your child client is granted conditional asylum, then s/he must wait to become a regular asylee because the INS limits the number of persons who may receive asylum under this subsection to 1,000 persons per year. The current priority date is about August 1999. Thus, persons who were granted conditional asylum in August 1999, are just now receiving their "regular" asylum status.

§2.5 Conditional asylum and ORR benefits

Advocates must be aware that if your child client is granted asylum under this special subsection, s/he will be a conditional asylee. Only a certain number of persons are allowed to receive asylum under this subsection, so your child may have to wait for years before s/he is a fully vested asylee. What this means on a more practical level is that your child will not be eligible for the refugee foster program. On a case by case basis, the INS will consider placing your child client into INS funded foster care.
Street children have little, if any, ability to improve their condition. Governments in Central America and other countries provide no food, clothing or shelter to street kids. The children are not afforded a basic education. An abandoned street child is properly considered an immutable characteristic because members of this group lack any resources to enable them to improve or change their status. Even if some external entity may change his status as a street child, the fact remains that the street child themselves cannot change their status.

INS typically tries to argue that being a street child is a temporary condition. However, “aging out” is a specious argument. Asylum law does not require an applicant show s/he will have a well-founded fear forever – only that s/he has such a fear currently.

§3.3 Mentally Ill or Disabled Children

Mentally ill, disabled and mentally retarded children are the most challenging clients a lawyer will face. Most disabled children are too incompetent to participate in the defense of their deportation. The Immigration Court provides them no guardian ad litem and most frustrating is getting a psychological or medical evaluation of the child. Who consents to your representation, who consents to the medical evaluation, can the child sign an asylum application, and does the fraud warning have any applicability?

The first thing to do when representing a disabled child is to OBJECT that the administrative process violates due process. If you do not object, you may lose your right to appeal on that issue. Proving your child has a disability will also be difficult. Check with your local organizations to see if any are willing to provide free psychological or medical evaluations for children. Many free services require that the child’s disability be a result of torture before they qualify for the free services. However, you should convince your local NGO to let you have their list of volunteer doctors to see if any would be willing to act independently.

Most judges are willing to recognize that the mentally ill are a social group. However, proving that the child will suffer persecution maybe the challenge. Some courts are less willing to see government neglect, indifference or lack or resources as persecution. An advocate need not show malignant or punitive intent on behalf of the government’s actions, but a government’s lack of resources may not be enough to win your asylum case. Depending on the country at issue, an advocate may be able to argue that mentally ill children are the target of government social cleansing. They are seen as “undesirables” and targeted for social purges condoned by the government of that country.

One autistic child was granted asylum because he was forced to undergo various degrading and dangerous mystical treatments consistent with the curse of Allah. The child was represented by his mother.

§3.4 Forced Prostitution/ Forced Marriage

Many children have won asylum claims because they feared or suffered forced prostitution or forced marriage. The persecution could be on account of religion, social group or political opinion. One could argue that the definable social group is girls who have been betrothed against their will by their families according to tradition or girls who have forcibly been prostituted against their will. The rebellion or the self-determination of the girl may play a role in defining their political opinion.

§3.5 Forced Conscription

The forcible recruitment of children could amount to a claim for political asylum. See Utkor v. McElroy, 930 F.Supp. at 885 n.5 (referring to the forcible recruitment of children as a potentially legitimate reason for a child subject to the policy to resist conscription and seek asylum).
Part V

Equal Protection Challenge to Derivative Asylee Status

§5.1 Suspect Class: Alien Refugee Children?

Under INA § 208(b)(3), a person granted political asylum may petition their spouses or children to become derivative asylees. The spouse or child does not have to independently qualify for asylum, they may gain asylee status solely on the basis of their relationship to the applicant. A child, however, has no right to petition their parents as beneficiaries of his/her application. For example, we frequently see the following scenarios:

1. Child from Sri Lanka wins asylum. Child’s parents are still in home country and thus child goes into foster home. Child, of course, should be able to reunite with his parents and bring them to USA. Child cannot because the immigration laws do not protect a minor child’s right to be with his/her parents.

2. Chinese child wins asylum. His parents are here in the US but they lost their asylum claim. Child’s parents refuse to come forward for fear of being deported. Child goes into foster care program in Seattle while child’s entire family lives in New York.

Unfortunately, the Equal Protection Clause of the 14th Amendment is only limited to state action. However, equal protection claims have been brought against the federal government under the 5th Amendment when their conduct is grossly unreasonable. Perhaps advocates could challenge INA §208(b)(3) to allow children to reunite with parents or advocates could pressure congressional representatives to amend the statute to reflect “family values.”

Part VI

International Law

§6.1 Best Interest of the Child

If a child’s deportation would not be in the best interest of the child, conceivably the child’s deportation violates international customary law. International law states that in any adjudication, a judge must consider the best interest of the child. For example, where a child’s deportation would separate him/her from their entire family, then proceedings should be terminated. We successfully convinced a judge that deporting a mentally disabled child to a country where he had no family violated international law. We have an extensive brief on the issue and please call us if you wish to receive a copy.
**Application for Asylum and for Withholding of Removal**

**PART A. INFORMATION ABOUT YOU.**

1. Alien Registration Number(s), if any (APA):

2. Social Security Number
   - n/a

3. Complete Last Name

4. First Name

5. Middle Name

6. What Other Names Have You Used? (Include maiden name and aliases):
   - Jimmy

7. Residence in the U.S.
   - C/O: INS Custody-Berks Detention Center
   - Street Number and Name: 1261 County Welfare Road
   - City: Leesport
   - State: PA
   - Zip Code: 19533

8. Mailing Address in the U.S. if Other Than Above
   - C/O: n/a
   - Street Number and Name: 
   - City: 
   - State: 
   - Zip Code: 

9. Sex
   - Male [X]
   - Female

10. Marital Status
    - Single [X]
    - Married
    - Divorced
    - Widowed

11. Date of Birth (MM/DD/YY)
    - 3/2/86

12. City and Country of Birth
    - Village Miami, India

13. Present Nationality (Citizenship)
    - Indian

14. Nationality at Birth
    - Indian

15. Race, Ethnic or Tribal Group
    - Asian

16. Religion

17. Check each box that applies:
    - [X] I am now in removal, deportation or exclusion proceedings.
    - [ ] I am not now in removal, deportation or exclusion proceedings.
    - [ ] I have never been in removal, deportation or exclusion proceedings.

18. Complete Items Through 19g:
    - a. When did you last leave your country? (MM/DD/YY)
       - 7/6/00
    - b. When did you last enter the U.S.? (MM/DD/YY)
       - 7/6/00
    - c. Where did you last enter the U.S.?
       - JFK Airport, New York
    - d. What was your status when you last entered the U.S.? [ ] ewi
    - e. What is your I-94 Number?
       - n/a
    - f. What is the expiration date of your authorized stay, if any?
       - n/a

19. Have you previously entered the U.S.?
    - Yes [X] No

   If yes, list place, date, and your status for each entry:
   - Place: 
   - Date: 
   - Status: 
   - Place: 
   - Date: 
   - Status: 

**FOR INS USE ONLY**

- Returned
- Resubmitted
- Rebuffed
- Rebuff Rec'd
- Action:
  - Interview Date:

- Asylum: 
  - Granted
  - Denied
  - Referred
  - Recommended Approval Date

- Date A.O., final decision or referral issued

- Total number of persons granted asylum

**For FOIR Use Only**

**To Be Completed by Attorney or Representative, If Any**

- Check if G-28/EOIR-28 is attached showing you represent the applicant.
- INS VOLAG or PIN #
- ATTY State License #

**Form I-589 (Rev. 03-01-98) N**
Information About You - Continued.

19. What is your native language? [ ] Yes [ ] No
Punjabi

20. Are you fluent in English? [ ] Yes [ ] No
21. What other languages do you speak fluently?
none

22. Have you ever applied to the United States Government or to any other Government(s) for refugee status, asylum, withholding of deportation, or withholding of removal?
[ ] Yes
[ ] No
☐ I was included in a pending application of my parent(s). However, I am now 21 years old or married so I am filing my own application.
☐ I was included in my spouse's application, but now I wish to file my own application.
☐ Yes. (In what country and what was the decision? Also specify the date of the decision.) Country ____________________________ Date __________

23. What country issued your last passport or travel document? ____________________________
24. Passport # ____________________________ Travel Document # ____________________________ 25. Expiration Date n/a

26. Prior address in last country of residence or country in which you fear persecution. (List Address, City/Town, Province, State, Department, and Country) Village Miani Algohana Ward, Teh Dasuya, Dist Hoshiarpur

27. Provide the following information about your education, beginning with the most recent.

<table>
<thead>
<tr>
<th>Name of School</th>
<th>Type of School</th>
<th>Location</th>
<th>From (Yr/Tr)</th>
<th>To (Yr/Tr)</th>
</tr>
</thead>
<tbody>
<tr>
<td>DDS Senior Study School</td>
<td>Grammar School</td>
<td>Waddimani, India</td>
<td>approx 1992</td>
<td>2000</td>
</tr>
<tr>
<td>Temple School</td>
<td>Pre School</td>
<td>Waddimani, India</td>
<td>approx 1990</td>
<td>approx 1992</td>
</tr>
</tbody>
</table>

28. Provide the following information about your residences during the last five years. List your present address first. (Use additional sheet of paper if necessary.)

<table>
<thead>
<tr>
<th>Number and Street</th>
<th>City</th>
<th>Province or State</th>
<th>Country</th>
<th>From (Yr/Tr)</th>
<th>To (Yr/Tr)</th>
</tr>
</thead>
<tbody>
<tr>
<td>INS Custody, Berks Det.Ctr.</td>
<td>Leesport</td>
<td>PA</td>
<td>US</td>
<td>12/1/00</td>
<td>Present</td>
</tr>
<tr>
<td>INS Custody</td>
<td>Chicago</td>
<td>IL</td>
<td>US</td>
<td>9/4/00</td>
<td>12/1/00</td>
</tr>
<tr>
<td>INS Custody</td>
<td>New York</td>
<td>NY</td>
<td>US</td>
<td>7/6/00</td>
<td>9/4/00</td>
</tr>
<tr>
<td>Afohana Ward No. 6</td>
<td>Village Miani</td>
<td>Dist. Hoshiarpur</td>
<td>India</td>
<td>3/86</td>
<td>7/00</td>
</tr>
</tbody>
</table>

29. Provide the following information about your employment during the last five years. List your present employment first. (Use additional sheet of paper if necessary.)

<table>
<thead>
<tr>
<th>Name and Address of Employer</th>
<th>Your Occupation</th>
<th>From (Yr/Tr)</th>
<th>To (Yr/Tr)</th>
</tr>
</thead>
<tbody>
<tr>
<td>n/a</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

30. Provide the following information about your parents.

<table>
<thead>
<tr>
<th>Name</th>
<th>Country and City of Birth</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Name] (father)</td>
<td>Waddimani, India</td>
<td>India</td>
</tr>
<tr>
<td>[Name] (deceased)</td>
<td>India</td>
<td>India</td>
</tr>
</tbody>
</table>
### PART B. INFORMATION ABOUT YOUR SPOUSE AND CHILDREN.

**Your Spouse.** ☐ I am not married. *(Skip to Part 3, Your Children.)*

<table>
<thead>
<tr>
<th>1. Alien Registration Number (AR)</th>
<th>2. Passport/ID Card, etc.*</th>
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<thead>
<tr>
<th>3. Complete Last Name</th>
<th>4. First Name</th>
<th>5. Middle Name</th>
<th>6. Date of Birth (Mo/Day/Yr)</th>
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<tr>
<th>7. Date of Marriage (Mo/Day/Yr)</th>
<th>8. Place of Marriage</th>
<th>9. City and Country of Birth</th>
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<td>□ Male □ Female</td>
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<thead>
<tr>
<th>13. Is this person in the U.S.?</th>
<th>□ Yes. <em>(Complete blocks 15 to 24.)</em> □ No. <em>(Specify Location)</em></th>
<th>14. Social Security #</th>
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<thead>
<tr>
<th>15. Place of Last Entry in the U.S.?</th>
<th>16. Date of Last Entry in the U.S.? (Mo/Day/Yr)</th>
<th>17. 1-94#</th>
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<tr>
<th>19. Expiration of Status (Mo/Day/Yr)</th>
<th>20. Is your spouse in removal, deportation or exclusion proceedings? □ Yes □ No</th>
<th>21. If previously in the U.S., Date of Previous Arrival (Mo/Day/Yr)</th>
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<thead>
<tr>
<th>22. Place of Previous Arrival</th>
<th>23. Status at Time of Previous Arrival</th>
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</table>

24. **If in the U.S., is this person to be included in this application?** *(Check the appropriate box.)*
   - □ Yes. *(Attach one (1) photograph of your spouse in the upper right hand corner of Page 3 and the extra copy of the application submitted for this person.)*
   - □ No, because my spouse is/has:
     - □ Filing separately.
     - □ Separate application pending.
     - □ Other reasons.

---

**All of Your Children, Regardless of Age or Marital Status.** *(Use Supplement A Form or attach additional pages and documentation if you have more than two (2) children.)*

<table>
<thead>
<tr>
<th>1. Alien Registration Number (AR)</th>
<th>2. Passport/ID Card, etc.*</th>
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<th>3. Complete Last Name</th>
<th>4. First Name</th>
<th>5. Middle Name</th>
<th>6. Date of Birth (Mo/Day/Yr)</th>
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<td></td>
<td>□ Male □ Female</td>
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<tr>
<th>11. Is this child in the U.S.?</th>
<th>□ Yes. <em>(Complete blocks 12 to 22.)</em> □ No. <em>(Specify Location)</em></th>
<th>12. Social Security #</th>
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<tr>
<th>13. Place of Last Entry in the U.S.?</th>
<th>14. Date of Last Entry in the U.S.? (Mo/Day/Yr)</th>
<th>15. 1-94#</th>
<th>16. Status when Last Admitted (Type if any)</th>
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<table>
<thead>
<tr>
<th>17. Expiration of Status (Mo/Day/Yr)</th>
<th>18. Is this child in removal, deportation or exclusion proceedings? □ Yes □ No</th>
<th>19. If previously in the U.S., Date of Previous Arrival (Mo/Day/Yr)</th>
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<table>
<thead>
<tr>
<th>20. Place of Previous Arrival</th>
<th>21. Status at Time of Previous Arrival</th>
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</table>

22. **If in the U.S., is this person to be included in this application?** *(Check the appropriate box.)*
   - □ Yes. *(Attach one (1) photograph of your child in the upper right hand corner of Page 3 and the extra copy of the application submitted for this person.)*
   - □ No, because child is/has:
     - □ Filing separately.
     - □ Separate application pending.
     - □ Over 21 years of age.
     - □ Married.
     - □ Other reasons.
### Information About Your Spouse and Children - Continued

(Use Supplement A Form or attach additional sheets of paper to list additional children.)

<table>
<thead>
<tr>
<th>All of Your Children, Regardless of Age or Marital Status.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Alien Registration Number (A#):</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>3. Complete Last Name</td>
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<td>6. Date of Birth (MM/DD/YY)</td>
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<td></td>
</tr>
<tr>
<td>11. Is this person in the U.S.? □ Yes (Complete blocks 11 to 22) □ No. (Specify Location)</td>
</tr>
<tr>
<td>12. Social Security #</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>17. Expiration of Status (MM/DD/YY)</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>20. Place of Previous Arrival</td>
</tr>
</tbody>
</table>

22. If in the U.S., is this person to be included in this application? (Check the appropriate box.)

- □ Yes. (Attach one (1) photograph of your child in the upper right hand corner of Page 3 on the extra copy of the application submitted for this person.)
- □ No, because child is:
  - □ Filing separately.
  - □ Separate application pending.
  - □ Over 21 years of age.
  - □ Married.
  - □ Other reasons.

### PART C. INFORMATION ABOUT YOUR CLAIM TO ASYLUM.

(Use Supplement B Form or attach additional sheets of paper as needed to complete your responses to the questions contained in Part C.)

1. Why are you seeking asylum? Explain in detail what the basis is for your claim. (Attach additional sheets of paper as needed.)

I believe I will be persecuted if I return to India.

I believe I will be subjected to beatings, mistreatment, and neglect. When I was living in India, my stepmother and father beat me, deprived me of food, and neglected me.

Further, the smuggler who brought me to the United States has threatened to kill me if I return to India. The smuggler will kill me if I am returned to India because I identified him to the INS and the Immigration Court.

If my family will not take me back into their home, I will become homeless and will have to live in the streets. I fear that I will receive no protection for anyone and will be harmed.

See attached affidavits of [signature].
2. Have you or any member of your family ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

☐ No. ☑ Yes. If yes, provide a detailed explanation of your or your relatives' involvement with each group and include the name of each organization or group; the dates of membership or affiliation; the purpose of the organization; your duties or your relatives' duties or responsibilities in the group or organization; and whether you or your relatives are still active in the group(s). (Attach additional sheets of paper as needed.)

I am unaware of any organizations or groups.

3. Have you or any member of your family ever been mistreated or threatened by the authorities of your home country or any other country or by a group or groups that are controlled by the government, or that the government of the country is unable or unwilling to control?

☐ No. ☑ Yes. If yes, was it because of any of the following reasons? (Check each of the following boxes that apply.)

☐ Race ☐ Religion ☐ Nationality ☑ Membership in a particular social group ☐ Political Opinion

On a separate sheet of paper, specify for each instance, what occurred and the circumstances; the relationship to you of the person involved; the date; the exact location; who it was who took such action against you or your family member(s); higher position in the government or group; the reason why the incident occurred. Attach documents referring to these incidents, if they are available. (Attach additional sheets of paper as needed.)

I am a member of various social groups:

1. Indian children who are victims of domestic violence where the government of India is unwilling or unable to protect the children.
2. Indian street children
3. Children who identify their smuggler and provide information to the U.S. government about the smuggler's identity.

See attached affidavits of [Redacted].

4. Have you or any member of your family ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in your country or any other country, including the United States?

☑ Yes. If yes, for each instance, specify what occurred and the circumstances; dates; location; the duration of the detention or imprisonment; the reason(s) for the detention or conviction; the treatment received during the detention or imprisonment; any formal charges that were lodged against you or your relatives; the reason for release; treatment after release. Attach documents referring to these incidents if they are available. (Attach additional sheets of paper as needed.)
Information About Your Claim to Asylum - Continued.

5. Do you fear being subjected to torture (severe physical or mental pain or suffering, including rape or other sexual abuse) in your home country or any other country if you return?

☐ No. ☑ Yes. If YES, explain why. (Attach additional sheets of paper as needed.)

I will be beaten, as I was in the past, by my stepmother and my father.

I am afraid to be homeless, living on the streets of India with no one to help me.

I will be hurt and killed by the smuggler who brought me to the U.S. for turning him into the U.S. government authorities.

See attached affidavits of (redacted).

6. What do you think would happen to you if you returned to the country from which you claim you would be subjected to persecution? Explain in detail and provide information or documentation to support your statement, if available. (Attach additional sheets of paper as needed.)

I will be beaten or left homeless on the streets in India with no way to take care of myself as a fourteen year old child. I also fear being beaten and or killed.

See attached affidavits of (redacted).

7. Describe in detail your trip to the United States from your home country. After leaving the country from which you are claiming asylum, did you or your spouse or child(ren), who are now in the United States, travel through or reside in any other country before entering the United States?

☐ No. ☑ Yes. If YES, for each person, identify each country and indicate the length of stay; the person's status while there; the reasons for leaving; whether the person is entitled to return for residence purposes; and if the person applied for refugee status or for asylum while there; or why he or she did not do so. (Attach additional sheets of paper as needed.)

I traveled by airplane from Bombay, India to Paris, France and to JFK Airport in New York.
PART D. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION FOR ASYLUM.

(Use Supplement D Form or attach additional sheets of paper as needed to complete your responses to the questions contained in Part D.)

1. Do you, your spouse, or your child(ren) now hold, or have you ever held, permanent residence, other permanent status, or citizenship, in any country other than the one from which you are now claiming asylum?
   [ ] No. [ ] Yes. If YES, explain. (Attach additional sheets of paper as needed.)

2. Have you, your spouse, your child(ren), your parents ever filed for, been processed for, or been granted or denied refugee status or asylum by the United States Government?
   [ ] No. [ ] Yes. If YES, explain the decision and what happened to any status you received as a result of that decision. If you have been denied asylum by an Immigration Judge or the Board of Immigration Appeals, please describe any change in country conditions or your own circumstances since the date of the denial that may affect your eligibility for asylum. (Attach additional sheets of paper as needed.)

3. Have you, your spouse, your child(ren), or your parents ever filed for, been processed for, or been granted or denied refugee status or asylum by any other country?
   [ ] No. [ ] Yes. If YES, explain the decision and what happened to any status you received as a result of that decision. (Attach additional sheets of paper as needed.)

4. Have you, your spouse, or child(ren) ever caused harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion, or ever ordered, assisted, or otherwise participated in such acts?
   [ ] No. [ ] Yes. If YES, describe, in detail, each such incident and your own or your spouse's or child(ren)'s involvement. (Attach additional sheets of paper as needed.)

5. After you left your country of claimed persecution for the reasons you have described, did you return to that country?
   [ ] No. [ ] Yes. If YES, describe, in detail, the circumstances of your visit, for example, the date(s) of the trip(s), the purpose(s) of the trip(s), and the length of time you remained in that country for the visit(s). (Attach additional sheets of paper as needed.)

6. Are you filing the application more than one year after your last arrival in the United States?
   [ ] No. [ ] Yes. If YES, explain why you did not file within the first year after you arrived. You should be prepared to explain at your interview or hearing why you did not file your asylum application within the first year after you arrived. For guidance in answering this question see Part 1: Filing Instructions, Section V. “Completing the Form,” Part D. (Attach additional sheets of paper as needed.)
PART E. SIGNATURE.

After reading the information on penalties in the instructions, complete and sign below. If someone helped you prepare this application, he or she must complete Part F.

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it is all true and correct. Title 18, United States Code, Section 1546, provides in part: "Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact — shall be fined in accordance with this title or imprisoned not more than five years, or both". I authorize the release of any information from my record which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

WARNING: Applicants who are in the United States illegally are subject to removal if their asylum or withholding claims are not granted by an asylum officer or an Immigration Judge. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn. Applicants determined to have knowingly made a frivolous application for asylum will be permanently ineligible for any benefits under the Immigration and Nationality Act. See INA 288(a)(6) and 8 CFR 208.18.

Signature of Applicant (The person named in Part A)

[ ]

Sign your name so it all appears within the brackets.

12/16/00

Date (Mon/Doy/Thr)

Print Name [Signature]

Write your name in your native alphabet

Did your spouse, parent or child(ren) assist you in completing this application? Yes [ ] No [ ]

(relationship)

Did someone other than you or your spouse, parent or child(ren) prepare this application? Yes [ ] No [ ]

[ ] Asylum applicants may be represented by counsel. Have you been provided with a list of persons who may be available to assist you, at little or no cost, with your asylum claim?

PART F. SIGNATURE OF PERSON PREPARING FORM IF OTHER THAN ABOVE. Sign below.

I declare that I have prepared this application at the request of the person named in Part E, that the responses provided are based on all information of which I have knowledge, or which was provided to me by the applicant and that the completed application was read to the applicant in his or her native language for verification before he or she signed the application in my presence. I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. Section 1324(a).

Signature of Preparer [Signature]

12/16/00

Date (Mon/Doy/Thr)

Print Name [Signature]

Mony Ruiz-Velasco

Address of Preparer: Street Number and Name

208 S. LaSalle St., Suite 1818

Apt. No. [ ]

City Chicago

State IL

ZIP Code 60604

PART G. TO BE COMPLETED AT INTERVIEW.

You will be asked to complete this Part when you appear before an asylum officer of the Immigration and Naturalization Service (INS), or an Immigration Judge of the Executive Office for Immigration Review (EOIR) for examination.

I swear (affirm) that I know the contents of this application that I am signing, including the attached documents and supplements, that they are all true or not all true to the best of my knowledge and that corrections numbered to were made by me or at my request.

Signed and sworn to before me by the above-name applicant on:

[Signature]

Date (Mon/Doy/Thr)

Write your Name in your Native Alphabet

Signature of Asylum Officer or Immigration Judge

Page 4 (Rev. 05-01-98) N
Direct Examination of [Name]

Good morning.
Can you please state your full name for the Judge.
Do you have a nick-name.
Can I call you Jimmy.

Jimmy, I'm going to ask you some short questions to introduce you to the Judge.
How old are you Jimmy.
When is your birthday (month/day/year).
Where were you born.
Where do you live now.
How long did you live in Miami.

Jimmy, lets tell everyone about living in Miami.
Did you live in a house.
Who else lived in the house.
Does you Daddy work.
What job does he do.
Can tell us about the STD/PCO job.
Did he go to the STD/PCO job every day of the week.
What time did he leave in the morning.
What time did he come home.
Can you tell us about the Fields work.
Did he work in the Fields every day of the week.
What time did would he leave to work in the Fields.
Would he come at night if he was working in the Fields.

Do you like your Daddy.

Do you miss him.

Jimmy, can we tell everyone about your Mommy.

Do you like your Mommy.

Why not.

I know you don't like to talk about these things, but we need to tell the Judge and everyone else here what your Mommy did.

Do you remember how old you were when your Mommy started beating you.
Did she ever beat before you were eleven.

Jimmy, why would did your Mommy beat you.
Are there other reasons she would beat you.
Can you describe for us a time when your Mommy beat you for no reason at all.

Jimmy, can we talk about how your Mommy beat you.
Did she use her hands.
Where did she hit you with her hands.
Did she use anything else.
How big was the stick.
How thick was the stick.
Where would she hit you with the stick.
Did she hit you with anything else.
How big was the "lungri."
Where did she hit you with the "lungri."

Jimmy, I know its hard for you to talk about this, but can we talk about the beatings and tell everyone about the real bad things your Mommy did to you.
Can you tell us about some of the beatings.
What happened (age, location, result, statements).
Where on your foot did you get hurt.
Can you show us.
Can you tell us about another beating.
What side of the face.
Did blood come out.

Jimmy, can you tell us about any other bad things your Mommy did.
Did she every curse at you.
Can you tell us what words she used.
Did she prepare food for you.
What did you eat for breakfast.
Who made tea for you.
Did she prepare a lunch for you.
Did she prepare lunch for your brother.
What did you eat for lunch.
Did you eat when you went home from school.
What did you eat.
Where did you eat it.
Did you eat dinner with your Mommy and Daddy.
Why not.
Did you brother eat dinner with your Mommy and Daddy.
Did your Mommy and Daddy take you and your brother to any celebrations (weddings, festivals).
Did you wear your hair long when you were in India.
Why.
Did your brother wear his hair long.
Did your Mommy help you take care of your long hair.
Did your Mommy help your brother take care of his long hair.
Jimmy, can you tell us if you told anyone in Miani about the bad things your Mommy did to you.
Did you tell your Daddy.
What did you say to him.
What did he say to you.
Did your Daddy tell your Mommy to stop beating you.
What did your Mommy tell your Daddy.
What did she tell your Daddy.
Did you tell your friends.
Why not.
Do you have grandfather or grandmother in Miani.
Did you tell them about the bad things your Mommy did.
Why not.
Did you tell the police.
Why not.
Did you ever tell your Mommy that you would go to the police.
What did she tell you when you told her.
Jimmy, thank you for telling us about your Mommy. Can we talk about something else now — about how you came to the United States.
Did you know that you were coming to the United States.
Who told you.
What did he tell you.
What did you do to prepare.
Where did you your Daddy take you.
Who did you meet.
Who was this man.
What did he say to you.
Did you go with him to the airport.
Did you get on a plane.
Where did the plane take you.
What happened when you go to New York.
What did Swaran Singh say to you in New York.
Did you tell anyone that Swaran Singh was not your grandfather.
Why not.

Jimmy, can we talk about going to Court in New York.
Before you went to Court, where were you living in New York.
Before you went to Court, did you try to run away.
Can you tell us what happened in Court.
When you were in New York, what did you say to the Judge.
If Swaran Singh threatened to kill you if you told anyone that he was not your Grandfather, why did you tell the Judge.
Were you scared.
Why.
What did the Judge say to you.
Did you think you would have to go back to India when you came back from Court.
Where did you go after the Court.
Did you try to run away.
How soon after you learned that you would have to go back to India, did you try to run away.
Why did you try to run away.

Jimmy, let's now talk about what you told the INS.
Jimmy, did you tell anyone in New York that you were scared to go back to India.
Why not.
Did you know anyone in New York who spoke Punjabi.
Did the INS take you from New York to some other city.
Did you tell anyone in Chicago that you were scared to go back to India.
Who did you tell.
Did you tell him in English or Punjabi.
What did you tell him.
What did he tell you.

Jimmy, are you scared to go back to India.
Who are you scared of.
Who else are you scared of.
What do you think will happen to you if you go back to India.
Who will pick you up from the airport.
When was the last time you spoke to your Daddy.
When was the last time you spoke with your Mommy.
What did she say to you.
UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Harlington, Texas

File No.:

In the Matter of

MELVIN

Respondent

) IN REMOVAL PROCEEDINGS

CHARGE: Removability Section 212(a)(6)(A) of the Immigration
and Nationality Act — removable for being an alien
present in the United States without being paroled or
who arrived in the United States at a time or place
other than is designated by the Attorney General

APPLICATIONS: Asylum, withholding of removal, voluntary
departure, relief under the Convention Against
Torture

ON BEHALF OF RESPONDENT:

Pro BAR
301 East Madison Ave
Harlington, Texas 78550

ON BEHALF OF SERVICE:

Dyann Bernstein, Esquire
Kyle Brown, Esquire
Immigration Naturalization
Service
P.O. Box 1711
Harlington, Texas 78551

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

The Immigration and Naturalization Service ("Service")
instituted removal proceedings in this matter on May 3rd 2000 at
that time the Service filed with the Court Notice to Appear (NTA)
in which it alleged that respondent Melvin

is not a citizen or national of the United States; is a
native and citizen of El Salvador; arrived in the United States at or near Hidalgo, Texas on or about April 23rd 2000, and; was not then admitted or paroled after inspection by an immigration officer. See Exhibit 1. The Service has further charged that Melvin is removable pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act") in that he is an alien present in the United States without being admitted or paroled or who arrived in the United States in a time and place other than is designated by the Attorney General Id.

At a hearing held on July 19th 2000 Melvin through counsel admitted to all four allegations in the charging document and conceded removability. We declined to designate a country for removal should that become necessary, the Court found that removability (indiscernible) to establish a clear convincing, unequivocal evidence and that Melvin was removable as charged in the charging document. The Court further designated El Salvador as the country for removal should that become necessary. Melvin requested and was granted the opportunity to apply for relief in the form of asylum, withholding of removal, voluntary departure and protection under the Convention Against Torture ("CAT"). The matter was reset in order for Melvin to file his application for

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1The Service originally alleged that was a native and citizen of Honduras, however, the parties agreed prior to the Court taking pleadings in this matter that he was actually a native and citizen of El Salvador, the Court accordingly amended the NTA per the request of the parties to specify that Melvin was a native and citizen of El Salvador.

2March 1, 2001
relief.

On August 2nd 2000 Melvin timely filed with the Court his application for asylum. See group Exhibit 2. At that time the Court scheduled the matter for a hearing on the merits of all claims for relief.

Prior to the hearing on the merits of Melvin's applications for relief the Court forwarded to the Department of State ("DOS") Melvin's application for asylum and requested and advisory opinion pursuant to 8 C.F.R. 208.11, in response the DOS sent to the Court a document entitled EL SALVADOR - PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS. A copy of said documents was forwarded to all parties and received into the record without opposition from the parties. See group Exhibit 3.

A hearing on the merits of Melvin's application for relief was commenced on September 25th 2000 and completed on October 25th 2000. At the time of his hearing Melvin presented to the Court his own testimony, he further presented to the Court an affidavit from his grandmother. See Exhibit 6. He also submitted to the Court substantial documentary evidence concerning the political, social and economic conditions in El Salvador. See group Exhibits 4 and 5. Said documents were received into the record without opposition from the Service. The Service did not present any evidence in this case. The only issue remaining for the Court at this time is whether Melvin is statutorily eligible for the relief that he is seeking and

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deserving said relief in the Court's discretion.

**Findings of Fact**

The Court makes the followings of fact based on Melvin's testimony as well as his applications for asylum and the other documentary evidence in the Court's record. Melvin is a 15-year old native and citizen of El Salvador having been born on

At the time of his birth, Melvin's father was a soldier.

When Melvin was a very young baby his father began to have problems with Melvin's mother. Melvin's mother abandoned Melvin and his father when Melvin was still a very small baby. The record indicates that Melvin was at that time his father's only child. Melvin's father was at the time still serving in the military and as a result Melvin's father left Melvin with Melvin's grandmother, . Although it is not completely clear how old Melvin was at the time, it appears that he was somewhere around the age of 1 year old, at the time that Melvin's father left him with his grandmother. As a result Melvin never knew his mother.

After Melvin's father finished serving in the military, Melvin's father continued to allow Melvin's grandmother to raise Melvin apparently because he did not feel that he was capable of taking care of such a small child. In addition, apparently due to his military service the guerillas were seeking out Melvin's father, presumably to persecute him in some way and as a result

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Melvin's father feared for his own safety as well as for the safety of Melvin.

However, Melvin's father lived in close proximity to Melvin's grandmother and as a result was able to visit with Melvin on a regular basis. Melvin enjoyed a very good relationship with his grandmother and even called her "momma".

Melvin attended school approximately three blocks from his grandmother's home. Initially Melvin never had any problems with anyone with any of his family members nor did he have any problems with anyone in his neighborhood including other neighbors, other students or the police. There were gangs active in Melvin's neighborhood as well as in his school. Melvin would see them on a regular basis. Most of the gang members belong to the gang known as the Mara Salvatrucha ("MS"). The local leader of the MS lived next door to Melvin's grandmother. The gangs were very active in Melvin's neighborhood and posed a real threat to the people living there. Nonetheless Melvin never had any problems with the gangs nor did they ever even try to recruit him.

Along with attending school Melvin would regularly go out with his grandmother to help her sell plants and food which is how she earned an income to support herself and Melvin. In addition Melvin would attend church on a regular basis with his grandmother. He would also go to the park and engage in other leisure time activities in his free time. Melvin's father would
continue to visit Melvin on approximately a weekly basis.

No one in Melvin's family including Melvin had any problems with any groups or individuals until approximately 1997 when Melvin's father became involved with a young woman who was not only a member of the MS but apparently also the girlfriend of the leader of the MS. The young woman Vilma, lived in Melvin's neighborhood.

Initially, Melvin was not aware of his father's involvement with Vilma, however, it soon came to light that his father was involved with Vilma and would see her on a regular basis. As a result of that involvement, Melvin's father, Melvin and Melvin's grandmother began to have serious problems with members of the MS.

Initially the MS began in 1997 to call Melvin names and harass him by throwing objects at him, standing in front of him when he tried to pass by the street and other actions designed to intimidate Melvin. In late 1997 the members of the MS also began to go after Melvin's father. They would call Melvin's father names, throw stones at his car when he came to the neighborhood to visit Melvin as well as Vilma and engage in other activities also designed to intimidate Melvin's father. As a result of those activities the family suffered various damage to their property. The windshield of Melvin's father's car was broken due to his car being stolen by members of the MS. Members of the MS had also began to stone Melvin's grandmothers home and as a

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result she also had windows broken in her home as a result of the member of the MS stoning her home.

This type of treatment and intimidation on the part of the MS directed toward Melvin and his family happened every time Melvin or Melvin's father encountered members of the MS. For the most part it happened on the average at least two times a week.

Toward the end of 1997 and in the beginning of 1998 the violence began to escalate, members of the MS would take action designed to intimidate Melvin and his grandmother, whether Melvin's father was around or not. They would continue to regularly stone Melvin's grandmother's home, they also use spray paint to spray graffiti on her home. Said actions occurred at least once a week.

So after in 1998 the MS began to ransack Melvin's grandmother's home. They would go in and throw everything in the home on the floor including Melvin's and his grandmother's clothing. Members of the MS would also break plates and other objects in the home and spray the letters "MS" on various objects in the home. Melvin recounted at least three times in which the MS ransacked Melvin's grandmother's home.

Melvin's grandmother attempted to report the incidents to the police, however, every time she contacted the police they would tell her that they could do nothing unless they actually caught members of the MS in the act of vandalizing and assaulting the family. Because members of the MS were always gone by the
time members of the police arrived at Melvin's grandmother's home they ultimately never did anything to assist Melvin and his grandmother during these initially incidents.

As 1998 wore on the incidents with the MS became even worst. Members of the MS began to physically block Melvin's father's car when he came to visit Melvin, on at least three separate occasions members of the MS pulled Melvin's father from his car and beat him with their fists and with wooden planks. In conjunction with the escalation of the attacks Vilma became pregnant with Melvin's father's child. The record reflects that that baby is Melvin's only sibling. The violence escalated to the point where on one occasion members of the MS dragged Melvin's father from his car and attacked him with a machete. As a result of that attack Melvin's father sustained a serious gash on his arm and as a result had to be taken to the hospital. After that incident Melvin's father no longer returned to Melvin's grandmother's home.

Around the same time the members of the MS physically attacked Melvin's grandmother, while plummeting her with stones, one of the stones hit her in the back and caused her to sustain a large laceration that also required her to be taken to the hospital.

Around that time Melvin's grandmother withdrew Melvin from school because she fear for his safety, however, Melvin's grandmother had no other family in El Salvador, outside of
Melvin's father, with whom she could seek refuge for herself and Melvin. In addition Melvin's grandmother had a very meager income and could not afford to relocate with Melvin. Melvin's father also believed that he was in no position to help Melvin and his grandmother because due to his being the target of the gangs animosity it would not make any sense to have Melvin and Melvin's grandmother live with him.

In 1999 the members of the MS began to physically attack Melvin. On several occasions they chased after him with bats and sticks. On several other occasions members of the MS were actually able to restrain Melvin and inflict serious bodily harm upon him. The first such incident was in August of 1999, on that occasion members of the MS beat Melvin with their fists on various parts of his body, as a result Melvin sustained serious injuries to his nose. Melvin was only about 12 years of age at the time.

Melvin's mother called the police after that incident, they did arrest the leader of the MS however, he was freed the following day and the police never got in touch with Melvin and his grandmother to do any type of formal investigation about the matter. As far as Melvin knows no members of the MS were ever charged, tried or in any way punished for the particular incident. Apparently, Melvin's grandmother had also called the police after the incident when Melvin's father was attacked by the MS with a machete but the police never even bother to come to

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their home on that occasion.

In October of 1999 Melvin was again physically accosted by members of the MS. On that occasion they began to beat him with a 20 inch stick that had a sharp point, they beat him for 10 to 15 minutes and told him that he "would pay because he was his father's son". As a result of that incident Melvin was left with various bruises and lacerations throughout his body, he demonstrated to the Court a scar that he still bears on his temple area as a result of the attack.

Again the police were called. The gang leader of the MS was arrested but once again he was free the next day and once again the police never bothered to follow up with Melvin nor his grandmother about the matter and as far as Melvin knows no member of the MS was ever arrested charged or in any way punished for that incident.

Apparently part of the reason why the level of violence directed towards Melvin had escalated to such a degree was because Melvin and Vilma along with Vilma's boyfriend, the leader of the MS got into a dispute about custody of Melvin's father and Vilma's child. The leader of the MS claimed that the baby belonged to him. Ultimately Vilma returned to be with the leader of the MS but Melvin's father was able to obtain custody of the baby. Melvin's father's gaining custody of the baby caused the MS to seek revenge against Melvin's father for having custody of the baby as well as his having had a relationship with Vilma and
against Melvin as a result of his relationship to his father. Basically the gang sought to punish Melvin's father by punishing Melvin.

Along with the physical attacks against Melvin members of the MS continued to spray graffiti on Melvin's grandmother's home, stone Melvin and his grandmother and ransack their home. It got to the point where Melvin and his grandmother were even afraid to go outside to buy food. At the same time the police were either unwilling or disinterested in helping stop the perpetrators on those occasions when they would respond to the calls from Melvin's grandmother, their response was always the same, they couldn't do anything unless they caught the perpetrators in the act. As a result no member of the MS were ever arrested, charged or convicted of this criminal activity.

Finally, in approximately October of 1999 the MS sent a letter that was apparently directed to Melvin's father, the letter was received at Melvin's grandmother's home and read something to the effect of "remember that having lost my daughter you will now have to pay with your son, even if he comes to the front door we will kill him". Given the brutality that Melvin and his family had suffered at the hands of the MS over the past several years there is no doubt in Melvin's mind nor in his grandmother's mind that the MS would carry out the threat contained in the letter. As a result in November of 1999 for his 14th birthday, Melvin set out on his own from his home country to

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try to save his life.

Melvin's journey took him first to Guatemala where he worked for about 3 months, after that he went on to Mexico. He was caught by the Mexican authorities and deported back to Guatemala. He eventually was able to make his way to the United States where he believed that he would finally find protection from the brutality that he had left at home.

Melvin has continued to maintain contact with his family by telephone since leaving El Salvador. He talked to his grandmother and found out that on September 14th 2000 members of the MS were able to determine where Melvin's father lived and burned down his home destroying almost everything in it. Apparently it did take members of the MS some time to locate Melvin's father because he had gone into hiding from them after being attacked by them with the machete, however, they obviously eventually were able to track down Melvin's father.

The record before the Court indicates that members of the MS never attempted to recruit Melvin to participate with them. Further it indicates that the only basis for the threats and physical attacks against Melvin were based on his relationship to his father.

Melvin believes that particularly given the gangs recent burning of Melvin's father's home that his own life is still in danger should he be returned to El Salvador. There is no doubt in his mind that members of the MS will eventually carry
out their threat to "kill his father's son". Because of Melvin's very young age and because of the lack of any other family members in El Salvador, outside of his father and his grandmother Melvin has nowhere else to see refuge in his country. As a result Melvin does not believe that his life will be safe no matter where he went in that country.

The documentary evidence before the Court certainly bears out the truth of Melvin's fears. His grandmother's affidavit attest to the persecution that she, Melvin, and Melvin's father have suffered at the hands of the MS. In addition the documentary evidence before the Court certainly substantiates the brutal nature of the MS, more alarming it also establishes that the MS is an extremely powerful well organized organization that operates throughout El Salvador. See group Exhibit 5, tabs 1, 5, 7, 9, 10. The documentary evidence also indicates perhaps just as alarmingly that the authorities in El Salvador are for the most part unable to protect members of the Salvadorian population from the MS. See group Exhibit 5, tabs 2, 7, 8, 9, 12, 14, 15, 16, 17. More troubling the documentary evidence before the Court indicates that in some instances former members of the death squad as well as current members of the Salvadorian military are sometimes actively involved in the MS either by participating as member of the MS, or corroborating with the MS to ensure that they are not properly prosecuted for their criminal activity. See group Exhibit 4, tabs 7, 1, 15, 16;
group Exhibit 5, tabs 2, 7, 8, 9, 12, 14, 15, 16, and 17. Even the United States Department of State has recognized that gang violence in El Salvador is one of the greatest problems plaguing that country at this time. The State Department has also recognized that in many instance the authorities in that country are unable to protect the citizens of El Salvador from gangs such as the MS. See group Exhibit 4, tab 15. In some instances it can even be said that the MS to a large degree has control of entire sections of El Salvador. See in general group Exhibit 4 and 5.

Legal Conclusions and Findings of the Court

The respondent bears the evidentiary burdens of proof and persuasion in the application for asylum under Section 208 for withholding of removal under Section 241(b)(3)(A) of the Act. See 8 C.F.R. 208.13(a); Section 208.16(b).

Under Section 208 of the Act the Attorney General through an immigration judge may grant asylum as a matter of discretion to an individual who's a refugee as defined in Section 101(a)(2)(A) of the Act, this prohibition defines a refugee as a person who's "unable or unwilling to return to and is unable or unwilling to avail himself or herself to the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Cardoza-Fonseca, 480 U.S. 421, 423, 428, (indiscernible). 5

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In order to establish a well founded fear of persecution an applicant must show: (1) that he possesses the believe or characteristic a persecutor seeks to overcome others by means of punishment of some sort; (2) that the persecutor is already (indiscernible) applicant possess to believe of characteristics; (3) that the persecutor has the capability of punishing the applicant, and; (4) that the persecutor had the inclination of (indiscernible) the applicant. Matter of Mogharrabi, 19 I&N Dec. 439, 436 (BIA 1987); Matter of Acosta, 19 I&N Dec. 211, 226 (BIA 1985).

The United States supreme Court has held that the well-founded fear standard requires a showing that the fear of persecution is based on "a reasonable possibility" such harm will occur. INS v. Stevic, 467 U.S. 407, 424, 425 (1984). This standard is more generous that the clear probability standard applicable withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 423. The reasonable possibility standard has been further refined by the "reasonable person" approach set forth by the fifth Circuit and adopted by the Board of Immigration Appeals ("Board") under this approach an applicant for asylum has a well-founded fear if he demonstrates that a reasonable person in similar circumstances would fear persecution. Matter of Mogharrabi, 19 I&N Dec. 425; Guevara-Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986).

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The Board acknowledge in Mogharrabi that a reasonable person may fear persecution even if the likelihood that it may occur is significantly less than a clear probability. Matter of Mogharrabi, 19 I&N Dec. 455. However, there must be a reasonable possibility of actually suffering such persecution. 8 C.F.R. Section 208.13(b)(2). The Supreme Court has indicated that an individual may show "a well-founded fear of persecution" even if he establishes that there is only a 10 percent chance of the event occurring. INS v. Cardoza-Fonseca, 480 U.S. 421 and 440.

An applicant may qualify as a refugee if he's actually suffered past persecution or if he possess a well-founded fear of further persecution. 8 C.F.R. 208.13(b). Past persecution alone satisfies the requirements of Section 101(e)(42)(A) of the Act regardless of whether there is a well-founded fear of future persecution upon return to the applicants home country unless a preponderance of the evidences establishes that circumstances in the applicants country of nationality or last habitual residence have changed since the persecution occurred. See INS v. Cardoza-Fonseca, U.S. 421 and 441; Matter of Jen, 20 I&N Dec. 16; 8 C.F.R. Section 208.13(b)(1)(i) 1993.

An applicant's own testimony in an asylum case maybe sufficient without corroborative evidence for a well-founded fear of persecution where the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the applicants fear. See Matter of Mogharrabi.

Turning to the case (indiscernible) the Court would first find that Melvin was a credible witness. He testified at length about the conditions that caused him to flee his own country. He testified in a forthright and sincere manner and his testimony was believable, consistent and sufficiently detailed to provided a plausible and coherent account for the reasons that he fled El Salvador. Further, for the most part Melvin's testimony in court mirror the reasons set forth in his applications for asylum for his having come to the United States.

In addition, Melvin submitted a detailed affidavit from his grandmother that corroborated Melvin's testimony. Furthermore, the supplementary documentation presented to the Court by Melvin as has been discussed amply corroborates the assertions set forth by Melvin during the course of these proceedings. In the case (indiscernible) Melvin has argued that he has suffered past persecution and also has a well-founded fear of future persecution based on his membership in a particular social group that being his nuclear family. The Service for it's part has argued that the case law requires that in order to establish persecution based on a social group consisting of one's nuclear family, the applicant must also demonstrate that he is being persecuted on some other independent ground found in the act apart from the ground consisting of "membership in a particular social group".

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In general the Board first addressed the issue of social group at length in the case of Matter of Acosta, 19 I&N Dec. 211, in that case the Board held that persecution on account of membership in a particular social group refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common and (indiscernible) characteristic, i.e. a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or conscience that it ought not be required to be change. Id. at 233. The Board went on to state: "the shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership program and ownership" Id.²

In applying Matter of Acosta, some Courts have fashioned a three step test in order to determine whether an applicant qualifies for asylum based on group membership, said test requires that the applicant: (1) identifies a particular social group; (2) establish that he is a member of that group; and (3) establishes that his well-founded fear of persecution is

²The Board in a fairly recent case Matter of R-A- in some ways expanded upon the definition of social group found in Matter of Acosta. See In re R-A, Int. Dec. 3403 (BIA 1999). However, the case dealt with the social group relating to that battered women, in addition the Attorney General recently vacated the Board's holding in In re R-A-, therefore the Court is not going to address any findings of the Board in that case at this time.

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based on his membership in that group. See example *Illie v. INS* 127 F. 3638 ³.

As to whether membership in a particular nuclear family can constitute membership in a particular social group the Court would note that from the beginning when the Board set forth in great detail the definition of membership in a particular social group it held that "kinship" may constitute a particular social group. In a later case, Matter of H, the Board appears to continue to hold on to the notion that family ties may constitute membership in a "particular social group". See *In re H*, 21 I&N 337 (BIA 1996). Although that case was more complicated in that it dealt with a particular sub-clan that shared not only kinship but linguistic commonalities nonetheless, (indiscernible) would indicate at least to this Court that the Board still is of the opinion that cared kinship ties may constitute membership in a particular social group.

Contrary to the contentions of the Service all of the circuit cases reviewed by this Court would indicate that the circuits are also in agreement that membership in a particular family can constitute membership in a "particular social group". One of the key cases relied on by several of the circuits is a 9th Circuit case, *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). In that case although it was not in anyway based on

³[7th Cir. 1997)]; *Lain v. INS*, 144 F.3d 505, 510 (7th Cir. 1998); *Fain v. INS*, 12 F.3d 1233, 1240 (9th Cir. 1993).
an applicant's claim of family constituting a particular social
group, the Board nonetheless in discussing the definition of a
particular group made it a point of holding: "perhaps a
(indiscernible) example of the "particular social group" would
consist of the immediate members of a certain family, the family
being the focus of fundamental affiliated concerns and common
interest for most people". Id. et 1575. The 1st Circuit on a
number of occasions has also held that a nuclear family is
cognizable as a social group such that persecution on account of
family membership could serve as the basis for asylum. In
Gebremichael v. INS the 5th Circuit (indiscernible) a 1st Circuit
case quoting from Sanchez-Trujillo v. INS held: "they can, in
fact, be no plainer example of the social group based on a common
identifiable and (indiscernible) characteristics in that of the
nuclear family indeed quoting the 9th Circuit where recently
stated that "A proto-typical example of a "particular social
group" would consist of the immediate members of a certain
family, the family being the focus of fundamental affiliational
concerns and common interest for most people."' Id. et 36
(citations omitted). See also Ravindran v. INS, 976 F.2d 754,
761 (indiscernible). 5 (1st Cir. 1992). Likewise the 7th Circuit
on numerous occasions has held that a family unit constitutes a
cognizable particular social group in Iliev v. INS, supra., the
7th Circuit states "our case law has suggested with some
certainty that a family constitutes a cognizable 'particular

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social" within the meaning of the law. See Allie v. INS, 127 F.3d F. 641. Likewise in Lwin v. INS the 7th Circuit held that in applying the Acosta formulation parents of a particular group of students could be found to share a "common immobile characteristic". See Lwin v. INS, 144 F.3d 505, 511. It also appears to the Court that the 5th Circuit has also accepted the notion that membership in a particular family may constitute membership in a particular social group. See Adebisi v. INS, et al 952 F.2d 910, 912 (5th Cir. 1992). In that case the immigration judge had held that "[T]here is no doubt, particularly in a situation like yours, the family relationship for this kinship, can constitute membership in a particular social group." See Id. et al 912.' Even though the applicant in that particular case did not prevail, it does appear to the Court based on the 5th Circuit's (indiscernible) in that case and based on it's not disturbing the immigration Judge findings that family membership can constitute membership in a particular social group, the 5th Circuit also accepts the notion that membership in a particular group can include membership in a particular nuclear family.

Furthermore, the Service's contentions that if one is

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'the 5th Circuit in no way took issue with the immigration judge's holding, the 5th Circuit went on to state that: "even if the term "social group" is understood to apply to a limited group such as the Eubete royal family, it remains clear that Adebisi is being threatened because he refuse to accept the position of leadership, not "on account of" his membership in the royal family."' Id.
going to argue that they have suffered persecution based on membership in a particular social group consisting of membership in a particular family the applicant must nonetheless show persecution based on some other ground enumerated in the Act. However, the cases cited to herein by this Court as well as the cases cited to by the Service in it's own brief bear out the contrary for the Service points to Gebremichael v. INS, supra. as supporting it's notion that one must establish persecution based on some other ground other than social group if one's basing their claim for social group on that (indiscernible) in a particular family, however, in that particular case the citation set forth by the Service concerning it being "undisputed that the father and brother were persecuted, although it was unclear whether they suffered religious persecution, political persecution of both" actually refers not to the applicant in that particular case but rather to his family members to whom his relationship constituted the basis for his claim for asylum and contrary to what the Service has set forth in it's brief in Gebremichael v. INS the 1st Circuit specifically found that the persecution suffered by that applicant was not based on his political opinion or some other ground apart from his membership in his nuclear family which constituted membership in a particular social group. Likewise in Aruta v. INS another case relied on by the Service, the 9th Circuit did not find that membership in a particular social group based on familial ties
required also the showing that one has been persecuted on some other ground, rather in that case the 9th Circuit accepted without contention respondent's assertions that membership in a particular social group based on one's family ties could constitute persecution, however the circuit went on to find that in that particular case there just was not enough evidence to show that the applicant had actually been persecuted. In addition, most of the cases cited to by the Court in this decision involved cases in which the applicant made an independent claim to membership based on a particular social group consisting of their ties to their family and the circuit courts were apparently willing to hold in several cases that persecution based upon that one particular ground alone was enough to establish that the applicant was eligible for asylum.

Finally, the Court would note that often times in interpreting the law the statute is the best place to start and it is very clear to this Court that the Act states that one can establish persecution based on race, religion, nationality, membership in a particular social or political opinion. If it were the case that one would need to establish persecution on account of more than one ground then certainly that or would have been replaced with "and". However, it is clear from the statute itself that one only need to establish persecution on one of the grounds set forth in the statute in order to establish persecution that would qualify one for asylum.
In addition the Court would point out that even the Service in its guidelines for children's asylum claims has acknowledged that social group may be defined by family membership. See memorandum from Jeff Weiss, dated December 10th 1998 Concerning Guidelines for Children's Asylum Claims.

In sum, the Court finds that membership in a particular nuclear family can constitute membership in a particular social group as required by the Act. In addition the Court concludes that one can establish eligibility for asylum based on membership in a particular group where that social group consist of the individuals particular family even if that individual has not raised a claim for persecution based on some other ground in the Act. Having said all that turning again to the case at bar the Court finds that Melvin was persecuted by the MS as has been discussed. Melvin was on several occasions not only verbally assaulted by members of that organization but was also physically assaulted by members of the MS and seriously injured. Those attacks upon Melvin in conjunction with the death threat that they made regarding Melvin in the opinion of this Court does constitute "persecution". In addition, the record before the Court would indicate that the only basis for that persecution by the MS of Melvin was as a result of his family ties to his father, his membership in a particular nuclear family, which this Court believes to constitute "membership in a particular social group".

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Furthermore, it appears to this Court that the MS is definitely a group that the Salvadorian government is unable or unwilling to control, one only look to the State Department report as well as the other voluminous documentation submitted to the Court by Melvin to arrive at that conclusion. In addition as has been noted there is even evidence that would indicate that in some ways the Salvadorian government and military is involved in the MS.

As a result the Court finds that Melvin has established that he has been persecuted in the past on account of his membership in a particular social group. For it's part the service has presented absolutely no evidence that would indicate that the situation in El Salvador has improved any since Melvin fled his country and as demonstrated by the MS's recent actions in setting on fire Melvin's father's home, it is clear that the circumstance in Melvin's particular case has certainly not improved any since his escape from his country. As has been discussed under the burden shifting scheme established by the regulations in the absence of any evidence presented by the Service to show affirmatively that conditions have changed substantially since the time that Melvin fled his country, Melvin is entitled to the legal presumption that not only has he suffered past persecution based on his membership in a particular social group but that he also has a well-founded fear of further persecution. See 8 C.F.R. 208.13(b); Matter of Chen, 20 I&N

In addition, given the recency and intensity of the threats made upon Melvin by the MS as well as the other actions that they have taken against Melvin and his family to seriously harm them the Court believes that any reasonable person in Melvin's situation in light of the other objective evidence presented to the Court by Melvin that indicates that the situation has not in anyway improved in his country would fear persecution upon returning to El Salvador. As a result the Court finds that Melvin independent of any past persecution that he may have suffered has also established a well-founded fear of future persecution based on his membership in a particular social group and against that persecution is directed at Melvin by a group that along with being involved in, the El Salvadorian government is unable or unwilling to control. The Court would again note as has been discussed that Melvin's grandmother on a number of occasions sought police protection by the authorities in El Salvador, only one perpetrator was ever actually arrested and he was back on the streets and free to persecute Melvin and his family within a short 24 hour period. In addition, the authorities took no further action to attempt to in any way bring the perpetrators to justice. Thus along with the objective documentary evidence presented to this Court, Melvin's own experience has shown that the authorities in El Salvador in his case were certainly unwilling or unable to control the MS.

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Finally, in some instances an individual seeking asylum must show countrywide persecution. To the extent that the documentary evidence would suggest that the Salvadorian government has actually involved with the MS, Melvin arguably may not need to show countrywide persecution. See Abdiel-Mariel v. INS, 73 F.3d 579 (5th Cir. 1996). In any event the record before the Court would show that even if Melvin were required to show countrywide persecution, he has succeeded in doing so. In general given that El Salvador is a country that is about the size of Massachusetts and given the substantial evidence before the Court that would show that the MS is an extremely powerful organization that operates throughout that country, in some instance with the cooperation with the Salvadorian authorities but in all instances without being effectively in any way controlled by the authorities in El Salvador, it would appear to this Court that any reasonable person in Melvin's circumstance would fear persecution no matter where he went in El Salvador. The Court further concludes that in adjudicating any cases involving claims by juveniles this Court must take into account the particular set of unique circumstances that are presented by the mere fact that the applicant is a juvenile. In this particular case Melvin's problems started when he was only 12 years of age, the problems continue to escalate while Melvin was a young teen of 13 and 14 years of age, at this time Melvin is still only a 15 year old boy, there is absolutely no way in which
this Court finds that any reasonable court in the United States could conclude that a 15 year old child from a lower income family in any way would be able to just pack up, move to some other part of El Salvador with absolutely no friends or family to support him and set up his own household, the very idea is in this Court's opinion absurd. While it's true that perhaps if Melvin were an adult the Court would need to look to the possibility of that adult being able to relocate in his own country, however, given that Melvin is a very young juvenile, this Court does not believe that under the laws of this country or under the refugee act upon which the laws of this country has been founded that a minor who is 14 or 15 years of age should be expected to be able to live independently on his own apart from any friends or family and that is what Melvin precisely would be required to do if he were returned to El Salvador. As has been discussed he has no family or friends anywhere in El Salvador with whom he could relocate, his only other family member is his father and the record amply demonstrates that Melvin would still be in danger were he to live with his father. As a result the Court finds that Melvin, although perhaps not even required to do so has shown that he would suffer countrywide persecution no matter where he went to in El Salvador. Furthermore, as a juvenile the circumstance of his case are even more compelling and would indicate to this Court that Melvin cannot reasonably be expected to find refugee anywhere in his home country.

A 28 March 1, 2001
In sum, the Court finds that Melvin has established that he possesses the belief or characteristic a persecutor seeks to overcome another by means of punishment of some sort. Furthermore, it is clear to the Court that the persecutor is already aware that Melvin possesses this particular characteristic. The persecutor in this particular case certainly has the capability of punishing Melvin and not only has the inclination to punish him but already has set out to do so. Furthermore, the Court finds that any reasonable person in Melvin's situation would fear persecution upon return to El Salvador. The Court would note, just as the Board of Immigration Appeals has noted in Matter of H, in the Matter of O-Z and I-Z, that although the persecutor at issue in this particular case were involved in random crimes in an increasingly violent El Salvador the particular persecution that Melvin has suffered in this case are distinguishable from the other violent crimes occurring in his country because of the evident motivation present in this case and by the identifiable of persecutors who have specifically focused their violent acts on Melvin due to his membership in a particular social group. See Matter of H, 21 I&N Dec. F.343; Matter of O-Z & I-Z, Int. Dec. 3346 (BIA 1998). Thus while some of the violence engaged in by the Mara Salvatruche in El Salvador may fall into the general category of criminal acts of violence that does not preclude certain acts engaged in by the MS of being persecutory and does not change the fact that the
harm inflicted by them in this particular case constituted persecution on account of Melvin's membership in a particular social group. In addition the Court finds that Melvin has established that he would suffer said persecution no matter where he went to in his home country. Furthermore, the Court finds that Melvin and his family have suffered persecution in the past and have a well-founded fear of future persecution at the hands of a group that the Salvadorian government is both involved with and at the same time unable or unwilling to control.

Finally, the Court finds that there are no negative factors in this case that would cause this Court to find that Melvin is not deserving of the relief that he is seeking in the Court's discretion. As a result the Court finds that Melvin is both statutorily eligible for asylum as well as deserving of the relief that he is seeking. In that the Court finds that Melvin has shown himself to be eligible and deserving for asylum and the Court finds that his other applications for withholding of removal, voluntary departure and protection under the Convention Against Torture are moot.

Conclusions of the Court

The Court finds that Melvin is removable pursuant to Section 212(a)(5)(A)(i) of the Act and that he an alien present in the United States without being admitted or paroled or who arrived in the United States at any time and place other than is designated by the Attorney General. However, the Court finds
that Melvin is also statutorily eligible for and deserving of asylum in the Court's discretion. As a result the Court finds that Melvin's application for asylum should be granted. That these proceedings should be terminated and that Melvin's other applications for removal are moot.

Wherefore the following orders will be entered:

IT IS HEREBY ORDERED that

IS REMOVABLE pursuant to Section 212(a)(6)(A)(i) of the Act.

IT IS FURTHER ORDERED that Melvin's application for asylum be and is hereby GRANTED.

IT IS HEREBY ORDERED that these proceeding be and are hereby TERMINATED.

IT IS FURTHER ORDERED that Melvin's application for withholding of removal, voluntary departure and protection under the Convention Against Torture are hereby considered to be MOOT.

MARGARET E. BURKHART

31 March 1, 2001
HUMAN TRAFFICKING
What is trafficking in persons?

Trafficking in persons - also known as "human trafficking" - is a form of modern-day slavery. Traffickers often prey on individuals who are poor, frequently unemployed or underemployed, and who may lack access to social safety nets, predominantly women and children in certain countries. Victims are often lured with false promises of good jobs and better lives, and then forced to work under brutal and inhuman conditions.

Under federal law, the technical term for modern-day slavery or coerced labor is "severe forms of trafficking in persons." "Severe forms of trafficking in persons" 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 an act is under 18; 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 subjecting that person to
involuntary servitude, peonage, debt bondage, or slavery. Many trafficking victims are forced to work in the sex trade. However, trafficking can also take place in labor situations such as domestic servitude, labor in a prison-like factory, or migrant agricultural work. Whether or not an activity falls under the definition of trafficking depends not only on the type of work victims are made to do, but also on the use of force, fraud, or coercion to obtain or maintain that work. There is one exception, however. Trafficking covers the use of minors for commercial sexual activity even if there is no force, fraud, or coercion. Trafficking also covers people who are held against their will to pay off a debt; this is known as peonage. A victim's initial agreement to travel or perform the labor does not allow an employer to later restrict that person's freedom or to use force or threats to obtain repayment.

Trafficking victims can be foreign nationals. They can also be native U.S. citizens, especially those who are particularly vulnerable, such as juvenile runaways or the homeless.

*What do we know about human trafficking victims in the United States?*

The full dimensions of the problem of human trafficking are difficult to measure. We do know, however, that human trafficking is a major source of profit for organized crime syndicates, along with trafficking in drugs and guns. The scope of the problem in the United States is serious: Congress estimates that approximately 50,000 women and children are trafficked into the United States annually.

Victims are often lured into trafficking networks through false promises of good working conditions and high pay as domestic workers, factory and farm workers, nannies, waitresses, sales clerks, or models. Once in this country, many suffer extreme physical and mental abuse, including rape, sexual exploitation, torture, beatings, starvation, death threats, and threats to family members. It is believed that most victims who are trafficked are isolated and remain undetected by the public because 1) the strategies used by the perpetrators isolate victims and prevent them from coming forward, and 2)
the public and the victim service providers have only recently become aware of this issue and may not be familiar with how to recognize or respond to trafficking victims.

**Are there federal laws that prohibit trafficking in persons?**

Yes. The Thirteenth Amendment to the U.S. Constitution outlaws slavery and involuntary servitude (holding another in service through force or threats of force). The *Victims of Trafficking and Violence Protection Act of 2000* ("VTVPA"), Pub. L. No. 106-386, effective October 28, 2000, supplements existing laws that apply to human trafficking including those passed to enforce the Thirteenth Amendment. It also establishes new tools and resources to combat trafficking in persons, and requires an array of services and protections for victims of severe forms of trafficking. Under the VTVPA, federal felony criminal offenses that may apply to trafficking in persons include slavery and peonage, sex trafficking in children and adults, and the unlawful confiscation of a victim's documents. The law applies to victims physically present in the 50 states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.

In addition to the severe forms of trafficking listed in the VTVPA, there are other existing statutes that may be applicable in particular cases. These include the crimes of 1) human smuggling, 2) kidnapping, 3) transportation for prostitution or any criminal sexual activity, and 4) importation of aliens for unlawful activities, including prostitution, organized crime and racketeering, fraud and false statements, money laundering, and visa fraud.

Traffickers convicted of certain federal offenses under the VTVPA and other statutes may receive prison sentences of up to twenty years for some offenses and up to life for others, may be required to pay substantial fines, and must provide full restitution to victims. They may also be subject to forfeiture of their property.

**What are the services and benefits for which victims of severe forms of trafficking may be eligible?**
Victims of severe forms of trafficking may be eligible for a number of benefits and services regardless of immigration status. First, the VTVPA allows victims who are not U.S. citizens to be eligible for certain benefits and services to the same extent as refugees. To be eligible to receive this assistance, victims of severe forms of trafficking who are eighteen years or older must be certified by the U.S. Department of Health and Human Services (HHS), after HHS consults with the U.S. Department of Justice. HHS must certify that the victim 1) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons, and 2) has either made a bona fide application for a T visa with the Immigration and Naturalization Service (INS) or is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons. Victims of severe forms of trafficking who are under 18 years of age are also eligible for certain benefits to the same extent as refugees but do not need to be certified.

Second, certain government-funded programs, services, and assistance that are necessary for the protection of life and safety, such as crisis counseling and intervention programs for victims of criminal activity, short-term shelter or housing assistance, and mental health assistance necessary to protect life or safety, are available to anyone, regardless of their immigration status.

Victims must be provided reasonable access to translation and interpretation services. In addition, information about pro bono and low-cost legal services, including immigration services, is available to victims of severe forms of trafficking.

Moreover, victims of severe forms of trafficking may be eligible for other services and benefits that are generally available to federal crime victims. Federal agencies, such as the Federal Bureau of Investigation (FBI), the INS, and U.S. Attorneys' offices have victim specialists who assist victims of federal crimes throughout federal criminal investigations and prosecutions. Victim specialists ensure that victims receive information about their rights and referrals to necessary services. Check government
listings of your local telephone directory (often the "blue pages") for your local FBI, INS, and U.S. Attorneys' offices.

**Federal victim specialists can provide the following assistance to victims of federal crime:**

- Information about available protections, especially against threats and intimidation, and available remedies.
- Information about emergency medical and social services.
- Information about shelter options.
- Referrals to public and private programs available to provide counseling, treatment, and other support to victims, such as domestic violence and rape crisis centers.
- Information about a victim's rights and his or her role in the criminal justice process.
- General information about the status of an investigation and notice of important case events.
- Information about how to apply for crime victim compensation through state compensation programs. (These programs reimburse victims for such crime-related expenses as medical costs, mental health counseling, funeral and burial costs, and lost wages or loss of support).
- Information about restitution.
- Information about the right to individual privacy and confidentiality issues.

**Is there any immigration relief available for victims of severe forms of trafficking who lack immigration status in the United States?**

Yes. The availability of relief will be determined by the individual circumstances surrounding the victimization and the specific eligibility requirements of the type of relief sought. The victim (or someone acting on the victim's behalf) will need to contact the INS to be issued immigration benefits. In order to evaluate individual eligibility for any specific immigration benefit, victims should seek assistance from a qualified immigration law practitioner.

- Continued Presence: In order to effectuate prosecution of traffickers, eligible victims who lack legal status but who are potential witnesses of such trafficking may receive temporary immigration relief under the continued presence provisions of Section 107(c) of the VTVPA. Only a federal law enforcement agency may petition the INS for continued presence. INS has the discretion to utilize one of several statutory and administrative mechanisms to authorize the continued presence of victims of severe forms of trafficking. Some of the mechanisms available to the INS for this purpose include parole, suspension of removal, and deferred action.
• T Visa: T visas may be available to victims of severe forms of trafficking who have complied with any reasonable requests for assistance in the investigation or prosecution of acts of trafficking. However, minors under the age of 15 do not have to comply with such requests in order to be eligible for a T visa. In addition, a victim of a severe form of trafficking is eligible to receive a T visa only if he or she is physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry on account of such trafficking, and if he or she would suffer extreme hardship involving unusual and severe harm upon removal.

• U Visa: U visas are available to aliens who have suffered substantial physical or mental abuse as a result of being the victims of certain crimes designated by the VTVPA - including trafficking - that violate federal, state, or local laws or have occurred while in the United States (including in Indian country and military installations) or its territories or possessions. To be eligible for a U visa, the victim must possess information concerning the crime and the U visa petition must include a certification from a government official (as listed in the statute) stating that the victim is helping, has helped, or is likely to be helpful in the investigation or prosecution of the crime.

Recipients of both the T and U visas are eligible for employment authorization and, may, after three years adjust their status to that of lawful permanent resident in accordance with federal law and INS regulations. In appropriate circumstances, these visas may be available to family members of the victim. By statute, only 5,000 T visas and 10,000 U visas may be issued to victims annually. These limits do not apply to family members.

Victims may also be sponsored or apply for other immigration benefits for which they may be eligible, such as an S visa or asylum. Victims should consult with a qualified immigration law practitioner for advice concerning the full range of benefits for which they may be eligible. For more information, please contact the INS or the toll-free Trafficking in Persons and Worker Exploitation Task Force complaint line at (888) 428-7581 (voice and TTY) or your local U.S. Attorney's office.

*Can victims of severe forms of trafficking legally work in the United States?*

Once again, the answer depends upon the victim's individual circumstances. Under the trafficking law, victims of severe forms of trafficking may be eligible to obtain an employment authorization document that allows them to work legally in the United States. Work authorization can only be granted in conjunction with either the continued presence provisions of the VTVPA or other forms of status issued by INS. Because of
the complex nature of immigration law, victims should consult with a qualified immigration law practitioner.

*What are some sources of help for victims of severe forms of trafficking who are looking for work?*

For help in finding a job, victims can obtain free services from career centers - called One-Stop Career Centers - in communities all over the United States. Staff at these centers will be able to identify the victim's specific educational, vocational, and social services needs that will enable them to become job-ready. To obtain information about the nearest center, call *(877) USA-JOBS.* The information is also available on-line through America's Service Locator at [http://www.servicelocator.org](http://www.servicelocator.org).

If victims are denied jobs because employers will not accept their employment documents, they should contact the Office of Special Counsel for Immigration-Related Unfair Employment Practices' toll-free hotline at *(800) 255-7688 / TDD (800) 237-2515.* Employers who refuse to accept valid documents may be committing unlawful discrimination.

*What are some of the federal laws that protect the wages and working conditions of employees in the United States, including victims of severe forms of trafficking?*

The Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration is responsible for the administration and enforcement of a wide range of laws that collectively cover most employment. These labor laws, including the *Fair Labor Standards Act* and the *Migrant and Seasonal Agricultural Worker Protection Act*, establish minimum standards for wages and working conditions in the United States. These laws carry both civil and criminal penalties.

All of the laws administered by the Wage and Hour Division are applicable without regard to immigration status. These laws cover a range of conditions, including: the minimum wage; overtime; the minimum age of employment; and standards for migrant and seasonal farm workers regarding wages, housing, and transportation. In addition, the field sanitation standard of the Occupational Safety and Health Administration requires that covered employers provide toilets, potable drinking water, and hand-washing facilities to hand laborers in the field.
If workers think their rights under any of the labor laws described above have been violated, how can they file a complaint with the Wage and Hour Division?

They can contact the Wage and Hour Division by dialing a toll-free help line at (866) 487-9243. A customer service representative can refer complaints to appropriate offices for further action. Wage and Hour staff will review the merits of the complaint, and, where appropriate, attempt to resolve the complaint with the employer. Where a violation has been found, remedies available to a worker may include payment of back wages and employment reinstatement. All complaints are confidential, to the extent permitted by law, except when it is necessary to reveal the worker's identity, with his or her permission, to pursue an allegation. It is illegal for an employer to intimidate, threaten, fire, or in any other manner discriminate against a worker for filing a complaint.

How can the U.S. Government help you assist victims of severe forms of trafficking?

If you have helped a trafficking victim escape, or are aware of someone who is a victim of trafficking, the Trafficking in Persons and Worker Exploitation Task Force can help coordinate the victim protection services set forth in this brochure, while moving to prosecute the traffickers. Call the toll-free Trafficking in Persons and Worker Exploitation Task Force complaint line at (888) 428-7581 (voice and TTY) to report a human trafficking situation. This toll-free line is staffed by personnel who have access to interpreters and can speak with callers in many languages. Complaint line staff handle initial reports of trafficking situations, refer cases to prosecutors and investigators, and direct victims or their advocates to appropriate services and assistance.

The VTVPA authorizes the Justice Department to make grants to states, Indian tribes, units of local government, and nonprofit, non-governmental victim service organizations to develop, expand, or strengthen victim service programs for victims of trafficking. The Department of Justice's Office for Victims of Crime (OVC) and the National Institute of Justice are currently funding programs, using limited grant monies not appropriated under the VTVPA. For example, in October 2000, OVC funded a California-based organization to conduct a demonstration project to work with victims of slavery and trafficking in persons in Los Angeles. Information about grants can be obtained from the Department of Justice's Office of Justice Programs' website (http://www.ojp.usdoj.gov)
or the OVC website (http://www.ojp.usdoj.gov/ovc/). Furthermore, you can contact the OVC Resource Center at (800) 627-6872 to find out about publications that may be available to assist you in working with trafficking victims.

The Office of Refugee Resettlement (ORR) at HHS provides victims of severe forms of trafficking certifications (for those 18 and older) and determinations (for minors) which enable these victims to receive certain benefits and services to the same extent as refugees. ORR also works with state refugee agencies to help victims apply for these benefits and services. You can contact ORR at (202) 401-9246.

The National Domestic Violence Hotline ((800) 799-SAFE) provides information on and access to local services that assist domestic violence victims. (Calls are answered in English and Spanish, and translation is available in 139 languages. Hotline assistance may also be accessed via TTY for the Deaf at (800) 787-3224.)

**How can victims receive assistance if they are not proficient in English?**

The toll-free Trafficking in Persons and Worker Exploitation Task Force complaint line is staffed by personnel who have access to interpreters and can speak with callers in many languages.

**How can you assist the U.S. Government in working to eliminate human trafficking?**

Qualified non-governmental organizations who are interested in providing pro bono or low cost legal services or social services for victims of human trafficking may contact the toll-free Trafficking in Persons and Worker Exploitation Task Force complaint line at (888) 428-7581 (voice and TTY) to be included in the list of service organizations to be provided to victims.

**RESOURCES**

Child Exploitation and Obscenity Section/ Criminal Division

U.S. Department of Justice

1400 New York Avenue, NW

Washington, DC 20530

(202) 514-5780

Website: http://www.usdoj.gov/criminal/ceos

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Criminal Section/ Civil Rights Division

U.S. Department of Justice
The Executive Office for United States Attorneys can help you identify your local United States Attorney's office.

Immigration and Naturalization Service
District Offices
Website: [http://www.ins.gov/graphics/fieldoffices/statemap.htm](http://www.ins.gov/graphics/fieldoffices/statemap.htm)
For general information about trafficking, see:
[http://www.ins.gov/graphics/lawenfor/interiorenf/antitraf.htm](http://www.ins.gov/graphics/lawenfor/interiorenf/antitraf.htm)

National Domestic Violence Hotline:
(800) 799-SAFE, (800) 799-7233 or
(800) 787-3224 (TTY for the Deaf)

Office of the Under Secretary for Global Affairs
U.S. Department of State
2201 C Street, NW
Washington, DC 20520
(202) 647-6240
(202) 647-0753 (fax)
Office for Victims of Crime
U.S. Department of Justice
810 7th Street, NW
Washington, DC 20531
The OVC Resource Center provides many tools you may find useful. Ask for assistance by calling (800) 627-6872 / TTY (877) 712-9279). OVC has an 18-minute video entitled "Victims of Trafficking: Far From Home and Helpless."
***
Office of Refugee Resettlement
U.S. Department of Health and Human Services
370 L'Enfant Promenade, SW
ORR / 6th Floor East
Washington, DC 20447
(202) 401-9246
Website: http://www.acf.dhhs.gov/programs/orr/
***
Office of Special Counsel for Immigration-Related Unfair Employment Practices
Civil Rights Division
U.S. Department of Justice
P.O. Box 27728
Washington, DC 20038
(800) 255-7688
TDD: (800) 237-2515
Website: http://www.usdoj.gov/crt/osc
***
Trafficking in Persons and Worker Exploitation Task Force
Toll-free complaint line: (888) 428-7581 with voice and TTY capability.
http://www.usdoj.gov/crt/crim/tpwetf.htm
This is for information on victim services and to report a crime.
***
Violence Against Women Office (VAWO)
U.S. Department of Justice
810 7th St., NW
Washington, DC 20531
(202) 307-6026
Website: http://www.ojp.usdoj.gov/vawo
VAWO can provide information on domestic violence, sexual assault, and stalking issues.
***
Wage and Hour Division
U.S. Department of Labor
Toll-free help line: (866) 487-9243
***
Women's Bureau
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
(800) 827-5335
Website: http://www.dol.gov/dol/wb
The Women's Bureau's mission is to formulate standards and policies which promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment.
***
This publication was prepared by the Women's Bureau of the U.S. Department of Labor in collaboration with the U.S. Departments of Justice, Health and Human Services, and State.
Specific components at the Justice Department include the Immigration and Naturalization Service, the Federal Bureau of Investigation, the Violence Against Women Office, the Office for Victims of Crime, the Executive Office for United States Attorneys, the Civil Rights Division, the Criminal Division, and the Office of Legal Policy. The Office of Refugee Resettlement, a component of the U.S. Department of Health and Human Services, and the Office of International Narcotics and Law Enforcement of the U.S. Department of State also collaborated on this brochure.
I-914, Application for T Nonimmigrant Status

(Filing Instructions for Application for T Nonimmigrant Status (Form I-914); Application for Immediate Family Member of T-1 Recipient (Form I-914, Supplement A); and Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (Form I-914, Supplement B)).

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Part 1. Purpose of This Form.

Form I-914, Application for T Nonimmigrant.

The purpose of the Form I-914 is to provide temporary immigration benefits to aliens who are victims of severe forms of trafficking in persons (principals), and to their immediate family members (derivatives), as appropriate. Form I-914 shall be filed with the U.S. Citizenship and Immigration Services (USCIS), initially by the victims themselves. The victims may also include eligible family members on their application at that time. The form may also be filed at a later date to petition for eligible family members whom the victim did not include in the original application, but for whom the victim subsequently wishes to file.

NOTE: USCIS is comprised of the former Immigration and Naturalization Service (INS).

Form I-914, Supplement A, Application for Immediate Family Member of T-1 Recipient.

The purpose of the Form I-914, Supplement A, is to allow principal T nonimmigrant status holders and applicants to apply for derivative benefits for their immediate family members. The principal applicant shall complete and file one Form I-914, Supplement A, for each family member for whom the principal applicant is now seeking derivative status.

An alien granted T-2, T-3, or T-4 nonimmigrant status may apply for employment authorization by filing an Application for Employment Authorization (Form I-765), with the appropriate fee or an fee waiver.

The Form I-765 may be filed concurrently with the filing of the application for T-2, T-3, or T-4 status, or at any time thereafter.

Eligibility for employment authorization will last for the length of the duration of the T nonimmigrant status (three years maximum). If employment authorization is approved, the T-2, T-3, or T-4 alien will be given an eligibility classification of C25 in accordance with section 214a.12(c)(25).

The validity period of the initial EAD will be for 12 months. Extensions may be granted in 12-month increments, up to the expiration date of the T nonimmigrant status (three years maximum).

NOTE: An Employment Authorization Document (EAD) cannot be issued to an alien (derivative family member) that is presently residing outside the United States. The principal alien will be notified of this fact.

Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.

The Form I-914, Supplement B, is used by Federal Law Enforcement Officers to certify that the applicant is a victim of a severe form of trafficking in persons.

Part 2. General Filing Instructions.

Safe Mailing Address.

As a result of situations leading to the filing of this application, you may not feel safe receiving correspondence regarding this application at the address where you live. The Safe Mailing Address (SMA) may, but need not be, the mailing address for the place where you live. It may be a post office box, the address of a friend, a community based organization that is helping you, your attorney, or any other address at which you can receive correspondence safely and punctually.

How to File.

Form I-914.

In addition to the Form I-914 application and the requisite evidence in support of the applicant’s claim, as described in Part 3 below, a complete application package shall include the filing fee and three passport-style identical photographs in color of the applicant.

The photographs must have been taken within six months of filing the application, and be unmounted and unretouched. The photograph shall show a full frontal facial position of the applicant. The photographs shall be 2 x 2 inches in size and have a white background. The photos should be glossy and not retouched or mounted. The dimension of the facial image should be about 1 inch to 1 3/8 inches from the chin to the top of the hair. The applicant’s name and Alien Registration Number (A#), if known, shall be lightly printed on the back of each photograph with a pencil.

Form I-914 Instructions (03/28/05) (Prior versions may be used until 06/30/05)
Waiver of Grounds of Inadmissibility.

A principal or derivative applicant who is or becomes inadmissible under section 212(a) of the Immigration and Nationality Act (the Act) will not be eligible for T nonimmigrant status unless the ground of inadmissibility is waived. If the ground of inadmissibility is one that can be waived, the alien should apply for a waiver of the grounds of inadmissibility on Form I-192, Application for Advance Permission to Enter as Nonimmigrant (Pursuant to Section 212(d)(3) of the Immigration and Nationality Act). Section 212(d)(3)(B) provides general authority for waiving many grounds of inadmissibility for nonimmigrants. These waivers are not automatic, but may be granted in the exercise of discretion. Form I-192 should be filed at the time of filing Form I-914.

Form I-914, Supplement A.

If, in addition to the Form I-914, the applicant also files one or more Forms I-914, Supplement A, Application for Immediate Family Member of T-1 Recipient, each must be accompanied by all of the appropriate documentation and evidence, the appropriate fees, and three photographs of the derivative applicant. The photographs of the derivative must comply with the same requirements as the photographs of the principal applicant, described above. If you are requesting employment authorization for the derivative applicant, a Form I-765, Application for Employment Authorization, must also accompany the Form I-914, Supplement A.

A Form I-914, Supplement A, Application for Immediate Family Member of T-1 Recipient, may be filed concurrently with the initial application of the principal applicant, or at any time thereafter. Any Form I-914, Supplement A, submitted subsequent to the principal applicant's initial filing, however, must be accompanied by a new Form I-914 with the appropriate boxes checked in Part A, and original signature, with the appropriate fee. Evidence supporting the original application, however, is not required to be resubmitted with the new Form I-914. No Form I-914, Supplement A, will be accepted without a copy of the original Form I-914.

Biometric Services and Interview Appointments.

All applicants between the ages of 14 and 79 years (inclusive) must be fingerprinted, as part of the USCIS biometric services requirement, to facilitate a criminal background check. If necessary, USCIS may also take applicant's photographs and signature.

In addition, USCIS may require the applicant to appear for a personal interview. The applicant will be notified of the proper time and location to appear for fingerprinting and for an interview, if required.

Failure to appear for a scheduled interview without prior authorization, or failure to comply with biometric services (fingerprint processing) may result in a denial of the application.


Evidence.

Form I-914.

An application must be filed with evidence sufficient to demonstrate that each of the eligibility requirements is satisfied.

Principal Applicant for T Nonimmigrant (T-1) Status.

To qualify for T-1 nonimmigrant status, an applicant must demonstrate that he or she:

- Is physically present in the United States, American Samoa or the Commonwealth of the Northern Mariana Islands as a result of trafficking;
- Is or has been a victim of a severe form of trafficking in person;
- Would suffer extreme hardship involving unusual and severe harm upon removal; and
- Has complied with any reasonable request for assistance in the investigation and prosecution of acts of trafficking in persons, unless the applicant is less than 18 years old.

To establish that he or she is a victim of a severe form of trafficking in person, the applicant must demonstrate that he or she was brought to the United States either:

- For the purpose of a commercial sex act, which act was either induced by force, fraud, or coercion, or occurred when the applicant had not reached 18 years of age, or
- For the purpose of labor or services induced by force, fraud, or coercion for the purpose of subjecting the applicant to involuntary servitude, peonage, debt bondage, or slavery.

An applicant is encouraged to raise all arguments and to document all elements of his or her claim, including allegations of extreme hardship, in his or her initial application.

Form I-914, Supplement A.

The Form I-914, Supplement A, must be filed with evidence sufficient to demonstrate that each of the eligibility requirements is satisfied.

Qualifications for T Derivative Applicants for Nonimmigrant Status.

An applicant for T derivative status must be:

- The spouse or child of the T nonimmigrant principal applicant or the T nonimmigrant status holder, if the principal applicant or status holder is over the age of 21.
The spouse, child or parent, if the principal applicant or status holder is under the age of 21 years.

Applicants for derivative status, as family members of an applicant for T-1 nonimmigrant status, or of a person granted T-1 nonimmigrant status, must submit credible documentary evidence of the relationship of the derivative applicant to the principal applicant. Documents that will be considered for this purpose are described below. If the principal applicant is over the age of 21, the derivative applicant must be the spouse or child of the principal applicant. If the principal applicant is under the age of 21, the derivative applicant may be the spouse, child, or parent of the principal applicant. If the derivative applicant is applying as the child of the principal applicant, the evidence must also establish that the derivative applicant is under the age of 21.

In addition, applicants for derivative status must submit evidence to demonstrate that either the principal or the derivative applicant will suffer extreme hardship if the derivative applicant is not permitted to join the principal applicant. An applicant is encouraged to raise all arguments and to document all elements of his or her claim, including allegations of extreme hardship, in his or her initial application.

Form I-914, Supplement B (Declaration of Law Enforcement Officer for Victim of Trafficking in Persons).

The primary evidence of an applicant's claim to be a victim of trafficking shall be a Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons. That declaration is appended to this form. An applicant for T-1 nonimmigrant status need not necessarily file a Form I-914, Supplement B, to prove the claim. However, the endorsement of a Federal Law Enforcement Officer on the Form I-914, Supplement B, constitutes primary evidence that the applicant is a victim and has complied with any reasonable request for assistance in the investigation and prosecution. There are no elements of the applicant's claim may be difficult to establish otherwise, and submission of the Form I-914, Supplement B, is strongly advised. Instructions pertinent to the Form I-914, Supplement B, follow.

If you do not provide a completed Form I-914, Supplement B, however, you must submit an explanation, describing your attempts to obtain the certification and why it does not exist or is unavailable. If you did attempt to obtain the certification, you must explain why you did not.

Secondary Evidence.

If you do not provide a completed Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, in addition to the explanation described above, you must also submit credible secondary evidence to establish that you are or have been a victim of a severe form of trafficking in persons and that you complied with any reasonable request from law enforcement. Such evidence may include, but is not limited to: police reports, newspaper articles, witness affidavits, or any other form of evidence. Even if you do provide a Form I-914, Supplement B, you may submit additional evidence.

Whether or not you provide a Form I-914, Supplement B, you must provide a personal narrative statement. That statement should describe the trafficking crime of which you were a victim, including:

- What were the circumstances of your entry into the United States?
- The purpose for which you were brought to the United States;
- How you were recruited or otherwise became involved in the trafficking situation;
- When these events took place;
- Who was responsible;
- How long you were detained by the traffickers;
- How and when you escaped, were rescued, or otherwise became separated from the traffickers;
- What you have been doing since you were separated from the traffickers;
- Why you were unable to leave the United States after you were separated from the traffickers;
- What harm or mistreatment you fear if you are removed from the United States;
- Why you fear you would be harmed or mistreated.

Attach documents to support your claim. The evidence submitted in support of the application must credibly establish each element of your claim. If you have in your possession, or have access to, a document showing how you entered the United States, you must submit a copy of that document with your application.


Form I-914.

Provide the specific information requested about you and your family. Answer ALL of the questions asked. If any question does not apply to you or you do not know the answer, reply "none," "N/A" (for not applicable), or "unknown," as appropriate. Provide detailed information. Answer the questions as completely as possible. You are strongly encouraged to answer all questions and to attach additional written statements and documents that support your claim.
Part A. Purpose for Filing the Application.

As was explained above, this form shall be used both for the initial application of a victim of trafficking in person, and to file subsequently for eligible family members. In this section, you are asked to describe, by checking one or more boxes, your purpose in filing this form.

Part B. General Information

About the Applicant.

Provide the requested information about yourself.

Part C. Details Related to Nonimmigrant Status.

The applicant must answer each question. The principal applicant must provide evidence to document that he or she:

- Is a victim of a severe form of trafficking in persons;
- Is present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, on account of such trafficking;
- Has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking (or is not yet 13 years old); and
- Would suffer extreme hardship involving unusual and severe harm upon removal.

The applicant must explain each of those elements of the claim in detail, and provide evidence of each of those elements of the claim. The evidence must be attached to the application when it is submitted. Failure to demonstrate eligibility credibly will result in denial of the application.

Part D. Processing Information.

Answer each of the questions. If you answer "Yes" to any of the questions, you must explain your answer on a separate piece of paper. Label that sheet Form I-914, Part D, reference the number of the question which requires explanation, and attach that sheet to your application. Answering "Yes" does not necessarily mean that your application will be denied.

Part E. Information About Your Family Members.

Provide the requested information about each of your family members for whom you now wish to seek immigration benefits. You may also file for a family member at a later date, rather than on your initial application. You must file out Form I-914, Supplement A, Application for Immediate Family Members of T-1 Recipient, with this application for each family member for whom you are now applying.

Part F. Attestation and Release.

By signing this form, you declare, under penalty of perjury, that the statements made on the application, and the evidence submitted with it, are true and correct.

By signing this form, you also agree that USCIS may release information from the record in order to investigate your claim, to determine your eligibility to investigate fraudulent claims, and to assist in the investigation of trafficking in persons and related crimes. USCIS requires that you sign the attestation and release so that USCIS may investigate your claim to eligibility.

Part G. Preparer and/or Translator Certification.

If anyone assisted you in preparing this form, translated the questions to you, or translated your responses to the questions, they must sign this certification, declaring, under penalty of perjury, that they assisted you, and that, to the best of their knowledge, the information on the form is truthful.

Form I-914, Supplement A.

Provide the specific information requested about you and your family. Answer all of the questions asked. If any question does not apply to you or you do not know the answer, reply "none," "N/A" (for not applicable), or "unknown," as appropriate. Provide detailed information. Answer the questions as completely as possible. You are strongly encouraged to attach additional written statements and documents that support your claim.

Part A. Relationship.

State the relationship of the Derivative Applicant family member to you. You must also include documentation of the claimed relationship. Documents acceptable for this purpose are listed below.

If you are filing for your:

- Husband or wife: Submit a copy of your marriage certificate.

- Child, and you are the mother: Submit the child's birth certificate showing your name and the name of your child.

- Child, and you are the father: Submit the child's birth certificate, showing both parents' names, and your marriage certificate. If the child was born out of wedlock and you are the father, provide proof that a parent/child relationship exists or existed. For example, the child's birth certificate showing your name and evidence that you have financially supported the child. (A blood test may be necessary.)
Mother: Submit your birth certificate showing your name and the name of your mother.

Father: Submit your birth certificate showing the names of both parents, and your parents' marriage certificate.

Stepparent: Submit your birth certificate showing the names of both natural parents, and the marriage certificate of your parent to your stepparent.

Adoptive parent or adopted child: Submit a certified copy of the adoption decree, legal custody decree if you obtained custody before adoption, and a statement showing the dates and places you have lived together with the adopted parent or child.

In addition, in any case in which a marriage license is required, if either the husband or wife was married before, you must submit documents to show that all previous marriages were legally ended (for example, a divorce decree or death certificate). In cases where the names shown on the supporting documents have changed, provide legal documents to show how the name change occurred (for example, a marriage certificate, adoption decree, court order, etc.).

If a required document is unavailable, you may provide the following secondary evidence (USCIS may require a statement from the appropriate civil authority certifying that the necessary document is unavailable):

- Church record: A certificate under the seal of the church where the baptism, dedication or comparable rite occurred within two months after birth, showing the date and place of the child's birth, date of the religious ceremony and the names of the child's parents.
- School record: A letter from the authorities of the school attended (preferably the first school), showing the date of admission to the school, child's date and place of birth, and the names and birthplaces of both parents, if shown in the school records.
- Census record: State or Federal census record showing the names, place of birth and date of birth or age of the person listed.
- Affidavit: Written statements sworn to or affirmed by two persons who were living at the time and who have personal knowledge of the event you are trying to prove; for example, the date and place of birth, marriage, divorce or death. The persons making the affidavit need not be citizens of the United States. Each affidavit should contain the following information: (1) the relationship, if any, of the affiant to you; (2) full information concerning the event; and (3) complete details concerning how the person acquired knowledge of the event.

Part B. Information About Primary Applicant.

Provide the requested information about yourself.

Part C. Information About Derivative Applicant.

Provide the requested information about the family member for whom you are applying. Answer each question fully. If necessary, attach additional sheets to completely address the question. Label those sheets “Form I-914, Supplement A, Part C” and reference the questions that require additional explanation.

Part D. Processing Information.

Answer each question. If you answer “Yes” to any question, you must explain your answer on a separate sheet of paper. Label that sheet “Form I-914, Supplement A, Part D.” Reference the number of the question that requires additional explanation, and attach the sheet to the application. Answering “Yes” does not necessarily mean that benefits will be denied.

Part E. Attestation and Release.

By signing this application, you declare, under penalty of perjury, that the statements made on the application and the evidence submitted with it, are true and correct. The derivative applicant must also sign, under the penalty of perjury, if he or she is in the United States.

By signing this application, you also agree that USCIS may release information from the record in order to investigate your claim, determine your eligibility, assist in the investigation and prosecution of trafficking and related crimes, and investigate and prosecute false claims. USCIS requires that you sign the attestation and release.

Part F. Preparer and/or Translator Certification.

If anyone assisted you in preparing this application, translated questions to you or translated your responses to the questions, that person must sign this certification, declaring under penalty of perjury that he or she assisted you, and that to the best of his or her knowledge the information on the application is truthful.

Part G. Application Checklist.

Please verify that you have complied with each item on this checklist. Be sure that you have complied with all USCIS requirements pertinent to this form.
Acceptance. Any application that is not signed or is not accompanied by the correct fee will be rejected with a notice that the application is deficient. You must correct the deficiency and resubmit the application. An application is not considered properly filed until accepted by USCIS.

Requests for more information or interview. We may request more information or evidence, or we may request that you appear at a USCIS office for an interview. We may also request that you submit the original of any copy. We will return these originals when they are no longer required.

In addition, failure to answer any question on the form, or failure to comply with any other USCIS requirement, may result in a processing delay or denial of the application.

Part 5. Fee.

Form I-914.

You must file your application with the following fees:

- If you are filing a single application, the filing fee is $255.00, plus the $70.00 biometric services fee, if you are between the ages of 14 and 79 years (inclusive).

- If you are filing as the principal and are including immediate family members concurrently on the same application, the filing fee is $525.00, plus $105.00 for each additional immediate family member to a maximum amount payable per application of $810.00. You must also include the $70.00 biometric services fee for each applicant between the ages of 14 and 79 (inclusive).

- If you are filing an application for your immediate family members after you have filed a single application, the filing fee is $255.00, plus $105.00 for each immediate family member to a maximum amount payable per application of $510.00. You must also include the $70.00 biometric services fee for applicants who are between the ages of 14 and 79 (inclusive).

Pay the fee in the exact amount. Checks and money orders must be payable in U.S. currency. Make check or money order payable to the Department of Homeland Security.

If you live in Guam, make your check or money order payable to the "Treasure, Guam." If you live in the U.S. Virgin Islands, make your check or money order payable to the "Commissioner of Finance of the Virgin Islands."

A charge of $50.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn. Please do not send cash in the mail.

USCIS recognizes that many applicants for T nonimmigrant status may be unable to pay the full application fee. Applicants who are financially unable to pay the application fee may submit a request for a fee waiver, as outlined in 8 CFR 103.7(c). The granting of a fee waiver will be at the sole discretion of USCIS. The fee for biometric services, however, cannot be waived.


An applicant for status as a T nonimmigrant shall submit a complete application package by mail to the:

USCIS Vermont Service Center,
75 Lower Weldon Street
St. Albans, VT 05479-3001.

Part 7. Federal Law Enforcement Declaration (Form I-914, Supplement B).

Form I-914, Supplement B, is to be completed by Federal Law Enforcement Officers for victims under the Victims of Trafficking and Violence Protection Act, Public Law 106-386. The law enforcement officer must complete the form based upon his or her knowledge of the case, including evidence developed by other law enforcement officers investigating the case.

In order to be granted immigration benefits, the applicant must demonstrate that he or she is present in the United States as a result of being a victim of a severe form of trafficking in persons. Unless the applicant is less than 18 years of age, the applicant must also show that he or she is cooperating with law enforcement in the investigation and prosecution of the trafficking crime of which he or she was a victim. These elements may be established without submitting a Form I-914, Supplement B, but submission of the Supplement B is strongly advised.

The Form I-914 applicant may detach Form I-914, Supplement B, and submit it to a Federal law enforcement officer familiar with the case in which he or she was a victim of a severe form of trafficking in persons. After the officer has completed the form, it should be submitted with your application package.

Part 8. Other Information.

Confidentiality.

Information provided in the application package is confidential. It will be used to determine eligibility, to investigate the fraudulent claim, to enforce penalties for false statements, to assist in the investigation and prosecution of trafficking and related crimes, but for no other purpose. The information provided is subject to verification by USCIS. However, USCIS will release the information only as necessary to the stated purposes.
Penalties for Perjury.

All statements contained in response to questions in this application are declared to be true and correct under penalty of perjury. Title 18, United States Code, Section 1546, provides in part:

... Whoever knowingly makes under oath, or as permitted under penalty of perjury under 1746 of Title 18, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement shall be fined in accordance with this title or imprisoned not more than five years, or both.

Knowingly providing false information on this application may subject you and/or the preparer of this application to criminal penalties under Title 18 of the United States Code. Knowingly providing false information on this application may also subject you and/or the preparer to civil penalties under Section 274C of the Immigration and Nationality Act (INA). 8 U.S.C. 1324c. Under 8 U.S.C. 1324c, a person subject to a final order for civil document fraud is deportable from the United States and may be subject to fines.

Authority for Collecting This Information.

The authority to require you to file Form I-914, Application for T Nonimmigrant Status, when applying for employment authorization is found in Public Law 106-398, Victims of Trafficking and Violence Protection Act. Information you provide on your Form I-914 is used to investigate the veracity of your claim. The information may form the basis for granting the benefit sought, or may form the basis for an investigation of a fraudulent claim. The information may also be provided to law enforcement agencies or prosecutors investigating or prosecuting crimes of trafficking or related crimes.

Failure to provide all information as requested may result in the denial or rejection of this application. The information you provide may also be disclosed to other federal, state, local and foreign law enforcement and regulatory agencies during the course of USCIS investigations.

Paperwork Reduction Act.

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. USCIS tries to create forms and instructions that are accurate and easily understood. Often this is difficult because immigration law can be very complex. The public reporting burden for this form is estimated to average three (3) hours and twenty-five (25) minutes per response, including the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information. USCIS welcomes your comments regarding this burden estimate or any other aspect of this form, including suggestions for reducing this burden to the U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., Washington, DC 20529; OMB No. 1653-0027. Do not mail your completed application to this address.
**START HERE - Please type or print. Use black ink. See Instructions for information about eligibility and how to complete and file this application.**

**PART A. Purpose for Filing the Application.**

Check all that apply:
- [ ] I am filing an application for T Nonimmigrant status, and have not previously filed for such status.
- [ ] I have a T-1 application pending EAC # ____________________________
- [ ] I have received T-1 status.
- [ ] I am applying to bring family member(s) to the United States.

**PART B. General Information About Applicant.**

<table>
<thead>
<tr>
<th>Family Name</th>
<th>Given Name</th>
<th>Middle Name</th>
</tr>
</thead>
</table>

Other Names Used: (If any) (Include maiden name and alias)

Residence in the U.S. (Street Number and Name) Apt. No. Home Phone ( )

City State Zip Code

SAFE Mailing Address in the U.S., if other than above. Apt. No. Daytime Phone ( )

City State Zip Code

<table>
<thead>
<tr>
<th>Gender</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
</table>

Marital Status:
- [ ] Single
- [ ] Married
- [ ] Divorced
- [ ] Widowed

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<tr>
<th>At (If any)</th>
<th>U.S. Social Security # (If any)</th>
<th>Date of Birth (mm/dd/yyyy)</th>
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</table>

Country of Birth Country of Citizenship

Passport # Issue Date (mm/dd/yyyy) Place of Issuance

I-94 # Date of Last Entry into U.S.

Place of Last Entry into U.S. Current Immigration Status

**PART C. Details Related to T Nonimmigrant Status.**

When answering the following questions about your claim you should explain relevant information. You should attach documents in support of your claim that you are a victim of a severe form of trafficking in persons and the specific facts on which you are relying to support your claim. If only applying for T derivative status subsequent to the principal Applicant’s initial filing, evidence supporting the original application is not required to be re-submitted with the Form I-914. (Attach additional sheets of paper as needed, labeling them as Part C and the question number. Refer to Instructions for further information.) Check either Yes or No as appropriate.

1. I am or have been a victim of a severe form of trafficking in persons. (Attach evidence to support your claim.)
   - [ ] Yes
   - [ ] No

2. I am submitting a Law Enforcement Agency (LEA) declaration on Form I-914, Supplement B. Declaration of Law Enforcement Officer for Victims of Trafficking in Persons. (If No, explain why you are not submitting the LEA Certification.)
   - [ ] Yes
   - [ ] No

3. I am physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry, or account of trafficking. (If Yes, explain in detail and attach evidence and documents supporting this claim.)
   - [ ] Yes
   - [ ] No

4. I fear that I will suffer extreme hardship involving unusual and severe harm upon removal. (If Yes, explain in detail and attach evidence and documents supporting this claim.)
   - [ ] Yes
   - [ ] No

Form I-914 (01/28/05) (Prior versions may be used until 06/30/05)
PART C. Nonimmigrant Status. (Continued)

5. I have reported the crimes of which I am claiming to be a victim. (If Yes, indicate to which law enforcement agency and office you have made the report, the address and phone number of that office, and the case number assigned, if any. If No, please explain the circumstances.)

<table>
<thead>
<tr>
<th>Law Enforcement Agency and Office</th>
<th>Address</th>
<th>Phone No.</th>
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6. I am under the age of 18 years. (If Yes, proceed to Question 5.)

7. I have complied with requests from U.S. government authorities for assistance in the investigation or prosecution of acts of trafficking. (If No, explain the circumstances. You may add additional pages if necessary, marking them Form I-914, Part C.7.)

8. This is the first time I have entered the United States. (If Yes, list each date, place of entry, and under which status you entered the United States for the past five years, and explain the circumstances of your most recent arrival.)

<table>
<thead>
<tr>
<th>Date of Entry</th>
<th>Place of Entry</th>
<th>Status</th>
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9. I am now applying for one or more eligible family members. (If Yes, complete and include a Form I-914, Supplement A, Application for Immediate Family Member of T-1 Recipient, for each family member for whom you are now applying. You may also apply to bring eligible family members to the United States on a later date.)

PART D. Processing Information.

Please answer the following questions. (If your answer is "Yes" to any one of these questions, explain on a separate piece of paper. Additionally, if any of the acts or circumstances below are related to your having been a victim of a serious form of trafficking, please explain. Answering "Yes" does not necessarily mean that you are not entitled to adjust your status or register for permanent residence.)

1. Have you ever, in or outside the United States:
   a. knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?  □ Yes □ No
   b. been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?  □ Yes □ No
   c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?  □ Yes □ No
   d. asserted diplomatic immunity to avoid prosecution for a criminal offense in the United States?  □ Yes □ No

2. Have you ever received public assistance in the United States from any source, including the United States government or any state, country, city or municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future?
   □ Yes □ No

3. Have you ever:
   a. within the past ten years, been a prostitute or procured anyone for prostitution, or intend to engage in any such activities in the future?  □ Yes □ No
   b. engaged in any unlawful commercial sexual activity, including, but not limited to, illegal gambling?  □ Yes □ No
   c. knowingly encouraged, induced, assisted, abetted or sided any alien to try to enter the United States illegally?  □ Yes □ No
   d. illicitly trafficked in any controlled substance, firearm, or person, or knowingly assisted, abetted or colluded in illegal trafficking?  □ Yes □ No
PART D. Processing Information. (Continued)

4. Have you ever engaged in, conspired to engage in, or do you intend to engage in, sabotage, kidnapping, political assassination, hijacking or any other form of terrorist activity?
   - Yes  □ No  □

5. Have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to, any person or organization that has engaged in or conspired to engage in sabotage, kidnapping, political assassination, hijacking or any other form of terrorist activity?
   - Yes  □ No  □

6. Do you intend to engage in the United States in:
   a. espionage?
      - Yes  □ No  □
   b. any activity a purpose of which is opposition to, or the council or overthrow of, the government of the United States, by force, violence or other unlawful means?
      - Yes  □ No  □
   c. any activity to violate or evade any law prohibiting the export from the United States of goods, technology or sensitive information?
      - Yes  □ No  □

7. Have you ever been a member of, or in any way affiliated with, the Communist Party or any other totalitarian party?
   - Yes  □ No  □

8. Did you, during the period from March 23, 1933 to May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany, ever order, incite, assist or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion?
   - Yes  □ No  □

9. Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, national origin, ethnic origin or political opinion?
   - Yes  □ No  □

10. Have you ever been deported from the United States, or removed from the United States at government expense, within the past year, or are you now in exclusion or deportation proceedings?
    - Yes  □ No  □

11. Are you under a final order of deportation, for violating section 244(c) of the Immigration and Nationality Act for use of fraudulent documents or have you, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States or any immigration benefit?
    - Yes  □ No  □

12. Have you ever left the United States to avoid being drafted into the U.S. Armed Forces?
    - Yes  □ No  □

13. Have you ever been a nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement and not yet complied with that requirement or obtained a waiver?
    - Yes  □ No  □

14. Are you now withholding custody of a U.S. citizen child outside the United States from a person granted custody of the child?
    - Yes  □ No  □

15. Do you plan to practice polygamy in the United States?
    - Yes  □ No  □

PART E. Information About Your Family Members.

Provide the following information about your spouse and all of your sons and daughters. If you need more space, use a separate sheet of paper.

<table>
<thead>
<tr>
<th>Full Name</th>
<th>Family Relationship</th>
<th>Date of Birth (mm/dd/yyyy)</th>
<th>&quot;A&quot;-Number (if applicable)</th>
<th>Country of Birth</th>
<th>Current Address (Street, City, State and Country)</th>
</tr>
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</table>

Complete Form I-94, Supplement A, Application for Immediate Family Member of T-1 Recipients, for each family member listed above for whom you are now applying to have join you in the United States, and attach it to this application.
PART F. Attestation and Release.

After reading the information regarding penalties in the instructions, complete and sign below. If someone helped you prepare this application, he or she must complete Part G.

I have read, or had read to me, this form, the information provided on it and the evidence provided with it, and I certify, under penalty of perjury under the laws of the United States of America, that all of the information in this entire application package, including the documentary evidence submitted with it, is true and correct.

I authorize the release of any information from my record that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking, to investigate any claims and to investigate fraudulent claims. I further authorize the U.S. Citizenship and Immigration Services to release information to law enforcement agencies and prosecutors investigating or prosecuting crimes of trafficking or related crimes.

Signature of Applicant (the Person in Part A)

[__________________________] (Sign your name within the brackets) Date (Month/Day/Year)

PART G. Preparer and/or Translator Certification.

To be completed and signed if this form is prepared by a person other than the applicant.

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

(Preparer’s/Translator’s Printed Name) (Preparer’s/Translator’s Signature)

Address __________________________ Phone Number __________________________

Date (Month/Day/Year) __________________________ Relationship to the Applicant __________________________

WARNING: Applicants who are in the United States illegally are subject to removal if their claims are not granted. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn.
Start Here - Please type or print. Use black ink. See Instructions for information about eligibility and how to complete and file this application. The receipt of this Form I-914, Supplement A is to be completed by the principal applicant. The Form I-914, Supplement A, is to be completed by the principal applicant. The derivative applicant is not (check one): [ ] Husband/Wife [ ] Child [ ] Parent.

### Part A. Relationship

The derivative applicant is my: (check one) [ ] Husband/Wife [ ] Child [ ] Parent.

### Part B. Information About Principal Applicant

<table>
<thead>
<tr>
<th>Family Name</th>
<th>Given Name</th>
<th>Middle Name</th>
</tr>
</thead>
</table>

Date of Birth (mm/dd/yyyy): [ ] Age (if any)

Principal applicant’s application has been previously: (check one) [ ] Submitted [ ] Cancelled [ ] Conditional Approval [ ] Found Bona Fide [ ] Approved for I-130 Immigrant Status

### Part C. Information About Derivative Applicant

<table>
<thead>
<tr>
<th>Family Name</th>
<th>Given Name</th>
<th>Middle Name</th>
</tr>
</thead>
</table>

A # (if any): [ ] U.S. Social Security # (if any)

Other Names Used (if any): (Include maiden name and surnames)

Intended Residence in U.S. (City, State): City, State

State: [ ] ZIP Code: [ ] Apt. No. [ ] City Phone: ( )

Attorney’s Affirmation: [ ] SAFE Mailing Address in the U.S.: Other than above. City, State: City, State

Apt. No. [ ] City Phone: ( )

<table>
<thead>
<tr>
<th>Gender</th>
<th>Male</th>
<th>Female</th>
<th>Married</th>
<th>Single</th>
<th>Deceased</th>
<th>Widowed</th>
</tr>
</thead>
</table>

Date of Birth (mm/dd/yyyy): [ ]

Names of Prior Husband/Wives (if any): Dates Marriages Ended and Current Immigration Status (if any)

<table>
<thead>
<tr>
<th>Country of Birth</th>
<th>Country of Citizenship</th>
<th>Passport #</th>
<th>Issued Date (mm/dd/yyyy)</th>
<th>Place of Issue</th>
</tr>
</thead>
</table>

Is the derivative applicant currently in the United States? [ ] Yes: (If yes, see item 15a). No: (If no, see item 15a).

Has the derivative applicant previously entered the United States? [ ] Yes: (If yes, see item 15b). No: (If no, see item 15b).

Date of Entry: [ ] Place of Entry: [ ] Status:

Arrival/Departure Record (I-94) Number, date entered, and date authorized stay expired, or will expire. (As shown on Form I-94 or I-95)

Form I-914, Supplement A (2/28/05) (Prior version may be used until 06/30/05)
PART C. Information About Derivative Applicant. (Continued)

Has family member for whom you are applying ever been under immigration proceedings?

- No

If Yes, answer the following:

<table>
<thead>
<tr>
<th>Issue Date:</th>
<th>Expired:</th>
</tr>
</thead>
</table>

List your family member's spouses and children. (Attach additional sheets of paper, if necessary. If family member is your spouse, list only his or her children.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Date of Birth (mm/dd/yyyy)</th>
<th>Country of Birth</th>
</tr>
</thead>
</table>

Are you applying for employment authorization for your family member?  

- No

If Yes, submit a Form I-765, Application for Employment Authorization, for the family member.

PART D. Processing Information.

Please answer the following questions. (If your answer is "Yes" to any one of these questions, explain on a separate piece of paper. Answering "Yes" does not necessarily mean that your family member will be denied permanent status.)

1. Has the family member for whom you are applying ever:
   a. knowingly committed any crime of moral turpitude or a drug-related offense for which he or she have not been arrested?  
      - Yes  
      - No
   b. been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?  
      - Yes  
      - No
   c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?  
      - Yes  
      - No
   d. attended diplomatic immunity to avoid prosecution for a criminal offense in the United States?  
      - Yes  
      - No

2. Has the family member for whom you are applying ever received public assistance in the United States from any source, including the U.S. government or any state, county, city or municipality (other than emergency medical treatment), or is he or she likely to receive public assistance in the future?  
   - Yes  
   - No

3. Has the family member for whom you are applying:
   a. within the past ten years been a prostitute or procured anyone for prostitution, or does he or she intend to engage in any such activities in the future?  
      - Yes  
      - No
   b. engaged in any unlawful commercialized vice, including, but not limited to, illegal gambling?  
      - Yes  
      - No
   c. knowingly encouraged, induced, assisted, abetted or aided any alien to try to enter the United States illegally?  
      - Yes  
      - No
   d. illicitly trafficked in any controlled substance, firearm, or person, or knowingly assisted, abetted or colluded in illegal trafficking?  
      - Yes  
      - No

4. Has the family member for whom you are applying ever engaged in, conspired to engage in, or does he or she intend to engage in, sabotage, kidnapping, political assassination, bombing or any other form of terrorist activity?  
   - Yes  
   - No

5. Has the family member for whom you are applying ever solicited membership or funds from, or through any means ever assisted or provided any type of material support to, any person or organization that has engaged or conspired to engage in sabotage, kidnapping, political assassination, bombing or any other form of terrorist activity?  
   - Yes  
   - No

6. Does the family member for whom you are applying intend to engage in the United States in:
   a. espionage?  
      - Yes  
      - No
   b. any activity a purpose of which is opposition to, or the control or overthrow of, the United States by force, violence or other unlawful means?  
      - Yes  
      - No
   c. any activity to violate or evade any law prohibiting the export from the United States of goods, technology or sensitive information?  
      - Yes  
      - No

7. Has the family member for whom you are applying ever been a member of, or in any way affiliated with, the Communist Party or any other totalitarian party?  
   - Yes  
   - No

8. Did the family member for whom you are applying, during the period from March 23, 1933 to May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany, ever order, incite, assist or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion?  
   - Yes  
   - No
PART D. Presenting Information. (Continued)

9. Has the family member for whom you are applying ever engaged in genocide, or otherwise ordered, incited, assisted, or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin or political opinion?
   □ Yes □ No

10. Has the family member for whom you are applying ever been deported from the United States, or removed from the United States at government expense, excluded within the past year, or is he or she now in detention or deportation proceedings?
   □ Yes □ No

11. Is the family member for whom you are applying under a final order of civil penalty for violating section 274C of the Immigration and Nationality Act for use of fraudulent document or has he or she, by fraud or willful misrepresentation of a material fact, ever sought to procure, or procured, a visa, other documentation, entry into the United States or any immigration benefit?
   □ Yes □ No

12. Has the family member for whom you are applying ever left the United States to avoid being drafted into the United States Armed Forces?
   □ Yes □ No

13. Has the family member for whom you are applying ever been a nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement and not yet cumulated with that requirement or obtained a waiver?
   □ Yes □ No

14. Is the family member for whom you are applying now withholding custody of a U.S. citizen child outside the United States from a person granted custody of the child?
   □ Yes □ No

15. Does the family member for whom you are applying plan to practice polygamy in the United States?
   □ Yes □ No

PART E. Attestation and Release.

The Derivative Applicant, the family member for whom you are applying, must sign below if he or she is presently in the United States. If someone helped you prepare this supplementary application, he or she must complete Part F.

I have read, or had read to me, this form, the information provided on it, and the evidence provided with it, and certify, under penalty of perjury under the laws of the United States of America, that the information on this supplementary application and the evidence submitted with it are true and correct.

I authorize the release of any information from the record that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit. I am not seeking for the family member for whom I am applying to investigate my claim and to investigate fraudulent claims. I further authorize the U.S. Citizenship and Immigration Services to release information to law enforcement agencies and prosecutors investigating or prosecuting crimes of trafficking or related crimes.

______________________________
Signature of Derivative Applicant (The family member for whom you are applying.)

______________________________
Date (Month-Day-Year)

______________________________
Signature of Principal (Sign your name within the brackets)

______________________________
Date (Month-Day-Year)

PART F. Preparer and/or Translator Certification.

To be completed and signed if this form is prepared by a person other than the applicant.

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

______________________________
(Preparer's/Translator's Printed Name)

______________________________
(Preparer's/Translator's Signature)

______________________________
Address

______________________________
Phone Number

______________________________
Date (Month-Day-Year)

______________________________
Relationship to the Applicant

WARNING: Applicants who are in the United States illegally are subject to removal if their claims are not granted. Any information provided in completing this application may be used as a basis for the institution of, or as evidence in, removal proceedings even if the application is later withdrawn.
PART C. Checklist.

☐ I completely filled out and signed the form.
☐ I have attached evidence that:
  • I am or have been a victim of a severe form of trafficking;
  • I am physically present in the United States on account of trafficking;
  • I am cooperating with the government in the investigation/prosecution of the traffickers (unless under age 18); and
  • I would suffer extreme hardship involving unusual and severe harm upon removal from the United States.
☐ I have included three photographs of myself.
☐ I have attached a check or money order for the required fees.

The required fees include:
  • The fee for filing this application;
  • The biometric services fee for fingerprinting the applicant, if the applicant is between the ages of 14 and 79 years, inclusive, and
  • If the applicant is also currently filing for family member, the applicant is responsible for additional charges, as detailed in the instructions to Form I-914, Supplement A.

IF I am applying for one or more family members:

☐ I have completed a Form I-914, Supplement A for each member for whom I am now applying and, if he or she is in the United States, each family member has signed that Form I-914, Supplement A.
☐ I have submitted the required evidence, including evidence of:
  • My relationship to the family member for whom I am applying;
  • My age, if I am applying for my parent;
  • My child’s age, if I am applying for my child; and
  • The extreme hardship that either I or my family member will suffer, if my family member is not permitted to join me in the United States.
☐ I have included three photographs of each family member for whom I am now applying.
☐ I have attached a Form I-765 Application for Employment Authorization, if I am requesting employment authorization for any family member.
☐ I have attached a check or money order for the required fees, or a request for a fee waiver.

The required fees include:
  • The fee for filing this supplementary application;
  • The biometric services fee for the applicant, if the applicant is between 14 and 79 years, inclusive, and must be fingerprinted, or if the CIS must also photograph the applicant or take his or her signature; and
  • The filing fee for Form I-765, Application for Employment Authorization, if the family member is requesting employment authorization.

NOTE: The required fees are posted on the USCIS website at http://www.uscis.gov and are also available from our National Customer Service Center at 1-800-375-5283.
I-914, Supplement B-Declaration of Law Enforcement Officer for Victim of Trafficking in Persons

PART A. General Information.

Name and Title of Certifying Officer or Official

Date

Victim's Name

Other Names Used

Gender

Male

Female

Date of Birth (mm/dd/yyyy)

Case No.

Date Initiated (mm/dd/yyyy)

Case Status

Completed

N/A

Date Completed (mm/dd/yyyy)

PART B. Statement of Claim.

1. The applicant or has been a victim of a severe form of trafficking in persons. Specifically, he or she is a victim of (Please check all that apply. Base your analysis on the practices to which the victim was subjected rather than on the specific violations charged. The courts on which convictions were obtained, or whether any prosecution resulted in convictions. Note that the definitions that control this analysis are not the elements of criminal offences, but are those set forth at 8 CFR 214.11(b).)

☐ Sex trafficking in which a commercial sex act was induced by force, fraud or coercion. Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

☐ Sex trafficking and the victim is under the age of 18.

☐ 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 subjecting to involuntary servitude, peonage, debt bondage, or slavery.

☐ Not applicable.

☐ Other, please specify on attached additional sheets.

2. Please describe the victimization upon which the applicant's claim is based and identify the relationship between said victimization and the crimes under investigation/prosecution. Attach the results of any name or database inquiry performed in the investigation of the case. Please include relevant dates, etc. Attach additional sheets, if necessary.

3. Has the applicant expressed any fear of retaliation or revenge if removed from the United States? If yes, please explain. Attach additional sheets, if necessary.
PART C. Cooperation of Victim.

☐ Has complied with requests for assistance in the investigation/prosecution of the crime of trafficking. (Explain below.)
☐ Has failed to comply with requests to assist in the investigation/prosecution of the crime of trafficking. (Explain below.)
☐ Has not been requested to assist in the investigation/prosecution of any crime of trafficking.
☐ Has not yet attained the age of 18.
☐ Other, please specify on attached additional sheet.

PART D. Family Members.

☐ Yes  ☐ No  Are any of the applicant's relatives believed to have been involved in his or her trafficking to the United States? If Yes, list the relatives and describe that relative's involvement in the applicant's trafficking.

PART E. Attestation.

Based upon investigation of the facts, I certify, under penalty of perjury, that the above-noted individual is or has been a victim of a severe form of trafficking in persons as defined by the TVPA. I certify that the above information is true and correct to the best of my knowledge, and that I have made, and will make, no promises regarding the above victim's ability to obtain a visa from the U.S. Citizenship and Immigration Services, based upon this certification.

[Signature of Law Enforcement Officer identified in Box A above]  [Date (Month/Day/Year)]

[Signature of Supervisor of Certifying Officer]  [Printed Name of Supervisor]  [Date (Month/Day/Year)]
# T & U Visa Comparisons

<table>
<thead>
<tr>
<th>Provision</th>
<th>T Visas</th>
<th>U Visas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligibility Requirements</td>
<td>&gt; Victim must be physically present in U.S., American Samoa, or Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of the trafficking—INS 101 (a)(15)(T)(i)(II).</td>
<td>&gt; Physical presence in the United States is not required. Applicants may be in or outside of the United States when filing; but the criminal activity that forms the basis for the visa must have violated the laws of the U.S. or must have occurred in the US, its territories or possessions—INA 101(a)(15)(U)(i)(IV).</td>
</tr>
<tr>
<td>-Physical presence in the U.S.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eligibility requirements</td>
<td>&gt; Must be victim of a severe form of trafficking in persons which is defined by the Act to mean: &gt; 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 &gt; 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 subjecting to involuntary servitude, peonage, debt bondage or slavery. —INA 101(a)(15)(T)(i)(I), and Trafficking Victims Protection Act Sec. 103(8) and 103(13).</td>
<td>&gt; Must have suffered substantial physical or mental abuse as a result of certain criminal activity: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; attempt, conspiracy, or solicitation to commit any of the above; or any similar activity in violation of federal, state, or local criminal law.—INA 101(a)(15)(U)(i)(III).</td>
</tr>
<tr>
<td>-Victim of crime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eligibility Requirements</td>
<td>&gt; Visa denied if there is substantial reason to believe victim committed a severe form in trafficking of persons as defined in the Act. — INS Sec. 214(n)(1) and Trafficking Victims Protection Act Sec. 107(e)(2).</td>
<td>&gt; No similar provision. The only applicable inadmissibility ground 212(a)(3)(E) Nazi persecutors and genocide perpetrators. — INA 212(d)(13); VAWA Section 1513(e).</td>
</tr>
<tr>
<td>-Certain criminals excluded</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eligibility requirements</td>
<td>✓ The trafficking victim has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking; OR ✓ Has not attained the age of 15; AND</td>
<td>&gt; The immigrant has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity listed in the statute; &gt; The immigrant (or if the immigrant is under 16, the parent,</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Written by Lutheran Immigration & Refugee Service
<table>
<thead>
<tr>
<th>Eligibility Requirements</th>
<th>If 15 years or older, victim must have complied with any reasonable request for assistance with the investigation or prosecution of severe forms of trafficking.</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Cooperation w/ law enforcement</td>
<td>The applicant's petition must include a certification from a Federal, State or local law enforcement official, prosecutor, judge or representative of other government agency investigating or prosecuting listed criminal activity or an official of the INS certifying that the immigrant (or if under 16 the parent, guardian, or next friend) must have been helpful, be helpful, or be likely to be helpful to a federal, state, or local investigation of prosecution of criminal activity. INA 101(a)(15)(U)(I)(III).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Eligibility Requirement</th>
<th>If 15 years old or over, must have been induced to participate in the severe form of trafficking by force, fraud or coercion. Trafficking Victims Protection Act Sec.103(8).</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Force, Fraud, Coercion</td>
<td>Not required</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Eligibility Requirements</th>
<th>The AG must determine that the alien would suffer extreme hardship involving unusual or severe harm upon removal. — INA 101(a)(15)(T)(i)(IV).</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Fear of retribution if removed</td>
<td>Not required</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Petitioning process (certification requirement)</th>
<th>Unclear from status who can file the petition, whether it can be a self-petition or must be a prosecutor filed petition. — INA 101(a)(15)(T)(i).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guardian or next friend of the immigrant must possess information concerning the criminal activity described in the statute.</td>
<td></td>
</tr>
<tr>
<td>The immigrant (or in the case of an immigrant child under the age of 16, the parent, guardian, or next friend of the it) has been helpful, is being helpful, or is likely to be helpful to a Federal, State or local law enforcement official, to a Federal, State or local prosecutor, to a Federal or State judge to the INS or to other Federal, State or local authorities investigating or prosecuting criminal activity listed in the statute.</td>
<td></td>
</tr>
</tbody>
</table>
| Eligibility of family members (who are accompanying or following to join) | The following relatives accompanying or following to join an immigrant who qualifies for a T-visa may also receive T-visas.  
If the immigrant trafficking victim is under 21: their spouse, child or parent is eligible.  
If the immigrant trafficking victim is over 21: their spouse or child.  
INA 101(a)(15)(T)(ii). | The following family members can also receive their own U-visa:  
In the case of a child victim a spouse, child or parent;  
In the case of an adult victim a spouse or child: PROVIDED THAT EITHER —  
The Attorney General considers granting the visa to the family member necessary to avoid extreme hardship; OR  
The Attorney General may also grant a U-visa to these family members based upon certification of a government official that an investigation or prosecution would be harmed without the assistance of these family members.  
INA 101(a)(15)(U). |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment authorization</td>
<td>T-visa recipients are employment authorized. INA Sec. 101(i)(2). Trafficking Victim’s Protection Act Sec. 107(e)(4).</td>
<td>U-visa recipients are employment authorized. INA Sec. 214(o)(3)(B). VAWA 2000 Sec. 1513(c).</td>
</tr>
<tr>
<td>T-visa numeric limits</td>
<td>5,000 maximum in any fiscal year (not including the spouses, sons, daughters, or parents of the victims admitted). INA Sec. 214(a)(2); Trafficking Victims’ Protection Act Sec. 107(e)(2).</td>
<td>5,000 maximum in any fiscal year (not including the spouses, sons, daughters, or parents of the victims admitted). INA Sec. 214(a)(2); Trafficking Victims’ Protection Act Sec. 107(e)(2).</td>
</tr>
</tbody>
</table>
| Waiver of Grounds of Inadmissibility | In addition to any other waivers that may be available under section 212, if in the national interest to do so the Attorney General may waive certain grounds of inadmissibility —  
(Section 212(a)(1) (health related grounds) and 212(a)(4) (public charge); and  
Any other provision or 212(a) except 212(a)(3)(national security), 212(a)(10)(C)(international child abduction) and 212(a)(10)(E)(citizens who renounced citizenship to avoid taxation) so long as the activities that rendered the immigrant inadmissible these other provisions | The Attorney General may waive all grounds of inadmissibility both for U-visa applicants and at adjustment except 212(a)(3)(E)(Nazis and genocide perpetrators) when the Attorney General considers the waiver to be in the national or the public interest. The waiver is not available to family members who are following or accompanying to join.  
INA Sec. 245(I)(1)&(3). |
<table>
<thead>
<tr>
<th></th>
<th>Length of temporary status</th>
<th>Access granted to public benefits</th>
<th>Adjustment to LPR status - Basic requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>of 212(a) were caused by or incident to their trafficking victimization</td>
<td>➢ No limitation</td>
<td>➢ No access granted.</td>
<td>➢ Continuous physical presence for at least 3 years since date of admission as a T-visa non-immigrant.</td>
</tr>
<tr>
<td>➢ INA Sec. 212(d)(13)</td>
<td></td>
<td></td>
<td>➢ Good moral character throughout this period.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>➢ Has complied with any reasonable request for assistance in the investigation or prosecution of trafficking acts during such period.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>➢ Would suffer extreme hardship involving unusual and severe harm upon removal from the U.S. — INA Sec. 245(i)(1)</td>
</tr>
</tbody>
</table>

*Written by Lutheran Immigration & Refugee Service*
| Adjustment to LPR status -Definition of physical presence | An immigrant will be considered to have failed to maintain continuous physical presence in the U.S. if the immigrant has departed from the U.S. for a period in excess of 90 days or for any periods in the aggregate exceeding 180 days. INA Sec. 245(i)(2)
Note that there are two section (i)(2) one here and the other discussing inadmissibility. | An immigrant will be considered to have failed to maintain continuous physical presence in the U.S. if the immigrant has departed from the U.S. for a period in excess of 90 days or for any periods in the aggregate exceeding 180 days;
UNLESS the absence was in order to assist in the investigation or prosecution; OR
UNLESS an official involved in the investigation or prosecution certifies that the absence was otherwise justified.
INA Sec. 245(i)(2).

| Adjustment to LPR status -Inadmissibility | In addition to any other waivers that may be available under section 212, if in the national interest to do so the Attorney General may waive certain grounds of inadmissibility —
Section 212(a)(1) (health related grounds) and 212(a)(4) (public charge); and
Any other provision or 212(a) except 212(a)(3) (national security), 212(a)(10)(C) (intermarital child abduction) and 212(a)(10)(E) (citizens who renounced citizenship to avoid taxation) so long as the activities that rendered the immigrant inadmissible these other provisions of 212(a) were caused by or incident to their trafficking victimization
INA Sec. 245(i)(1). | Must not be inadmissible under section 212(a)(3)(E)(Nazis and genocide)

| Adjustment to LPR status for family members | Upon adjustment of a T-visa recipient, the status of their spouse, parent, or child may also be adjusted. Available to family members admitted with T visas. — INA Sec. 245(i)(1). | Available to family members admitted with T visas, plus AG may adjust status or issue an immigrant visa to a spouse, child, or (in the case of an immigrant child) a parent who did not receive a T-visa if the AG considers it necessary to avoid extreme hardship. — INA Sec. 245(i)(3).

| Adjustment to LPR status -Numerical limitations | No more than 5,000 (not including spouses, sons, daughters, or parents) in any fiscal year. — INA Sec. 245(i)(3)(A)&(B),
No reduction of legal immigration visas upon adjustment of status. — INA Sec. 245(i)(4). | No fiscal year limitations
No reduction of legal immigration visas upon adjustment of status. — INA Sec. 245(i)(4)

| Attorney General referrals | The AG is obliged to refer T | The AG shall provide visa
SPECIAL IMMIGRANT JUVENILE STATUS
Purpose of This Form.
This petition is used to classify an alien as:
- an Amerasian;
- a Widow or Widower;
- a battered or abused Spouse or Child of a U.S. Citizen or Lawful Permanent Resident;
- a Special Immigrant (Religious Worker; Panama Canal Company Employee; Canal Zone Government Employee, U.S. Government in the Canal Zone Employee; Physician; International Organization Employee or Family Member, Juvenile Court Dependent or Armed Forces Member).

 Initial Evidence Requirements.
If these instructions state that a copy of a document may be filed with this petition, and you choose to send us the original, we may keep that original for our records. Any foreign language document must be accompanied by an English translation certified by the translator that he/she is competent to translate the foreign language into English and that the translation is accurate.

Amerasian. Any person who is 18 or older, an emancipated minor, or a U.S. corporation may file this petition for an alien who was born in Korea, Vietnam, Laos, Kampuchea, or Thailand after December 31, 1950, and before October 22, 1982, and was fathered by a U.S. citizen.

 The petition must be filed with:
- copies of evidence showing that the person is for was born in one of the above countries between those dates. If the petitioner was born in Vietnam, you must also submit a copy of his/her Vietnamese I.D. card, or an affidavit explaining why it is not available;
- copies of evidence establishing the parentage of the person, and of evidence establishing that the biological father was a U.S. citizen. Examples of documents that may be submitted are birth or baptismal records or other religious documents; local civil records; an affidavit, correspondence or evidence of financial support from the father; photographs of the father (especially with the child); or, absent other documents, affidavits from knowledgeable witnesses which detail the parentage of the child and how they know such facts;
- a photograph of the person;
- if the person is married, submit a copy of the marriage certificate, and proof of the termination of any prior marriages; and
- if the person is under 18 years old, submit a written statement from his/her mother or legal guardian which:
  -- irrevocably releases him or her for emigration and authorizes the placement agencies to make necessary decisions for his/her immediate care until a sponsor receives custody;
  -- shows an understanding of the effects of the release, and states whether any money was paid or coercion used prior to obtaining the release; and
  -- includes the full name, date and place of birth, and present or permanent address of the mother or guardian, and with the signature of the mother or guardian on the release authenticated by a local registrar, court of minors, or a U.S. Citizenship and Immigration Services (USCIS) officer.

The following sponsorship documents are also required. You may file these documents with the petition, or wait until we review the petition and request them. However, not filing them with the petition will add to the overall processing time.

INSTRUCTIONS
- An Affidavit of Financial Support executed by the sponsor, with the evidence of financial ability required by that form. Please note that the original sponsor remains financially responsible for the Amerasian if any subsequent sponsor fails in this area;
- Copies of evidence showing that the sponsor is at least 21 years old and is a U.S. citizen or permanent resident;
- Fingerprints of the sponsor taken by the USCIS as part of the required biometric services; and

If this petition is for a person under 18 years old, the following documents issued by a placement agency must be submitted:

-- a copy of the private, public or state agency's license to place children in the U.S., proof of the agency's recent experience in the intercountry placement of children and of the agency's financial ability to arrange the placement;
-- a favorable home study of the sponsor conducted by a legally authorized agency;
-- a pre-placement report from the agency, including information regarding any family separation or dislocation abroad that would result from the placement;
-- a written description of the orientation given to the sponsor and to the parent or guardian on the legal and cultural aspects of the placement;
-- a statement from the agency showing that the sponsor has been given a report on the pre-placement screening and evaluation of the child; and
-- a written plan from the agency to provide follow-up services, including mediation and counseling, and describing the contingency plans to place the person this petition is for in another suitable home if the initial placement fails.

Widow/Widower of a U.S. Citizen. You may file this petition for yourself if:
- you were married for at least two years to a U.S. citizen who is now deceased and who was a U.S. citizen at the time of death;
- your citizen spouse's death was less than two years ago;
- you were not legally separated from your citizen spouse at the time of death; and
- you have not remarried.

The petition must be filed with:
- a copy of your marriage certificate to the U.S. citizen and proof of termination of any prior marriages of either of you;
- copies of evidence that your spouse was a U.S. citizen, such as a birth certificate if born in the United States, Naturalization Certificate or Certificate of Citizenship issued by USCIS, Form FS-240, Report of Birth Abroad of a Citizen of the United States, or a U.S. passport which was valid at the time of the citizen's death; and
- a copy of the death certificate of your U.S. citizen spouse.
Self-Petitioning Battered or Abused Spouse or Child of a U.S. Citizen or Lawful Permanent Resident. You may self-petition for immediate relative or family-sponsored immigrant classification if you:

- are now the spouse or child of an abusive U.S. citizen or lawful permanent resident;
- are eligible for immigrant classification based on that relationship;
- are now residing in the United States;
- have resided in the United States with the U.S. citizen or lawful permanent resident abuser in the past;
- have been battered by, or have been the subject of extreme cruelty perpetrated by:
  -- your U.S. citizen or lawful permanent resident spouse during the marriage; or are the parent of a child who has been battered by or has been the subject of extreme cruelty perpetrated by your abusive citizen or lawful permanent resident spouse during your marriage; or
  -- your citizen or lawful permanent resident parent while residing with that parent;
- are a person of good moral character;
- are a person whose removal or deportation would result in extreme hardship to yourself, or to your child if you are a spouse; and if you
- are a spouse who entered into the marriage to the citizen or lawful permanent resident abuser in good faith.

NOTE: Divorce or other legal termination of the marriage to the abuser after the self-petition is properly filed with USCIS will not be the sole basis for denial or revocation of an approved self-petition. If you marry before you become a lawful permanent resident, however, your self-petition will be denied or the approval revoked.

Your self-petition may be filed with any credible relevant evidence of eligibility. The determination of what evidence is credible and the weight to be given that evidence is within the sole discretion of USCIS, therefore, you are encouraged to provide the following documentation:

- evidence of the abuser's U.S. citizenship or lawful permanent resident status;
- marriage and divorce decrees, birth certificates, or other evidence of your legal relationship to the abuser;
- one or more documents showing that you and the abuser have resided together in the United States in the past, such as employment records, utility receipts, school records, hospital or medical records, birth certificates of children, deeds, mortgages, rental records, insurance policies, or affidavits;
- one or more documents showing that you are now residing in the United States, such as the documents listed above;
- evidence of the abuse, such as reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. If you have an order of protection or have taken other legal steps to end the abuse, you should submit copies of those court documents;
- if you are more than 14 years of age, your affidavit of good moral character accompanied by a local police clearance, state-issued criminal background check, or similar report from each locality or state in the United States or abroad in which you have resided for six or more months during the three (3) year period immediately preceding the filing of your self-petition;
- affidavits, birth certificates of children, medical reports and other relevant credible evidence of the extreme hardship that would result if you were to be removed or deported; and
- if you are a spouse, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding your courtship, wedding ceremony, shared residence and experiences showing that your marriage was entered in good faith.

Special immigrant Juvenile. Any person, including the alien, may file this petition for an alien who:

- is unmarried and less than 21 years old;
- has been declared dependent upon a juvenile court in the United States or who such a court has legally committed to, or placed under the custody of, an agency or department of a state who has been found eligible for long-term foster care; and
- has been the subject of administrative or judicial proceedings in which it was determined that it would not be in the juvenile's best interests to be returned to the juvenile's or his/her parent's country of nationality or last habitual residence.

NOTE: After a special immigrant juvenile becomes a permanent resident, his or her parent(s) may not receive any immigration benefit based on the relationship to the juvenile.

The petition must be filed with:

- a copy of the juvenile's birth certificate or other evidence of his or her age;
- copies of the court or administrative document(s) upon which the claim to eligibility is based.

Special immigrant Religious Worker. Any person, including the alien, may file this petition for an alien who for the past two (2) years has been a member of a religious denomination which has a bona fide nonprofit, religious organization in the United States, and who has been carrying on the vocation, professional work, or other work described below, continuously for the past two (2) years, and seeks to enter the United States to work solely:

- as a minister of that denomination; or
- in a professional capacity in a religious vocation or occupation for that organization; or
- in a religious vocation or occupation for the organization or its nonprofit affiliate.

NOTE: All special immigrant religious workers, other than ministers, immigrating to the United States as special immigrant religious workers must immigrate (i.e., enter the United States) or adjust status to permanent residence (i.e., have their Form I-360 and Form I-485 approved) before October 1, 2008.
The petition must be filed with:

- a letter from the authorized official of the religious organization establishing that the proposed services and alien qualify as above;
- a letter from the authorized official of the religious organization attesting to the alien's membership in the religious denomination and explaining, in detail, the person's religious work and all employment during the past two (2) years and the proposed employment; and
- evidence establishing that the religious organization, and any affiliates which will employ the person, is a bona fide nonprofit religious organization in the U.S. and is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986.

Special immigrant based on employment with the Panama Canal Company, Canal Zone Government or U.S. Government in the Canal Zone. Any person may file this petition for an alien who, at the time the Panama Canal Treaty of 1977 entered into force, either:

- was resident in the Canal Zone and had been employed by the Panama Canal Company or Canal Zone Government for at least one (1) year; or
- was a Panamanian national and either honorably retired from U.S. Government employment in the Canal Zone with a total of 15 or more years of faithful service or so employed for 15 years and since honorably retired; or
- was an employee of the Panama Canal Company or Canal Zone Government, had performed faithful service for five (5) years or more as an employee, and whose personal safety, or the personal safety of his/her spouse or child, is in danger as a direct result of the special nature of his/her employment and as a direct result of the Treaty.

The petition must be filed with:

- a letter from the Panama Canal Company, Canal Zone Government or U.S. Government agency employing the person in the Canal Zone, indicating the length and circumstances of employment and any retirement or termination; and
- copies of evidence to establish any claim of danger to personal safety.

Special Immigrant Physician. Any person may file this petition for an alien who:

- graduated from a medical school or qualified to practice medicine in a foreign state;
- was fully and permanently licensed to practice medicine in a State of the United States on January 9, 1978, and was practicing medicine in a State on that date;
- entered the United States as an "H" or "J" nonimmigrant before January 9, 1978; and
- has been continuously present in the United States and continuously engaged in the practice of medicine since the date of such entry.

The petition must be filed with:

- letters from the person's employers, detailing his/her employment since January 9, 1978, including the current employment; and
- copies of relevant documents that demonstrate that the person filed for meets all the above criteria.

Special Immigrant International Organization Employee or family member. Certain long-term "G" and "N" nonimmigrant employees of a qualifying international organization entitled to enjoy privileges, exemptions and immunities under the International Organizations Immunities Act, and certain relatives of such an employee, may be eligible to apply for classification as a Special Immigrant. To determine eligibility, contact the qualifying international organization or your local USCIS office.

The petition must be filed with:

- a letter from the international organization demonstrating that it is a qualifying organization and explaining the circumstances of qualifying employment and the immigration status held by the person the petition is for, and
- copies of evidence documenting the relationship between the person this petition is for and the employee.

Armed Forces Member. You may file this petition for yourself if:

- you have served honorably on active duty in the Armed Forces of the United States after October 15, 1978;
- you originally lawfully enlisted outside the United States under a treaty or agreement in effect on October 1, 1991, for a period or periods aggregating:
  -- twelve (12) years, and were never separated from such service except under honorable conditions; or
  -- six (6) years, are now on active duty, and have reenlisted to incur a total active duty service obligation of at least 12 years;
- you are a national of an independent state which maintains a treaty or agreement allowing nationals of that state to enlist in the U.S. Armed Forces each year; and
- the executive department under which you have served or are serving has recommended you for this special immigrant status.

The petition must be filed with:

- certified proof issued by the authorizing official of the executive department in which you are serving or have served which certifies that you have the required honorable active duty service and/or commitment; and
- your birth certificate.

General Filing Instructions. Please answer all questions by typing or clearly printing in black ink only. Indicate that an item is not applicable with “N/A.” If an answer is “no,” please so state. If you need extra space to answer any item, attach a sheet of paper with your name and your alien registration number (A#), if any, and indicate the number of the item the answer refers to. Every petition must be properly signed, accompanied by the proper fee. If you are under 14 years of age, your parent or guardian may sign the petition.

Where to File. If you are filing for a Special Immigrant Juvenile, file the petition at the local USCIS office having jurisdiction over the place where he or she lives.
If you are filing for Amerasian classification and the person you are filing for is outside the United States, you may file this petition at the USCIS office that has jurisdiction over the place he/she lives or the office that has jurisdiction over the place he/she will live.

If you are in the United States and filing as a Widow/Widower you may file this petition together with your application for adjustment of status.

If this petition is for an Amerasian, a Widow/Widower, or a Special Immigrant Armed Forces Member, and that person lives outside the United States, you may file this petition at the USCIS office overseas or the U.S. consulate or embassy abroad having jurisdiction over the area in which he or she lives.

In all other instances (except for a self-petitioning battered or abused spouse or child, or a special immigrant international organization officer or employee or family member, described below), file this petition at a USCIS Service Center, as follows:

If you live in Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, Virginia or West Virginia, mail this petition to USCIS, Vermont Service Center, 75 Lower Weldon Street, St. Albans, VT 05479-0001.

If you live in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee or Texas, mail this petition to USCIS, Texas Service Center, P.O. Box 152122, Dept A, Irving, TX 75015-2122.

If you live in Arizona, California, Guam, Hawaii or Nevada, mail this petition to USCIS, California Service Center, P.O. Box 145300, Laguna Niguel, CA 92676-5300.

If you live elsewhere in the United States, mail this petition to USCIS, Nebraska Service Center, 650 S Street, Lincoln, NE 68501-2521.

If you are a self-petitioning battered spouse or abused spouse or child, mail your completed Form I-360 with supporting documents and correct fee to the Vermont Service Center at the following address:

USCIS
Vermont Service Center
75 Lower Weldon Street,
St. Albans, VT 05479

If the Vermont Service Center later sends you a Notice of Approval of your petition, you may apply at your local USCIS office to adjust your status as a lawful permanent resident.

If you are a special immigrant international organization officer or employee or family member, mail your Form I-360 with supporting documents and correct fee to the Nebraska Service Center at the following address:

USCIS
Nebraska Service Center
P.O. Box 87360
Lincoln, NE 68501-7360

Public Service information. The National Domestic Violence Hotline provides information, crisis intervention and referrals to local service providers, including legal assistance organizations, to victims of domestic violence or anyone calling on their behalf at 1-800-799-7233 or TDD at 1-800-799-7244 TDD.

The hotline services are available 24 hours a day seven (7) days a week, toll-free from anywhere in the United States, Puerto Rico or the U.S. Virgin Islands. The staff and volunteers speak both English and Spanish and have access to translators in 139 languages.

Fee.
The fee for this petition is $195.00, except that there is no fee if you are filing for an Amerasian. The fee must be submitted in the exact amount. It cannot be refunded. Do not mail cash. All checks and money orders must be drawn on a bank or other institution located in the United States and must be payable in United States currency. The check or money order should be made payable to the Department of Homeland Security, except that:

- If you live in Guam, and are filing this application in Guam, make your check or money order payable to the "Treasurer, Guam."
- If you live in the U.S. Virgin Islands, and are filing this application in the U.S. Virgin Islands, make your check or money order payable to the "Commissioner of Finance of the Virgin Islands."

Checks are accepted subject to collection. An uncollected check will render the application and any document issued invalid. A charge of $30.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn.

Processing information.
Rejection. Any petition that is not signed or is not accompanied by the correct fee will be rejected with a notice that the petition is deficient. You may correct the deficiency and resubmit the petition. However, a petition is not considered properly filed until accepted by the USCIS.

Initial processing. Once the petition has been accepted, it will be checked for completeness, including submission of the required initial evidence. If you do not completely fill out the form, or file it without required initial evidence, you will not establish a basis for eligibility and we may deny your petition.

NOTE: A self-petitioning battered or abused spouse or child of a U.S. citizen or lawful permanent resident may submit any relevant credible evidence in place of the suggested evidence.

Requests for additional information or interview. We may request additional information or evidence or we may request that you appear at a USCIS office for an interview. We may also request that you submit the originals of any copy. We will return these originals when they are no longer required.

Decision. If you establish that the person this petition is for is eligible for the requested classification, we will approve the petition. We will send it to the U.S. embassy or consulate for visa issuance, unless he or she is in the United States and appears eligible and intends to apply for adjustment to permanent resident status while here. If you do not establish eligibility, we will deny the petition. We will notify you in writing of our decision.

Penalties.
If you knowingly and willfully fail to or conceal a material fact or submit a false document with this request, we will deny the benefit you are filing for, and may deny any other immigration benefit. In addition, you will face severe penalties provided by law, and may be subject to criminal prosecution.
Forms and Information
To request USCIS forms, call our toll free number at 1-800-870-3676. You may also obtain USCIS forms and information on immigration laws, regulations and procedures by telephoning our National Customer Service Center (NCSC) at 1-800-375-5283 or from our internet website at www.uscis.gov.

Privacy Act Notice.
We ask for the information on this form, and associated evidence to determine if you have established eligibility for the immigration benefit you are seeking. Our legal right to ask for this information is in 8 USC 1154. We may provide this information to other government agencies. Failure to provide this information, and any requested evidence, may delay a final decision or result in denial of your request.

Paperwork Reduction Act Notice.
A person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood and that impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: (1) learning about the law and form, 15 minutes; (2) completing the form, 20 minutes; and (3) assembling and filing the application, 85 minutes for an estimated average of 2 hours per response. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the U.S. Citizenship and Immigration Services, Regulatory Management Division, III Massachusetts Avenue, NW, Washington, D.C. 20529, OMB No. 1115-0117. Do not mail your completed application to this address.
START HERE - Please type or print in black ink.

Part 1. Information about person or organization filing this petition. (Individuals should use the top name line; organizations should use the second line.) If you are a self-petitioning spouse or child and do not want USCIS to send notices about this petition to your home, you may show an alternate mailing address here. If you are filing for yourself and do not want to use an alternate mailing address, skip to Part 2.

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City

State or Province

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Zip/Postal Code

U.S. Social Security #

A #

IRS Tax #

(If any)

Part 2. Classification Requested (check one):

a. Amerasian
b. Widow(er) of a U.S. citizen who died within the past two (2) years
c. Special Immigrant Juvenile
d. Special Immigrant Religious Worker
e. Special Immigrant based on employment with the Panama Canal Company, Canal Zone Government or U.S. Government in the Canal Zone
f. Special Immigrant Physician
g. Special Immigrant International Organization Employee or family member
h. Special Immigrant Armed Forces Member
i. Self-Petitioning Spouse of Abusive U.S. Citizen or Lawful Permanent Resident
j. Self-Petitioning Child of Abusive U.S. Citizen or Lawful Permanent Resident
k. Other, explain:

Part 3. Information about the person this petition is for.

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State or Province

Country

Zip/Postal Code

Date of Birth

(Month/Day/Year)

U.S. Social Security #

A #

(If any)

Marital Status:

☐ Single

☐ Married

☐ Divorced

☐ Widowed

Date of Arrival

(Month/Day/Year)

Current Nonimmigrant Status

Expires On

(Month/Day/Year)

To Be Completed by Attorney or Representative, if any

Fill in box if G-28 is attached to represent the applicant

VOLAG #

ATTY State License #

FOR USCIS USE ONLY

Returned

Receipt

Resubmitted

Reloc Sent

Reloc Rec'd

Petitioner/Applicant Interviewed

Classification

Consulate

Priority Date

Remarks:

Action Block

OMB No. 1615-0020. Expires 02/28/05

Form I-360 (Rev. 09/11/00)Y (Fee Change 01/31/05)
START HERE - Please type or print in black ink.

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Part 2. Classification Requested (check one):

a. [ ] A Merican
b. [ ] Widower(e) of a U.S. citizen who died within the past two (2) years
c. [ ] Special Immigrant Juvenile
d. [ ] Special Immigrant Religious Worker
e. [ ] Special Immigrant based on employment with the Panama Canal Company, Canal Zone Government or U.S. Government in the Canal Zone
f. [ ] Special Immigrant Physician
g. [ ] Special Immigrant International Organization Employee or family member
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k. [ ] Other, explain

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Marital Status: [ ] Single [ ] Married [ ] Divorced [ ] Widowed

Complete the items below if this person is in the United States:

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Current Nonimmigrant Status: Expires on (Month/Day/Year)

To Be Completed by Attorney or Representative, if any

[ ] Fill in box if G-28 is attached to represent the applicant

VOLAG#

ATTY State License #
Part 4. Processing Information.

Below give to U.S. Consulate you want notified if this petition is approved and if any requested adjustment of status cannot be granted.

American Consulate: [City] [Country]

If you gave a United States address in Part 3, print the person's foreign address below. If his/her native alphabet does not use Roman letters, print his/her name and foreign address in the native alphabet.

Name [Address]

Sex of the person this petition is for.  
- Male  
- Female

Are you filing any other petitions or applications with this one?  
- No  
- Yes [How many?]

Is the person this petition is for in exclusion or deportation proceedings?  
- No  
- Yes [Explain on a separate sheet of paper]

Has the person this petition is for ever worked in the U.S. without permission?  
- No  
- Yes [Explain on a separate sheet of paper]

Is an application for adjustment of status attached to this petition?  
- No  
- Yes

Part 5. Complete only if filing for an Amerasian.

Section A. Information about the mother of the Amerasian

Family Name [Given Name] [Midis Initial]

Living?  
- No (Give date of death)  
- Yes (Complete address line below)  
- Unknown (Attach a full explanation)

Address

Section B. Information about the father of the Amerasian. If possible, attach a notarized statement from the father regarding parenthood.

Family Name [Given Name] [Midis Initial]

Date of Birth [Month/Day/Year]  
Country of Birth

Living?  
- No (Give date of death)  
- Yes (Complete address line below)  
- Unknown (Attach a full explanation)

Home Address

Home Phone #  
Work Phone #

At the time this Amerasian was conceived:

- The father was in the military (Indicate branch of service below - and give service number here):  
  - Army  
  - Air Force  
  - Navy  
  - Marine Corps  
  - Coast Guard

- The father was a civilian employed abroad. Attach a list of names and addresses of organizations which employed him at that time.

- The father was not in the military, and was not a civilian employed abroad. (Attach a full explanation of the circumstances.)

Part 6. Complete only if filing for a Special Immigrant Juvenile Court Dependent.

Section A. Information about the Juvenile

List any other names used.

Answer the following questions regarding the person this petition is for. If you answer "no," explain on a separate sheet of paper.

Is he or she still dependent upon the juvenile court or still legally committed to or under the custody of an agency or department of a state?  
- No  
- Yes

Does he/she continue to be eligible for long term foster care?  
- No  
- Yes
Part 7. Complete only if filing as a Widow/Widower, a Self-petitioning Spouse of an Abuser, or as a Self-petitioning Child of an Abuser.

Section A. Information about the U.S. citizen husband or wife who died or about the U.S. citizen or lawful permanent resident abuser.

<table>
<thead>
<tr>
<th>Family Name</th>
<th>Date of Birth (Month/Day/Year)</th>
<th>Country of Birth</th>
<th>Given Name</th>
<th>Date of Death (Month/Day/Year)</th>
<th>Middle Initial</th>
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He or she is now, or was at time of death a (check one):

- [ ] U.S. citizen born abroad to U.S. citizen parents
- [ ] U.S. citizen through Naturalization (Show A #)
- [ ] U.S. lawful permanent resident (Show A #)
- [ ] Other, explain

Section B. Additional information about you.

<table>
<thead>
<tr>
<th>How many times have you been married?</th>
<th>How many times was the person in Section A married?</th>
<th>Give the date and place you and the person in Section A were married. (If you are a self-petitioning child, write &quot;IVA&quot;)</th>
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When did you live with the person named in Section A? From (Month/Year) until (Month/Year)

If you are filing as a widow/widower, were you legally separated at the time of U.S. citizen's death?  [ ] No  [ ] Yes, (attach explanation).

Give the last address at which you lived together with the person named in Section A, and show the last date that you lived together with that person at that address:

If you are filing as a self-petitioning spouse, have any of your children filed separate self-petitions?  [ ] No  [ ] Yes (show children's full names):

Part 8. Information about the spouse and children of the person this petition is for. A widow/widower or a self-petitioning spouse of an abusive citizen or lawful permanent resident should also list the children of the deceased spouse or of the abuser.

A. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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<tr>
<td>Country of Birth</td>
<td>Spouse</td>
<td>A #</td>
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B. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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<td>Country of Birth</td>
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C. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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D. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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E. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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<td>Country of Birth</td>
<td>Child</td>
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F. Family Name | Given Name | Relationship | Date of Birth (Month/Day/Year) |
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<tbody>
<tr>
<td>Country of Birth</td>
<td>Child</td>
<td>A #</td>
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<tr>
<td>G. Family Name</td>
<td>Given Name</td>
<td>Middle Initial</td>
<td>Date of Birth (Month/Day/Year)</td>
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</tr>
<tr>
<td>Country of Birth</td>
<td>Relationship</td>
<td>Child</td>
<td>Age</td>
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<tr>
<th>H. Family Name</th>
<th>Given Name</th>
<th>Middle Initial</th>
<th>Date of Birth (Month/Day/Year)</th>
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<tbody>
<tr>
<td>Country of Birth</td>
<td>Relationship</td>
<td>Child</td>
<td>Age</td>
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**Part 9. Signature.**

Read the information on penalties in the instructions before completing this part. If you are going to file this petition at a USCIS office in the United States, sign below. If you are going to file it at a U.S. consulate or USCIS office overseas, sign in front of a USCIS or consular official.

I certify, or, if outside the United States, I swear or affirm, under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it is all true and correct. If filing this on behalf of an organization, I certify that I am empowered to do so by that organization. I authorize the release of any information from my records, or from the petitioning organization's records, that the U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit being sought.

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<th>Signature</th>
<th>Date</th>
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**Signature of USCIS or Consular Official**

<table>
<thead>
<tr>
<th>Print Name</th>
<th>Date</th>
</tr>
</thead>
</table>

**NOTE:** If you do not completely fill out this petition or fail to submit required documents listed in the instructions, the person(s) filed for may not be found eligible for a requested benefit and the petition may be denied.

**Part 10. Signature of person preparing form, if other than above. (sign below)**

I declare that I prepared this application at the request of the above person and it is based on all information of which I have knowledge.

<table>
<thead>
<tr>
<th>Signature</th>
<th>Print Your Name</th>
<th>Date</th>
</tr>
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</table>

**Print Name and Address**
Special Immigrant Juvenile Status  
For Children Under Juvenile Court Jurisdiction  
Immigrant Legal Resource Center  
May 2001

Chapter 1

Introduction and Overview

Special Immigrant Juvenile Status (SIJS) is a federal law that helps certain undocumented children in the state juvenile system obtain lawful immigration status. This chapter provides basic information about SIJS. It also directs you to other chapters that discuss different aspects of SIJS in more detail.

For many children’s welfare workers, this chapter will provide all the information you need. Chapters 2 - 4 are designed to answer more specific questions. In particular, Chapter 4 provides information on the application process and how to complete the forms. Chapter 5 provides information on other ways besides SIJS that children can obtain lawful status, such as immigrating through an adoptive parent or applying for asylum.

The Appendices to this manual contain many useful items, such as a sample court order and other papers that you can present to a juvenile court judge, a handout in English and Spanish that you can use to discuss the risks and benefits of this program with the applicant, a copy of the law, regulations, and INS memoranda, and sample completed copies of application forms. See Appendices. Note that it is easy to obtain the INS forms you’ll need for the application from the INS website, by calling a toll-free number, or from an immigration practitioner. See instructions in Chapter 4, § 4.4, below.

§ 1.1 Lawful Immigration Status: What is It and Why is It Important?  
The Stories of Julia and Martin

Immigration is controlled by a federal law -- the Immigration and Nationality Act\(^1\) -- and enforced by a federal agency -- the Immigration and Naturalization Service (INS).

Under our immigration laws, any person who is not a U.S. citizen is referred to as an alien. An alien who has a green card has permanent lawful immigration status and is called a lawful permanent resident. An alien with no lawful immigration status is said to be undocumented.

Life in the United States can be terribly difficult for an undocumented person. He or she might be deported (forced to leave the United States) if caught by INS. Further, the person cannot obtain employment authorization, and so cannot work legally. Undocumented young people are not eligible for in-state tuition at state colleges and universities, and therefore usually cannot go to college.

\(^1\) Abbreviated INA. The INA also appears in Title 8 of the United States Code. Citations to both the INA and the U.S. Code are provided throughout.
The Special Immigrant Juvenile Status law permits undocumented children who have come under the jurisdiction of a juvenile court and meet other requirements to become lawful permanent residents.

**Examples: The Stories of Julia and Martin.** When “Julia” was fourteen years old, she became a dependent of a juvenile court due to her parents’ abuse. The court terminated her parents’ rights and placed Julia in long-term foster care. She recovered from her abuse and adjusted well to life. She got good grades and was accepted to a state university.

However, just before Julia’s eighteenth birthday the county workers discovered that she had been born in Mexico and brought into the U.S. illegally. Although Julia spoke English perfectly and seemed very “American,” she was an undocumented immigrant. Because of this, it looked like everything Julia had worked for would be destroyed. As an undocumented person, Julia was not eligible to pay in-state tuition and so could not afford college. Further, she could not work legally, and so faced a future of being exploited in the underground economy or working with fake papers and hoping she was not discovered. Finally, if the INS ever located her, they could deport her back to Mexico, where she had no one.

Luckily, one of her social workers had heard of SIJS. Although right before Julia’s eighteenth birthday was a very late date to apply, county social workers and local immigration attorneys working together were able to successfully complete the SIJS application process before Julia was released from dependency. Julia became a lawful permanent resident through SIJS. The end of the story is that the real “Julia” went on to a successful college career, became an accountant, and has made a great life for herself!

“Martin” was placed in juvenile delinquency proceedings when he was arrested after a fight. When it came time for the juvenile court to release him on probation, the court found that it could not send him back to his parents because of their record of physical abuse and illegal actions. The court instead placed Martin in a foster care group home. Although the INS has not published a guidance on this, under the statute and the regulation Martin also meets all the requirements for a green card through SIJS.

**§ 1.2 Who is Eligible to Become a Permanent Resident Through "Special Immigrant Juvenile" Status?**

Persons under the jurisdiction of a juvenile court who are “deemed eligible for long term foster care” may be able to obtain special immigrant juvenile status and, based on that, apply for lawful permanent residency (a green card). To do this, they must submit two applications and meet two sets of requirements:

1) They must apply for **special immigrant juvenile status**, and

2) Based on the special immigrant juvenile application, they also must apply for **permanent residency** (the green card). In immigration terminology, applying for permanent residency is called applying for **adjustment of status** to that of a lawful permanent resident.

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2 "Special immigrant juvenile" is defined in INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J), reprinted in Appendix G. This section was added by § 153 of the Immigration Act of 1990 (IA90).
The two applications usually are filed at the same time, although in some circumstances the SIJS petition might be submitted first.

A. **Petition for Special Immigrant Juvenile Status (SIJS)**

A federal statute (law) provides that an applicant must meet the following criteria to qualify for SIJS.³

1. **Dependency, Delinquency, or Other Juvenile Court Proceedings**

The applicant must be under the jurisdiction of a juvenile court. While INS has not made a written policy about this, this should include children in delinquency as well as dependency proceedings. (The statute says that the applicant either must be a dependent of a juvenile court, or a juvenile court must have had the applicant legally committed to, or placed under the custody of, an agency or department of a state.) In either delinquency or dependency proceedings, the child applicant must meet all of the requirements for SIJS, including the requirement discussed below that she is “deemed eligible” for long term foster care.

**Example:** Sanny is a dependent of a juvenile court due to neglect by his parents. Rose is in delinquency proceedings for auto theft, and the court has found that it can’t return her to her parents’ custody on probation due to their abuse. Both children may be eligible for SIJS.

For further discussion of dependency and delinquency hearings, see § 2.2 in the next chapter.

2. **The Applicant Must Have Been “Deemed Eligible For Long-Term Foster Care.”**

The statute says that the child must be “deemed eligible for long term foster care” by the court. This phrase has a specific legal meaning for SIJS. The INS regulation on SIJS defines “deemed eligible for long term foster care” to mean that the court has found that family reunification is not a viable option and, usually, the child will go on to foster care, adoption or guardianship.⁴ Thus, the child generally must be in the permanent placement phase, and not reunified with a parent or still going through reunification.

**Example:** Sondra is in permanent placement now that reunification efforts with both parents have ended. She is in long-term foster care but might be adopted. She is “deemed eligible for long-term foster care” and therefore eligible for SIJS. Esteban’s mother is being offered reunification services. He has been living in foster care for

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³ INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J), reprinted in Appendix G, which states in part that a special immigrant juvenile is:

(i) who has been declared dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed under the custody of, an agency or department of a state, and who has been deemed by the court eligible for long-term foster care due to abuse, neglect or abandonment,

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence, and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.

⁴ See 8 CFR § 204.11(a)(1993), reprinted in Appendix G.
months, but since the judge has not yet found that reunification is not viable, he is not eligible for SIJS.

For further discussion, see § 2.3.

3. The court or some administrative agency must rule that it is not in the child’s best interest to be returned to his or her home country.

Generally the juvenile court will include in its SIJS order (discussed below) that it is not in the child’s best interest to be returned to the home country. The evidence for this finding may range from a home study conducted by a foreign social service agency to determine that a grandparent’s home is not appropriate, to simply interviewing the child to learn that there are no known appropriate family in the home country. For further discussion, see § 2.4.

4. The court should make it clear that it made its findings and orders based on abuse, neglect or abandonment of the child, as opposed to just to get the child immigration status.

The requirement of a specific finding about “abuse, neglect and abandonment” was added to the SIJS law in 1997. The juvenile court judge’s order should specifically identify whether abuse, neglect or abandonment was the basis for the dependency or placement order, and for “deeming the child eligible for long term foster care” (i.e., determining that reunion with the parents was not viable). For example, the judge’s order could state, “The minor is deemed eligible by this Court for long term foster care, based on abuse” or “The above orders and findings were made due to abandonment and neglect of the minor.” See sample judge’s order in Appendix C. For further discussion, see § 2.5, below.

5. The juvenile court judge should sign an order making the above findings.

The juvenile court judge will sign a special order, usually prepared by the child’s attorney or other advocate, stating that all the findings required for SIJS have been made. The child will submit this order to the INS as part of the child’s application for special immigrant juvenile status. A sample judge’s order appears in Appendix C.

6. Other Requirements: Juvenile Court Must Retain Jurisdiction, Applicant Must be Under Age 21 and Unmarried

The INS added some requirements of its own, that were not written in the federal law. Some of the INS requirements might be dropped in the future, but they apply to all applications now. For more information see § 2.8.

The Juvenile Court Must Retain Jurisdiction. Current INS regulation requires that the applicant remain under juvenile court jurisdiction until the immigration application is finally decided and the applicant is a lawful permanent resident. Juvenile court lawyers must ensure that judges retain jurisdiction over the applicant until INS grants the SIJS application after the interview. The INS interview may take place from six to thirty-six months, or even longer, after the SIJS application is filed.

§ 8 CFR § 204.11(c)(5), reprinted in Appendix G
Some juvenile court judges will want to, or must under state law, terminate dependency proceedings when the child reaches a certain age. Children's advocates need to fight to keep the child under juvenile court jurisdiction. Note that immigration attorneys may be able to persuade the INS to speed up ("expedite") the interview if the child is about to age out of the juvenile court system. When the child goes to the INS interview, s/he should have a copy of the minutes from his or her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.

The INS regulation creates a difficult situation and needlessly costs juvenile systems time and energy by requiring children to stay in longer in the juvenile court system than they otherwise would. It is possible that better rules will appear in the future. The INS was considering regulations that would offer relief to persons who age out of juvenile court jurisdiction before the INS makes its final decision. Advocates should keep abreast of developments.

**Applicants who are 18, or who are 21.** State laws generally require that a youth be under age 18 at the time he or she first is declared a juvenile court dependent. State laws vary as to how long a child can remain a juvenile court dependent, once he or she has been declared a dependent. Some states end dependency at age 18, others extend it to age 19 especially if the child must complete high school, and others potentially can extend the age to 21. Similarly, different states have different laws for how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

Under INS regulations, any person under 21 who meets the SIJS requirements can apply for SIJS. Thus as far as the INS is concerned, a 19 year old could file a SIJS application and attend the INS interview—so long as s/he remains under the jurisdiction of a juvenile court, eligible for long term foster care, and the subject of a court order declaring that it is not in his or her best interest to return to the home country.

**Example:** Julia entered the foster care system when she was 14 years old. Because social workers had not heard about SIJS earlier, Julia did not apply for SIJS until she was 19. The juvenile court retained jurisdiction over Julia until she was 20 and the INS granted her SIJS application.

**Marriage.** Under INS regulations, applicants for SIJS must remain unmarried until the entire process is completed and the INS grants permanent residency.

B. **Application for Permanent Resident Status**

Besides meeting the above requirements for SIJS, the children must fulfill other requirements that apply to all persons who become lawful permanent residents of the United States (get a green card).

Applicants might be barred from permanent residency if they have a record of involvement with drugs, prostitution, or other crimes, if they are HIV positive, committed visa fraud, were previously deported, or have certain other "bad marks" against them. These children need advice from expert immigration counsel before applying. They may well win their case—but they need to get good advice to make sure of that before they apply. Immigration lawyers should note that special waivers of inadmissibility are available to special immigrant juveniles that do not require a qualifying relative. See discussion at § 2.11.

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6 8 CFR § 204.11(c)(1). See reprint of regulation in Appendix G.
More detailed information on all eligibility requirements for special immigrant status and adjustment of status is provided in Chapter 2.

The following types of cases, discussed in Chapter 2, deserve special attention and expert advice:

- children who soon will turn 18, or are over 18
- children who soon will be released from juvenile court jurisdiction
- children who currently are in deportation ("removal") proceedings
- children who are or have been in juvenile delinquency proceedings or have a juvenile or adult criminal record
- children who are or might be HIV positive
- children who were "paroled" into the United States by immigration authorities
- children who have been previously deported or removed

§ 1.3 What Are the Benefits of Applying for Special Immigrant Juvenile Status?

The most important benefit of applying for SIJS is obtaining lawful permanent resident status -- a green card. Special immigrant juvenile status might be the only route for an undocumented child to gain lawful permanent immigration status in the United States. (But see Chapter 5 for other ways that children can obtain lawful immigration status.)

A lawful permanent resident has the right to live and work permanently in the United States and to travel in and out of the country. While public benefits (e.g., welfare, MediCare) for permanent residents have been drastically curtailed since 1996, permanent residents are eligible for some benefits initially and more as time goes on. Also, after five years permanent residents can apply for U. S. citizenship.

Lawful permanent resident status is permanent -- a special immigrant juvenile who obtains permanent residency will keep it after he or she is no longer under juvenile court jurisdiction. The person remains a permanent resident for her entire life. The only reason it would end would be if the person became deportable for some reason, such as conviction as an adult of certain criminal offenses.

The above benefits come with the green card, but two important benefits come as soon as the person submits the application forms to the INS. Applicants who have submitted the application for SIJS and adjustment of status and are waiting for an interview are protected against deportation and are granted employment authorization until their cases are decided.

Counties benefit when a child wins SIJS because they can access federal foster care matching funds, which they cannot do for undocumented children.

See Chapter 3 for further discussion of these benefits.
§ 1.4 What Are the Risks of Applying?

The greatest risk to the child is that, if the application is turned down, the INS might attempt to “remove” (deport) the child from the United States.

When a child files a petition for SIJS, the child is alerting the INS to the fact that he or she is in the U.S. Since these petitions are not confidential, the INS has the right to use that information to place the child into removal proceedings for deportation if the SIJS and adjustment of status applications are denied. See Chapter 3.

It is crucial to make sure that the child is likely to win the status before submitting an application, so that you don’t unintentionally cause the child to be deported. Note that children who are not eligible for SIJS still may be eligible to get lawful status in some other way, such as through adoptive parents, or through abusive U.S. citizen or permanent resident parents even if the child does not come or remain under juvenile court jurisdiction. See Chapter 5.

§ 1.5 Who Should Apply?

Children who will qualify for both special immigrant status and adjustment of status to permanent residency should submit applications. Generally children should not apply under this program if the advocate is not confident that the applications will be granted. In case of doubt, the advocate should be sure to consult with competent immigration counsel. For example, children with juvenile delinquent or adult criminal records, records of extensive immigration violations, or children with HIV should consider strategy with an expert before filing.

There is one exception to this cautionary advice: children who are already in deportation (“removal”) proceedings have nothing to lose by submitting an application, since INS is already trying to deport them. They should apply for special immigrant status if there is any chance of qualifying, so that their deportation is stopped. Note that if these children are already in INS actual or constructive custody, juvenile courts will have to get permission to take jurisdiction over the children. See § 1.9.

§ 1.6 What is the Application Procedure?

The child must file two applications, one for special immigrant juvenile status and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the United States, but can apply locally.\(^7\) Currently, both the SIJS and the adjustment of status applications are filed at the same time at the local INS district office with jurisdiction over the child’s residence.\(^8\) Besides the forms, the applicant must submit the results of a set medical exam

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\(^7\) Immigration practitioners should see INA § 245(h), which provides that SIJS applicants are deemed paroled in and therefore eligible for adjustment even if they entered without inspection. They do not have to qualify under § 245(i) or another special program, or pay a penalty fee: they are entitled to adjustment by virtue of their SIJS petition. Otherwise, immigration attorneys should note that an SIJS adjustment procedure is like that of a 245(a) adjustment for an immediate relative.

\(^8\) In the future, it is possible that INS will change the procedure and have the applicant mail the petition for SIJS to a regional INS office, and once that is approved have the applicant file the application for adjustment of status in person at a local INS office. Counsel should stay alert for new filing rules.
conducted by an INS-approved doctor (which includes a test for HIV and tests for the presence of some illegal drugs), various filing fees unless they are waived, and some proof of age such as a birth certificate. Applicants generally are required to have a photo-identification at the interview.

As soon as the application is filed with INS, the applicant can obtain employment authorization. INS will schedule an appointment for the applicant to get fingerprinted for an FBI check of any criminal or delinquency record or prior deportation. The wait for the interview itself can be long – depending on the INS office, it may be from six months to three years, or even longer. When the applicant finally gets to the interview, he or she often can have a social worker, and certainly an attorney, attend if desired. The INS might approve the case right at the interview, or might request further information. If the INS denies the case, it might or might not refer the child to a judge for deportation (“removal”) proceedings. The applicant can apply again in front of the judge, and can appeal denials at any stage.

The child will submit two applications at the same time:

One for special immigrant juvenile status, and
One for adjustment of status to permanent resident.

The application procedure is discussed in detail in Chapter 4. A sample application packet appears in Appendices B through E.

§ 1.7 Talking with the Child Applicant and Child’s Attorney About SIJS

Before a petition for special immigrant juvenile status is filed for a child, the child should understand what the application is about, and what are the risks and benefits of filing. Any attorney for the children must be consulted, and the child’s social worker, probation officer, CASA volunteer, foster parent, or other interested advocate should be involved. A one-page form in Spanish and English that you can use to help explain the program to the child appears in Appendix A.

§ 1.8 Original Parents, and Maybe Siblings, Cannot Benefit Through Grant of SIJS to Child

A child who immigrates as a special immigrant juvenile ceases to be the “child” of the original parents for immigration purposes. INA § 101(a)(27)(J). This means that the child will not be able to use her new lawful immigration status to help her original parents get lawful status. For example, a special immigrant juvenile who becomes a permanent resident and then a U.S. citizen will not be able to immigrate his or her natural mother. Usually a U.S. citizen of at least 21 years of age would have that right.

Congress enacted this rule to make sure that parents who abused, neglected or abandoned their children would not benefit from the fact that the children qualified for SIJS. The parents don’t lose any immigration benefit that they otherwise would have had, because without SIJS their undocumented child could not have helped his or her parents to immigrate.

Unfortunately, it also may be that the child is barred from using her new status to assist a brother or sister to immigrate. Immigration law defines siblings as persons with a common
parent. Since the SIJS recipient is no longer the "child" of the abusive parent, the INS may assert that he or she no longer has a sibling relationship with brothers and sisters. A U.S. citizen who is at least 21 years old can petition for permanent resident status for a sibling. The main drawback is that sibling or "fourth preference" petitions generally have a long waiting period of from 12 to 20 years after the petition was filed before the sibling receives any legal rights.

§ 1.9 Children in INS Actual or Constructive Custody

If an immigrant child is already in INS actual or constructive custody before coming to juvenile court, a juvenile court judge cannot make custody decisions about the child without INS' permission. This is a very unusual federal law, depriving state courts of jurisdiction over children within the state. As amended in 1997, the SIJS statute provides that no state juvenile court

"has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General [INS] unless the Attorney General specifically consents to such jurisdiction."9

Thus, juveniles who are in INS actual or constructive custody must obtain INS consent before a juvenile court can take jurisdiction over the minor. Juvenile court orders made without this consent are invalid according to INS standards.

What is "actual or constructive" INS custody? Actual custody means that INS has the child in a detention facility run by INS. Constructive custody has not been defined in official INS memoranda, but INS authorities appear to agree that this refers only to children housed in a special INS-sponsored foster care setting that INS has created in some states as an alternative to regular detention for children. In these settings, the INS pays a private or non-profit group to run a "soft detention" group home expressly for unaccompanied immigrant children under INS authority. Often the home meets state foster care licensing requirements. If a child is not in such a setting, the child is not in "constructive" INS custody and a juvenile court judge does not need permission to rule on the child's placement. The INS does not appear to take the position that a child is in constructive custody if the child once was in INS custody but has since been released. Thus a child who was arrested by INS but was then released on bond or to a relative, and who still has to go to immigration court hearings, is not in actual or constructive custody, and a juvenile court should not have to get INS permission to take the child.10

Requests for INS consent for a court to take jurisdiction over a child in INS custody must be made in writing to the INS District Director with jurisdiction over the juvenile's place of residence.11 According to an official INS Memorandum, the District Director should consent to the juvenile court taking jurisdiction over the child if:

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10 INS is expected to make this position explicit in future regulations. This information is based on conversations with national INS officials and Katherine Brady of the ILRC in 2000, as well as on the history leading up to the 1997 amendment. We are not aware of any local INS making any other interpretation, but if it does, please contact immigration or children's advocates and, if needed, national INS officials. You might start with Michael Biggs, INS Office of Adjudications, 202/353-7707, or Jo Anne London, INS Office of General Counsel, 202/514-0198.
11 July 9, 1999 "Memorandum #2" issued by Thomas E. Cook, Acting Assistant Commissioner, reprinted in Appendix J. See ILRC memorandum in Appendix K.
1) it appears that the juvenile would be eligible for SIJ status if a juvenile court order is issued; and

2) in the judgment of the district director, the dependency proceeding would be in the best interest of the juvenile.\textsuperscript{12}

Since dependency proceedings are expert governmental deliberations dedicated to identifying and implementing a plan that is in the best interests of the child, it should be an extremely rare case where the District Director decides that holding such proceedings are not in the child’s best interest. In practice, however, some District Directors have denied such cases.

Judges and advocates dealing with children who may be in INS custody should contact a resource center for information on how to best prepare a request for consent from the District Director. See Appendix H, Resources.

\textsuperscript{12} Id.
Chapter 2

Eligibility for Special Immigrant Juvenile Status and Adjustment of Status to Permanent Residency

This chapter takes a closer look at who is eligible to apply for special immigrant juvenile status and adjustment of status to permanent residency.

PART ONE: Eligibility for Special Immigrant Juvenile Status

§ 2.1 Statutory Requirements

Under the federal statute the requirements for special immigrant juvenile status are:

1) The child must be declared dependent on a juvenile court, or the court must have legally committed the child to or placed the child under the custody of a state department or agency (see § 2.2);

2) The child must be “deemed eligible for long-term foster care” (see § 2.3); and

3) A judge or administrative authority must have determined that return to the previous home country is not in the child's best interest (see § 2.4).

4) The judge should make clear that all of the above findings and determinations were made because of the neglect, abuse or abandonment of the child (see § 2.5).

The above findings should be set out specifically in an order signed by the juvenile court judge or other presiding judge. A sample order appears at Appendix C. It may be necessary to explain the need for such an order to the judge, since the factors may go beyond the usual formal requirements of dependency or delinquency proceedings. A memorandum discussing the program from the Presiding Judge of the Juvenile Court in Los Angeles and copies of the applicable law may be helpful. These are reproduced at Appendix F and G. It is often most efficient to draft and bring the court order to the hearing ready for the judge to use and sign. A sample order appears at Appendix C. The signed order will be submitted to the INS with the application for special immigrant juvenile status.

Sections 2.2 through 2.9 examine these and other special immigrant juvenile requirements in detail.

§ 2.2 — Under the Jurisdiction of a Juvenile Court: Dependency and Delinquency; Need to Retain Juvenile Court Jurisdiction

A. Dependency Proceedings

The immigration statute makes it clear that a child who is a dependent of juvenile court, and who meets the other requirements, is eligible for SIJS. (As discussed below, children who are not dependents but are under the jurisdiction of any juvenile court that makes custody
decisions for them – such as delinquency proceedings – also are eligible.)

**Getting a Child Into Dependency Proceedings.** If you are evaluating a child that you feel should be made a dependent of a juvenile court, remember that the question is one of state children’s law. Do not look to immigration law or immigration lawyers to define which children the juvenile court can “take in.” The process may be different in each state or county. One can alert the county Child Protective Services (or, under whatever name, the part of the county social services network that evaluates children for dependency). Even if the county office does not want to recommend dependency, the court can hear petitions filed by others. See if there is a legal aid-type office in your area for children. If there is not, consult court-appointed attorneys who practice in dependency proceedings.

**B. Juvenile Delinquency and Other Juvenile Court Proceedings.**

Often SIJS is seen as a form of relief available only for children in dependency proceedings. As a result, relatively few children in delinquency proceedings apply for SIJS. However, the statute specifically makes SIJS available to children in juvenile court proceedings other than dependency. The statute defines a special immigrant juvenile as an immigrant who is in the U.S. and

> “who has been declared dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed in the custody of, an agency or department of a State, and who has been deemed by that court eligible for long-term foster care due to abuse, neglect or abandonment”


A child in delinquency proceedings comes squarely within the statute as someone whom a juvenile court “has legally committed to, or placed in the custody of, an agency or department of a State.” (The second, separate issue, of when a delinquent child has been “deemed eligible for foster care” is discussed below.) Many children in delinquency have been granted SIJS, and local INS may well be sympathetic toward those children.¹³

The INS, however, has not addressed the delinquency issue in writing. Therefore, children in delinquency who apply for SIJS may be at greater risk of being denied by local INS. For this reason it is safest for children in delinquency who may be eligible for SIJS to secure placement in dependency or concurrent dependency/delinquency status, if this is permitted under state law. This eliminates any legal question. Children in delinquency who are unable to obtain placement in dependency and are considering applying for SIJS should be informed of the possible risks of submitting an application.

**Deemed Eligible for Long-Term Foster Care.** For the child to qualify for SIJS, the delinquency judge must issue a court order ruling on the child’s eligibility for long-term foster care due to abuse, neglect or abandonment, and on the fact that it is in the child’s best interest not to be returned to the home country. Remember that under INS regulation, “eligible for long-term foster care” means that family reunification is no longer a viable option, and that the child normally will go on to foster care, adoption or guardianship. In many states delinquency court judges frequently make rulings such as this, when it comes time to determine where to place the

¹³ As one INS official remarked, “We took sociology. We know that a lot of kids end up in delinquency for the same reason they could have ended up in dependency: because of abuse in the home.”
child on probation. For example, in California children in delinquency proceedings will be placed in long-term foster care, often in group homes, if parental reunification is not viable due to abuse, neglect, or abandonment. Or, the abused child may go on to guardianship or adoption, which are also acceptable alternatives under the SIJS regulation. (See discussion of guardianship and adoption in § 2.3, below.)

**Example:** Samuel is brought to delinquency proceedings and the court finds that he has committed theft and battery. Because Samuel has been severely neglected by his parents, when it is time for Samuel’s release from custody the court rules that parental reunification is not viable and places Samuel in foster care. The court is considering releasing Samuel to his uncle as guardian. Either way, Samuel should be found eligible for SIJS, even though he was never in dependency proceedings.

**Dangers of Delinquency.** Note that a few types of delinquency findings are dangerous because they are “grounds of inadmissibility” that can make a child ineligible for SIJS. The most dangerous finding is sale or possession for sale of drugs (as opposed to simple possession). A finding regarding prostitution or sex offenses can also cause problems. See further discussion in § 2.11. However, many juvenile delinquency dispositions, including many offenses involving violence or theft, do not cause immigration problems. Because of the danger that the local INS will not understand this legal issue and attempt to make a wrong ruling (e.g. try to deny a child based on a juvenile disposition of robbery), we advise that any child with a delinquency record have an expert immigration attorney on the case and at the INS interview.

3. **Juvenile Court Must Retain Jurisdiction Until INS Final Decision**

Under INS regulation, the SIJS applicant must remain under the juvenile court’s jurisdiction until the SIJS petition and application for permanent residency both are approved. In many jurisdictions, the INS interview at which this might occur does not take place until six months or even up to thirty-six months or more, after the SIJS application has been filed. Advocates must persuade juvenile court judges to retain jurisdiction over the SIJS applicant until the INS has finally approved the applications. In some cases the court might be willing to retain jurisdiction over an older child if foster care funds were no longer being paid out. Or, the INS might agree to move the interview date up if a child is about to “age out” of dependency. This difficult rule may improve in the future, through legislation or regulatory change. Advocates should keep abreast of developments.

§ 2.3 **“Deemed Eligible for Long-Term Foster Care”**

*Family Reunification, Foster Care, Adoption, Guardianship.*

The statute provides that the applicant must be "deemed eligible for long term foster care due to abuse, neglect or abandonment." The regulation defines this term simply to mean that the court has found that family reunification is not a viable option, and the child normally would be placed in foster care, guardianship or adoption.

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14 8 CFR § 204.11(c)(5), reprinted at Appendix G.
A. Definition of “Deemed Eligible for Long-Term Foster Care”

The INS regulation interpreting the statute provides that a child is deemed eligible for long-term foster care once the court has found that family reunification is no longer a viable option. The regulation states that “normally” this will mean that the child would remain in foster care until the age of majority, unless the child is adopted or placed in guardianship.\footnote{8 CFR § 204.1(i)(a) states that “Eligible for long term foster care means that a determination has been made by a juvenile court that family reunification is no longer a viable option. A child who is eligible for long term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in a guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long term foster care.” The regulation is reprinted in Appendix G.} Thus a child who has been adopted or placed in a guardianship after parental reunification efforts have been ended will be considered to be “eligible for long term foster care.” A child who remains a juvenile court dependent but is no longer supported by foster care might also qualify.

Abuse, Neglect or Abandonment: While the grammar is somewhat confusing, the 1997 amendment appears to add the requirement that the child is deemed eligible for long term foster care due to abuse, neglect or abandonment (as opposed to due to a desire to get SJS status). See discussion in § 2.5, and sample judge’s order in Appendix C.

Timing of the Order: Sometimes there is no parental involvement in juvenile court proceedings because the parent is dead or has conclusively abandoned the child. In these cases, some state courts may make a finding that family reunification efforts can be terminated earlier in the process than they would if the parents were actively involved. (See, for example, Calif. Welf. & Inst. Code § 366.21(e).) This would allow the child to be "deemed eligible for long term foster care" and able to apply for SJS earlier in the process. This would be especially helpful to older children who might "age out" of the system before becoming a permanent resident.

Parents Outside the United States. For a dependency court to terminate parental rights is of course a serious process requiring notice to the parents. In practice, if a court or children’s agency thinks there is close family in the home country it will go through a process of investigating conditions there to evaluate whether it is in the child’s best interest to return. For example, some county workers in California have developed a working relationship with the staff of the family welfare system in Mexico, and may obtain a home study of a parent or grandparent’s house. Other agencies depend upon interviewing the child and/or adults who know the situation to determine whether such family exists and can be notified, and for information about the family. Foreign consulates may provide help to agencies in locating the child’s parents in other countries to advise them of the proceedings. Children’s welfare workers normally will describe efforts to locate and evaluate close family in other countries in their reports to the court. This information also may be relevant to the court’s determination that it is not in the child’s best interest to return to the home country (see sec. 2.4 below).

B. Issues Relating to Adoption

This section will discuss several issues pertaining to adoption and immigration status. The material is relevant to any noncitizen adopted child, regardless of whether the child immigrates through the adoption or through SJS.
For an SIJS Applicant, the Juvenile Court Must Retain Jurisdiction Until the INS Grants the Application, Presumably Even After Adoption. The federal immigration regulation permits children who have been adopted to apply for SIJS, but it still imposes the requirement that the juvenile court retain jurisdiction over the case for the months or years until the INS finally approves the application. Usually a juvenile court would terminate its jurisdiction over a child’s case once an adoption was completed. To comply with the INS regulation, some juvenile courts have either delayed completing the final step of the adoption until the INS granted its approval, or simply retained jurisdiction over the case despite the completion of the adoption. This requirement may be eliminated in the future through legislative or regulatory change; advocates should keep abreast of developments.

Immigrating through Adoption as an Alternative to Immigrating Through SIJS. A child will be able to immigrate through adoptive parents instead of through SIJS if the child is under 16 years old when the adoption is completed and is not otherwise inadmissible. The child also must live in the legal custody of the adoptive parents for two years before the papers are filed. However, immigration through adoptive parents has several disadvantages compared to SIJS. It may involve a long waiting period if the parents are permanent residents rather than citizens; it may require the child to return to the home country for at least a few days to obtain the immigrant visa, and the child will be subject to more grounds of inadmissibility, including the “public charge” ground in which the adoptive parents must prove they have certain income. For this reason, most children adopted after juvenile court custody choose to immigrate through SIJS rather than through their new parents, if possible. See discussion in Chapter 5.

If SIJS or the Violence Against Women Act provisions (see Chapter 5) are not an option, however, immigrating through an adoptive parent may be the best choice. See discussion below regarding (a) why any child going to be adopted would like the adoption to be completed by her 16th birthday, even if she doesn’t immigrate through the adoptive parents and (b) how undocumented adoptive parents might be able to immigrate through their adopted child.

Any Immigrant Child Being Considered For Adoption by a U.S. Citizen May Benefit From Having the Adoption Completed By Their Sixteenth Birthday – Even if the Child Already Has a Green Card or Is Immigrating Through SIJS or Other Means. The advantage the child may gain is automatic U.S. citizenship. A child automatically becomes a U.S. citizen if, while under the age of 18, she (1) is a permanent resident, through SIJS, family immigration, or any means; (2) is legally adopted by a U.S. citizen before she reaches the age of 16, and has resided at any time in the legal custody of the citizen for two years; and (3) is residing in the legal and physical custody of the U.S. citizen parent.

States Should Not Oppose Adoption Based on the Adoptive Parents Undocumented Status. Adoptive Parents Potentially Could Immigrate Through The Adopted Child. At least in California, undocumented parents may adopt children despite the parents’ lack of lawful immigration status. If you encounter problems with this issue anywhere in the country, contact

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16 Please note that if a child is adopted as an orphan because of parental death or abandonment, then the child does not have the two-year legal custody and residence with the parents requirements. There are, however, other requirements for orphans. See INA § 101(b)(1)(F).

17 There are different rules for someone who was adopted as an orphan. See INA § 101(b)(1)(F).


15
the National Immigration Law Center in Los Angeles, which brought successful legal action against California on this matter (213-487-2531).19

Note that an adopted child who becomes a permanent resident (through SJS or some other means) will ultimately be able to help her undocumented adoptive parents to immigrate (get a green card), as long as the family meets certain requirements. First, a “parent/child” relationship for immigration purposes must be established, which means that the adoption must have occurred before the child’s 16th birthday, and the child must have resided in the adoptive parent or parents’ lawful custody for two years, at any time. Second, the child must become a U.S. citizen and be at least 21 years of age to file for her parents. See § 5.1 for more information on immigrating through family relationships in general.

§ 2.4 Not in the Child’s Best Interest to be Returned to Previous Home Country

The court or administrative body must find that it is not in the child’s best interest to return to the home country or country of most recent residence. Specifically, the immigration statute states that to qualify for SJS, the applicant must be a person

"for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence ..."20

The easiest course is to have the juvenile court judge include this finding along with the others in her order that will be submitted to INS. See sample judge’s order, Appendix C. 21

Obviously, the court must base this finding on evidence, so social workers, probation officers or others writing reports to the court should discuss their efforts to determine the conditions for the child in the home country, the conditions for the child in the United States, and the basis for their recommendation that it is not in the child’s best interest to return. The “best interest of the child” determination is one to be made by state court or agency officials based on applicable children’s law standards. The court or agency determination should be made on the wide range of factors usually considered in a “best interest of the child” finding, and is not limited merely to factors relating to abuse, neglect or abandonment.22

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19 Rodriguez-Mendez v. Anderson, CN 948348 (San Francisco Superior Court, February 9, 1993), All County Letter 93-16 (March 2, 1993).
21 It may be necessary to explain the need for such an order to the judge, since a specific finding that it is not in the child’s best interest to return to the home country may go beyond the usual formal requirements of dependency or delinquency proceedings. A memorandum discussing the program from the Presiding Judge of the Juvenile Court in Los Angeles and copies of the applicable law may be helpful. These are reproduced at Appendix F and G. It is often most efficient to draft and bring the court order to the hearing ready for the judge to use and sign. A sample order appears at Appendix C.
22 The statute does not limit the “best interests” determination to factors relating to abuse, neglect or abandonment of the child, as it does the determination that the child is deemed eligible for long-term foster care. Compare 8 USC § 1101(a)(27)(J)(i) (deemed eligible for long-term foster care “due to” abuse, neglect or abandonment) with § 1101(a)(27)(J)(ii) (administrative or judicial determination that it is not in the child’s best interest to return to home country, with no mention of abuse, neglect or abandonment).
It is possible that some INS offices will demand details about the situation in the home country. Such a demand conflicts with the plain language of the statute: the statute, quoted above, requires evidence that a judicial or administrative body has determined that it is not in a child’s best interest to return, not direct evidence about the conditions in the home country itself. Again, advocates will have to decide what information it is legal, ethical or advisable for them to disclose in the face of inappropriate INS demands. See discussion in § 2.5.

§ 2.5 Due to “Abuse, Neglect or Abandonment”: Legal Standards, INS Requests for Evidence and Documentation

The statute provides that a special immigrant juvenile must have been the subject of juvenile court orders and deemed eligible for long-term foster care “due to abuse, neglect or abandonment.”

A. Requirement to Show Neglect, Abuse or Abandonment.

Under 1997 amendments to the SIJS law, the child must show that the reason that court made the various orders was due to the “neglect, abuse or abandonment” of the child, and not just to help the child gain lawful immigration status. To people involved in juvenile court it seems obvious that abuse, neglect and abandonment would be the basis for such orders by a juvenile court, but the statute requires judges or others in the system to make this finding explicit. For that reason, every juvenile court order to be submitted to INS should include a statement identifying the basis for the order, e.g., “On January 4, 1998 the minor was deemed eligible for long term foster care due to abandonment,” or “The above orders and findings were based on the abuse of the child.” See sample judge’s order in Appendix C.

Legal Terms Other than “Abuse, Neglect or Abandonment.” Some states use different legal terms to describe the basis for refusing to place a child with his or her parents. For example, behavior that most state statutes would term neglect or abandonment might be called “destination” under New York state law. To be safe, until clarifying regulations are published, if the child was declared a dependent under some other legal term it still may be best to ask the judge to also

23 Memorandum #2 is confusing about this issue. On the last page it states that applicants should present “Evidence that it would not be in the juvenile’s best interest” to be returned to the home country. See page 3. This requirement goes beyond the statute and the regulation. Also, page 2 of “Memorandum #2” provides that this can be established by the dependency order. See Appendix J, and ILRC memorandum in Appendix K.

24 See INA § 101(a)(27)(J)(i), 8 USC § 1101(a)(27)(J)(i), cited above. See also the regulation at 8 CFR § 204.11(a)(6), which simply repeats the statutory language that a court or administrative body must have made the finding. Both are reprinted in Appendix G.

25 Section 101(a)(27)(J)(i), 8 USC § 1101(a)(27)(J)(i), defines a special immigrant juvenile as one “who has been deemed dependent on a juvenile court located in the United States or whom such court has legally committed to, or placed under the custody of, an agency or department of a State, and who has been deemed by that court eligible for long-term foster care due to abuse, neglect or abandonment...” See Appendix G for full statute.

26 The statute adds the requirement of abuse, neglect or abandonment to the section requiring dependency or commitment to a state agency, and eligibility for long term foster care. See INA § 101(a)(27)(J)(i), 8 USC § 1101(a)(27)(J)(i), as amended on November 27, 1997. While it is not clear from the grammar of the statute that the requirement applies to all of these factors, the safest course is to include it. See reprints in Appendix G.
include in the order one of the terms "abuse, neglect or abandonment." The judge should use the term whose plain meaning reflects what actually happened to the child.

**Abuse, Neglect or Abandonment is Defined Under State Law.** The state juvenile court decides whether to take custody of the child due to abuse, neglect or abandonment as a question of state law. The INS cannot assert that it disagrees with Oklahoma’s definition of abuse or California’s definition of neglect. It cannot attempt to impose a federal definition. The question remains whether a judge under the applicable law of the state has found abuse, neglect or abandonment.

**Where the Abuse Occurred.** There is no requirement in the statute, regulation or INS memoranda that the abuse, neglect or abandonment occurred in the United States. In fact, many immigrant children lost parents or escaped abusive parents in the country of origin and came alone to the United States. Many U.S. juvenile courts are open to accepting these unaccompanied or abandoned children (as they are open to accepting U.S. citizen children who are living on the street, as opposed to children directly removed from families). The only legal issue is whether the juvenile court has made its determinations based on abuse, neglect or abandonment of the child as defined under state law.

### 2. Evidence and Documentation Regarding Abuse, Neglect and Abandonment

In some areas of the country there has been controversy and confusion about what kind of evidence INS can require about abuse, neglect and abandonment of the child. *We feel that the best course is to provide only the judge’s order, with the minimum amount of information needed to meet the legal elements of SJJ’S, and not to supply a lot of details about abuse, family, living situation, etc.* The statute provides that INS should be given *proof that judges have made certain findings*, not proof that children actually were abused. The reason for this is simple: INS officers are in no way trained to evaluate or interpret whether a child has been abused, is telling the truth, whether the abuse should be considered to have ended, state law definitions of children’s terms, psychologist’s reports, etc. Moreover giving the information to INS may violate legal and ethical rules regarding confidentiality.

However, some advocates are in a position where INS has said that without this evidence, it will not approve the case. Plus, the statute relating to INS “consent” to accept the judge’s order is vague and could be read to support some INS inquiry. Hopefully in the future the INS will centralize its decision-making on this question, so that reasonable and consistent rules are applied. Until then, advocates need to decide how hard to fight and how to fight most efficiently if INS requires inappropriate information or documents. We recommend having a meeting with higher-up INS officials and personnel from the juvenile system, such as judges, court staff, directors of social work, or children’s attorneys.

**What evidence must the juvenile court include in its order to establish that it made the order due to abuse, neglect or abandonment?** Many advocates feel a legal and/or ethical obligation to disclose only the legal basis for the dependency and not to give further factual information. For example, a court order could state that “the minor was made a dependent of this court and deemed eligible for long term foster care under Calif. W&I Code § 300(a) (physical abuse) and § 300(d) (sexual abuse).” This is evidence that the juvenile court deemed the juvenile eligible for long-term foster care due to abuse, neglect or abandonment.

Other advocates have provided more factual information, in response to INS threats to deny the SJJ’S application, and depending upon privacy rules in their courts. Some INS offices
routinely demand to obtain a copy, or review a copy, of the entire juvenile court file on the applicant. If the INS requests information that you believe is illegal or unethical to provide, we recommend that you speak with other groups in your area (including the Bar Association) and ask to meet with local INS about the issue, rather than simply give over confidential information for review by INS officers who, after all, have no training whatsoever to evaluate the information.

The INS' actions in this area are controlled by INS Memorandum #2 on Special Immigrant Juveniles, dated July 1999. Some INS offices may not have Memorandum #2. You should supply them with a copy. INS Memorandum #2 (and an ILRC memorandum discussing it) appear as Appendices J and K at the back of this manual. If the INS challenges your case and demands more evidence, you should closely examine Memorandum #2. While it is somewhat vaguely written, Memorandum #2 appears to provide that if the judge's order provides the basic information, the INS must "consent" to accepting the order as the basis for SIJS. If the order does not provide the necessary information, Memorandum #2 discusses alternative ways of obtaining evidence acceptable to INS, such as written statements by social workers. See Memorandum #2 and ILRC memo discussing it, in Appendices J and K.

Thus, we recommend that information about the elements of consent should be provided in the juvenile court judge's order, where possible. However, if a juvenile court order does not include information establishing all the SIJS requirements ("elements of consent"), the INS will look to documents filed with the court or sworn statements by the court or state agency or department.27

Regarding documents filed with the court, the INS recognizes that while such documents would be the most reliable evidence of the elements to be proved, in many States documents submitted to or issued by the juvenile court in dependency or delinquency proceedings may be subject to privacy restrictions.28 Advocates who demonstrate that juvenile court proceedings are protected by state privacy laws should be able to avoid giving INS documents filed with court.

Regarding the sworn statement by court or state department or agency, this appears to be a safety device provided in case the juvenile court judge is not able or willing to provide sufficient information. According to the INS:

If a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to INS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.29

Thus when all else fails a social worker, department attorney, or other responsible party from court or state agency or department can submit a sworn statement. Immigration

27 July 9, 1999 "Memorandum #2" issued by Thomas E. Cook, Acting Assistant Commissioner. p. 3, in Appendix J, and ILRC memo discussing it in Appendix K.
28 Id.
29 Id.
proceedings regularly accept un-notarized sworn statements with the following signature statement: "I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief." Again, the person providing the sworn statement must consider legal and ethical confidentiality concerns when deciding what information to include.

§ 2.6 INS “Consent” to Accept the Judge’s Order

The following discussion is somewhat complex, and for many SIJS cases is not needed. The “consent” issue need not worry you, and you do not necessarily even need to read this section, unless you are in one of two situations: (a) the child you are assisting is in some form of INS custody, or (b) the INS is stating that it intends to deny your SIJS application because it is refusing to “consent” to accept your juvenile court judge’s order.

A. INS Consent that Children in INS Custody Proceed to Juvenile Court Jurisdiction.

The SIJS law provides for two types of INS “consent.” One consent involves the fairly unusual case in which a child was first in the INS’ custody, and now wants to go on to juvenile court jurisdiction. For a discussion of this kind of consent, see § 1.9 and information in Appendix L.

B. General INS Consent for SIJS.

The other kind of consent, which we’ll call “general” consent, applies to every SIJS case. Basically, the law provides that the INS must “consent” to (i.e., accept) the juvenile court judge’s order to serve as the basis for SIJS if the applicant establishes the required legal elements, and not consent if the applicant doesn’t. The INS makes this “consent” just in the act of approving the SIJS petition; there is no separate application for consent. That is why in the majority of cases the consent issue does not come up; the INS just “consents” when it grants the SIJS petition. Unless there is a problem, advocates do not need to concern themselves with the issue, or to write the INS anything about it. We present the following fairly detailed discussion of consent only to help advocates in situations in which the INS is threatening to withhold consent or may be misinterpreting the consent provision. If this is happening, you should also see further discussion in the July 1999 “Memorandum #2” on Special Immigrant Juveniles, and ILRC discussion of the Memorandum, at Appendices J and K.

A 1997 amendment to the SIJS law provides that the INS must “consent” to granting SIJS to an applicant based on the juvenile court judge’s order.\(^\text{30}\) This kind of consent is linked to whether there was abuse, neglect or abandonment. The legislative history to this amendment states that to consent, the INS must find that the court’s actions were made due to abuse, neglect and abandonment of the child, rather than primarily for the purpose of obtaining SIJS.\(^\text{31}\) The INS has stated that it agrees that the only reason it would not “consent” would be some doubt about the issue of abuse, neglect or abandonment. In its 1999 “Memorandum #2” on SIJS, the INS noted that the dependency order should establish that the juvenile is deemed eligible for long term foster care due to abuse, neglect or abandonment and that it is not in the child’s best interest to be returned to the home country. The INS states, “If both elements are established, consent to the

\(^{30}\) See INS § 101(a)(27)(J)(iii), 8 USC § 1101(a)(27)(iii), in Appendix G.

\(^{31}\) See Conference Committee Report, section 113, reproduced in Appendix G.
order serving as [a basis for SIJS] must be granted.” Memorandum #2, page 2, “Juveniles Not in INS Custody.”

You might meet an INS officer who wrongly asserts that INS “consent” can be based on anything, such as his not liking the child’s demeanor, the fact that the child is in delinquency not dependency proceedings, or other reason. Or, an officer might wrongly assert that the juvenile court must obtain INS consent even if the child had not been in INS custody before coming to juvenile court. If this occurs, get the assistance of an attorney and arrange a meeting with INS to discuss consent and the 1999 Memorandum #2.

§ 2.7 Proof of Age; Obtaining Documentation

Proof of Age. The INS regulation requires every applicant for special immigrant juvenile status to submit some documentary proof of age. The evidence can take the form of a “birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary’s age.”

Immigration practitioners should note that the requirement is for some proof of age, a much looser standard than the usual proof of birth. There is no requirement that the person submit a birth certificate. Children have been granted SIJS who did not even know what country they were born in, and did not personally know their year of birth. The statute recognizes that these children come from abusive, chaotic, or interrupted homes, and does not impose the strict requirements of proof of birth that appear in regular family immigration.

Obtaining Documentation to Prove Age. The following practice tips may help you to obtain documents. Because the search for documents can be time consuming (for example, it might take several weeks to hear back from a foreign registry), it is critical to start as soon as the application for SIJS becomes a possibility. For example, if a social worker or probation officer identifies that the child is undocumented and is waiting to transfer the matter to another part of the agency for handling, that person could do the child a tremendous service by immediately beginning the search for documents.

Foreign birth certificates, if you can obtain them, are the ideal proof of age.

(1) The easiest way to obtain a foreign birth certificate is to contact helpful family or friends in the home country who will travel to the local or national registry to obtain a certified copy. Unfortunately, abused children often lack these connections.

(2) Send away for the birth certificate yourself. You will need a letter written in the language of the country and addressed to the registrar in the town where the child was born (or, more importantly, where she believes her birth was registered) or to national registry. You will need an international money order. The letter should state the name, birth date and birthplace of the child and if possible the names of both parents. There are relatively inexpensive “express mail” services to Mexico and Central America in most large cities.

32 8 CFR § 204.11(d)(1), reprinted in Appendix G.
The Foreign Affairs Manual (FAM) of the Department of State is an important resource. The FAM provides information on how to obtain foreign birth certificates from various countries. If birth certificates from a particular country appear in a different form, such as family registration certificates, or if they are generally unavailable and therefore not required, the FAM will state this. To find the FAM, go to a local law library or contact a local immigration agency or attorney. If you are in northern California, you may contact the Immigrant Legal Resource Center, Attorney of the Day at (415) 255-9499, ext. 6263. The Attorney of the Day will send you copies of the pages from the FAM that relate to the country you're dealing with.

(3) Contact the local consulate from the child's country and ask for their assistance.

Foreign identity documents: Any foreign identity document, including a military document and perhaps a school identity card, should be accepted as proof of age.

Other substitute documents: If you cannot obtain a birth certificate, the regulation provides that the applicant can submit any "other document which in the discretion of the [INS district director] establishes the person's age." The regulation creates a generous standard because it is well known that some of these children will not have necessary information or will have a hard time obtaining documents.

One good guide for what definitely must be acceptable substitute documents is the INS regulation defining substitute documents for birth certificates in family visa petitions. See 8 CFR § 204.1(f) and (g)(2), reprinted in Appendix G. This is a fairly strict standard for substitute documents that is imposed in regular family immigration cases. Substitute documents may include (1) a baptismal certificate with the seal of the church, showing date and place of birth and date of baptism; (2) affidavits from people who are personally aware of the birth; (3) early school records showing date of admission to the school, the child's date and place of birth, and the name and place of birth of the parent or parents. You must also describe the efforts you made to locate the birth certificate. The best proof is a statement from the registrar explaining that the child's birth certificate cannot be found there.

But that guide is not a requirement for SIJS. The INS District Director can accept any document in his or her discretion to prove age in an SIJS case. If you have nothing else, offer a state court order on the child's age. Regular civil courts can make all kinds of findings, including age. For example, under California Welf. & Inst. Code § 362, a juvenile court can make any and all reasonable orders for the care of a minor. At least some INS offices have accepted such an

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33 This part of the FAM is reproduced in volume 11 of Gordon and Mailman, Immigration Law and Procedure (Matthew Bender Publishing Co.). Ask your county law library if they have this multi-volume set.

34 INS regulations for substitute documents in regular family visa petitions may provide some guidelines here. See 8 CFR § 204.1(g)(2), reprinted in Appendix G. In that context, a third party who was aware of the birth should state in the affidavit that she was alive at the time of the birth and had personal knowledge of it. The affidavit should include the person's full name and address, date and place of birth, relationship to the parties, if any, and complete details concerning how the affiant knows of the birth. In fact it is a good idea to include other details that they know about the person's life. For instance, the affiant can say that she knew the parents, was present at the wedding, visited the mother when she was pregnant, knew the neighborhood the family lived in, and saw the family and the child on a regular basis.

35 These are the "secondary evidence" acceptable under federal regulation to prove birth in the U.S. in family visa cases when "primary evidence" (birth certificate, etc.) is not available. See 8 CFR § 204.1(f), (g)(2).
order as proof of age. Offer an official doctor and psychologist's evaluation. The INS itself conducts dental exams on youth in its custody to determine if they are under the age of 18, so this is a strong document. (Be aware, however, that the INS then may want to have its own dentist examine the child and you may end up with dueling dental exams.) Always remind the INS that the regulation purposely gave INS wide discretion on what documents will suffice as proof of age.

When submitting foreign documents, be sure to demonstrate that you diligently searched for original documents and were unable to find them. This is required. Be prepared to show correspondence with a registrar in the home country, and/or a declaration by the worker of the steps taken to locate documents or information.

Must submit proof of age with initial filing? INS regulation lists proof of age under "Initial documents which must be submitted in support of the petition." While you should be able to file without a birth certificate, it is possible that a local INS will refuse to accept the application without some evidence. If possible, present proof that the birth certificate is not available — such as a letter from a registrar or other in the home country saying it is not available — and/or proof that you are pursuing other means. If nothing else, include a sworn statement by the child or social worker and cite the regulation stating that the INS District Director has discretion to accept any document. With that, the INS should accept the papers for filing and leave it to the interview officer to decide whether the document is sufficient, and hopefully by the interview you will have something more.

§ 2.8 Additional INS Requirements--
How Long Must Juvenile Court Jurisdiction Be Maintained?
What Happens When the Applicant Turns 18 or 21?
What If the Applicant Marries?

The federal statute sets out requirements a child must meet in order to qualify for special immigrant status. The INS, in its own regulations, adds more requirements. Those INS-imposed requirements will be discussed in this section.

Advocates should make every possible effort to comply with these INS requirements. However, if compliance is impossible, keep in mind that the requirements in the INS regulation might be vulnerable to a lawsuit in federal court, charging that INS overstepped its authority by imposing requirements that weren't stated in the statute.

A. Jurisdiction Until The Entire Application Is Decided.

The INS regulation states that the person applying for special immigrant status must remain under juvenile court jurisdiction throughout the entire application process, i.e. until INS approves the applications for special immigrant juvenile status and adjustment to permanent residency. Thus, if an applicant is under juvenile court jurisdiction when he or she files the I-825 and adjustment applications with INS, but leaves court jurisdiction during the several months long wait for the INS interview, the INS will deny the application.

This regulation has caused tremendous problems by requiring juvenile courts to retain jurisdiction over older youth longer than the courts normally would. Hopefully a new statute or regulation will change the rule, so that the applicant only needs to be under juvenile court jurisdiction at the time she files the application with INS, not all the way until the INS gets
around to deciding the application. But until the rule is changed, you must attempt to comply. Advocates who are running out of time should pursue two strategies simultaneously:

1) **Ask the juvenile court judge to retain jurisdiction** over the child and schedule a last hearing a few weeks after the interview date.

   - Some courts have taken an affirmative stand on this issue. In Los Angeles, the presiding judge of juvenile court, Jaime R. Corral, distributed a memorandum to all juvenile court judges requesting that they maintain jurisdiction past the age of 18 for juveniles who may qualify for this relief; this may be of use in informing or convincing other judges. See Appendix F.
   - Advocates report that in some instances, judges have agreed to retain the children as dependents while stopping other forms of foster care support.

2) **Ask the INS to expedite the application** (give a quicker date for the interview). This is a discretionary decision. In some areas of the country, the INS has agreed to move up the SIJS adjustment interview if the applicant is about to age out of juvenile court.

   - Find out from local immigration practitioners if the INS has a history of doing this in other time-urgent cases, to use as a precedent (for example, family immigration cases in which a child is about to turn 21 and go into a less advantageous immigration category.)
   - If you believe that the INS may not immediately be open to your request, it may be helpful to ask civic organizations such as the local bar association volunteer services program to join in the request and ask for a meeting, ask a respected local immigration lawyer, who may have good contacts in the INS, to take on the case and make the request, or ask the member of the United States Congress that represents the district where your client lives to intervene on your client’s behalf with the INS.

In some areas, immigration and children’s agencies and civic organizations have formed an ongoing local **Task Force on SIJS**. In San Francisco, children’s and immigration law staff, county workers, city attorneys, probation officers, the Bar Association and other civic groups formed a Bay Area Task Force to exchange information and discuss problems. This became useful in policy work, as both the INS and the local county systems were responsive to considering concerns raised by the Task Force.

When the applicant goes to the INS adjustment interview, s/he **bring a copy of the minutes from his or her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.**

**Mandatory injunction and/or writ of mandamus:** If the applicant can establish that INS has taken an unreasonable amount of time to process the application, a lawyer acting on behalf of the client may ask a federal court to order a mandatory injunction and/or writ of mandamus to force INS to act on the case. Whether INS has taken an unreasonable time in
processing an application will depend on the facts of the particular case. It will be the court's
discretion to decide if the agency delay is unreasonable.36

In the case of Yu v. Brown, the plaintiff filed an application for SIJS and adjustment to
legal permanent resident. INS had taken no action on the application for more than a year. As a
result, the plaintiff alleged that the INS had unreasonably delayed the processing of the SIJS
application and sought a writ of mandamus/injunctio to compel the INS to act on the
application.37 The court in this case found that the delay was unreasonable. Further, the court
determined that whether a delay is unreasonable will depend on the facts of the particular case.
However, a writ of mandamus/injunction was determined to be an appropriate remedy for the
unreasonable delay.

B. The Age of 18 or 21.

Under the INS regulations, any person under 21 years of age who meets the requirements
can apply for SIJS.38 Thus an 18- or 19-year old can file an SIJS application and attend the INS
interview as long as s/he remains under juvenile court jurisdiction, "eligible for long term foster
care," and the subject of a court order that it would not be in his or her best interests to return to
the home country.

Note: Some court staff and practitioners wrongly believe that lawful permanent
residency status terminates at age 18. Once a person becomes a permanent resident (a "green
card" holder), that status continues for the person's entire life unless s/he becomes deportable for
some reason, such as serious criminal conviction.

C. The Applicant Cannot Be Married.

Under INS regulation, if the child marries prior to receiving special immigrant status, the
petition will be denied. If the child marries after receiving special immigrant status but before
receiving permanent residency, the status automatically will be revoked. (See § 2.9 for discussion
of revocation.)

Children over 18 and under 21 who are under juvenile court jurisdiction still qualify.

Ask the juvenile court to maintain jurisdiction over children 18 years or over if needed.
Jurisdiction should be maintained until the application
for adjustment of status has been finally approved.

If an eligible child will be terminated from juvenile court jurisdiction before adjusting,
ask the INS to move up the adjustment interview date.
Get advice immediately

36 See Yu v. Brown, 36 F.Supp.2d 922
37 Id.
38 § CFR § 204.11(c)(1). See reprint of regulation in Appendix G.
§ 2.9 How the Applicant Can Lose Special Immigrant Status: Revocation of Approval

The INS can revoke special immigrant juvenile status at any point before the applicant completes final processing for adjustment of status (the green card). Under the regulations, INS will revoke an applicant's special immigrant status if, prior to obtaining permanent residency, the applicant

- becomes 21 years old;
- marries;
- ceases to be under juvenile court jurisdiction;
- ceases to be deemed eligible for long-term foster care; or
- is the subject of a determination in an administrative or judicial hearing that it is in the applicant's best interests to return to their or their parents' country of nationality or last habitual residence.39

Advocates argue that the INS does not have the authority to revoke special immigrant status when the person marries since that reason exceeds the scope of the statute passed by Congress. See § 2.8.

If an applicant is about to leave juvenile court jurisdiction because of age, advocates must work hard to persuade the judge to retain juvenile court jurisdiction, and/or persuade the INS to move up the interview date. See discussion in § 2.2, above.

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PART TWO: Eligibility for Adjustment of Status to Permanent Residency

§ 2.10 Statutory Requirements for Adjustment of Status

Adjustment of status is the procedure through which a person becomes a lawful permanent resident (green card-holder) without leaving the United States. (The other procedure, called consular processing, requires the person to travel to his or her home country and have an interview at the U.S. consulate there.) Some people who entered the U.S. illegally and immigrate through family members are not permitted to adjust status in the United States, and instead must go to the home country to do consular processing. This is not a problem for special immigrant juveniles, because the statute provides an exception for special immigrant juveniles so that they can apply for adjustment of status at the INS in the United States despite having entered or worked illegally.40

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39 8 CFR § 101.6(c), (f)
40 See INA § 245(h), 8 USC § 245(h). The statute as passed in November 1990 in the Immigration Act of 1990 was mistakenly written in a way that would have required most children to travel outside of the United States in order to apply for permanent residency. This error was corrected in the Technical Amendments of 1991 (§ 302(d)(2)).
§ 2.11 Grounds for Deportation and Inadmissibility: Criminal Record, HIV Positive Status, Public Charge Issues; Waivers of Inadmissibility

Grounds of Deportability and Inadmissibility. People who come within certain categories are penalized under the immigration laws. An alien can be forced to leave the United States (be deported or removed) if he or she comes within a “ground of deportability.” The person can be denied admission to the U.S. or denied adjustment to lawful permanent resident status (a green card) if she comes within a “ground of inadmissibility.” The grounds of inadmissibility and deportability are listed in the federal immigration law.\(^4\) Most apply to persons who have committed or been convicted of certain crimes, have committed certain immigration offenses, have certain diseases, cannot financially support themselves (the “public charge” ground), are judged subversive, or have other problems.

Comparing Immigration Through SIJS to Immigration Through Family Members. Many grounds for inadmissibility and deportation do not apply to special immigrant juveniles.\(^5\) This is an advantage that special immigrant juvenile applicants have over children who immigrate through their natural or adoptive parents. Children immigrating through their parents are subject to most grounds of inadmissibility, including the public charge ground. (To meet the public charge ground, their adoptive family must at a minimum show that they earn 125% of the Poverty Income Guidelines.) Also, unless the petitions were filed on or before April 30, 2001, these children must go through consular processing outside the U.S. instead of adjustment of status in the U.S. if they entered the U.S. illegally. Finally, a person immigrating through SIJS can apply to have certain grounds of inadmissibility waived that a person immigrating through family is not eligible to waive.

Grounds of Inadmissibility That Can Be Waived. Some inadmissibility grounds do apply to special immigrant juveniles, but the applicant can ask for a discretionary “waiver.”\(^6\) The applicant will submit a special waiver application asking the INS to “forgive” the ground of inadmissibility. It is probable, but not guaranteed, that INS will approve such waiver applications. The waivable inadmissibility grounds include:

- people who have been prostitutes or procurers (“pimps”)
- people who were convicted as adults once of simple possession of 30 grams or less of marijuana
- people who are HIV positive
- people who were deported and did not remain outside the U.S. for five years before returning
- persons who committed fraud to enter the U.S. or to get a visa

\(^4\) The grounds for deportation appear at INA § 237(a), 8 USC § 1227(a). The grounds for inadmissibility appear at INA § 212(a), 8 USC § 1182(a).

\(^5\) See INA § 212(c), 8 USC § 1227(c) excepting various grounds of deportation, including grounds relating to entry without proper documents, termination of conditional residency, and failure to report change of address; and INA § 245(h)(1), (2)(A), 8 USC § 1255(h)(1), (2)(A), added by Miscellaneous and Technical Corrections Act of 1991 § 301(d)(2), creating eligibility for adjustment by deeming special immigrant juveniles to have been paroled in to the U.S. and exempting them from the public charge ground of inadmissibility.

people who are alcoholics or have a "mental or physical disorder" that poses a risk to people or property (e.g., suicidal behavior, psychopathy, disorder that causes the person to prey sexually on other minors)

- people who are or have been drug addicts or abusers
- people who helped other aliens to enter the U.S. illegally.

If a child might come within any of these grounds, you will need the help of an immigration expert to file a waiver. As stated above, since it is possible the waiver will not be granted, the application carries some risk. This may be especially true for people with problems related to drugs, since INS takes a severe approach to drug offenses.

**Note to Immigration Attorneys: Special SIJS Provisions for Inadmissibility, Deportability, Waivers, and Adjustment.** Congress provided a special waiver, available only to SIJS applicants, of many of the grounds of inadmissibility. Unlike traditional inadmissibility waivers such as INA §§ 212(i) or 212(h), the SIJS waiver does not require the child to have a qualifying relative with lawful status. The Attorney General is authorized to waive the designated grounds for "humanitarian purposes, family unity, or when it is otherwise in the public interest." See INA § 245(h)(2). The legislation proposed by Senator Feinstein in 2001 (S. 121) would add additional waivers. See Appendix M.

All SIJS applicants are by law deemed to be paroled in and therefore eligible for adjustment of status. See INA § 245(h)(1). They do not need to qualify for adjustment under INA § 245(i) or pay a penalty fee; they are eligible to adjust by virtue of being special immigrant juveniles. Noncitizens who qualify as special immigrant juveniles are exempted from the grounds of deportability that relate to unlawful presence. Therefore even children who were wrongly admitted or are now out of status cannot be charged under those grounds. This could lead to an interesting argument in an unusual situation: arguably a child who qualifies for SIJS but for some reason cannot adjust status – for example, because the government denied an HIV waiver or had "reason to believe" the child was a drug trafficker and therefore inadmissible – cannot be deported just for unlawful status.

**Grounds That Cannot Be Waived.** Other grounds of deportation or inadmissibility are not waivable. A person who comes within one of these grounds should not submit an application.

44 "Drug abuse" may mean anything more than one-time experimentation with illegal drugs. Immigration practitioners may note that no waiver of the deportation ground relating to abuse or addiction is provided to special immigrant juveniles, but if the juvenile is able to obtain a waiver of the inadmissibility ground in the context of the adjustment application, that waiver should protect against deportation as well.

45 See inadmissibility waiver at INA § 245(h)(2)(B), 8 USC § 1255(h)(2)(B), as amended by the Miscellaneous and Technical Corrections Act of 1991, § 301(d)(2), reprinted at Appendix G, supra. and INA § 245(h)(1), (2)(A), 8 USC § 1255(h)(1), (2)(A), added by Miscellaneous and Technical Corrections Act of 1991 § 301(d)(2), creating eligibility for adjustment by deeming special immigrant juveniles to have been paroled in to the U.S. and exempting them from the public charge ground of inadmissibility.

46 The statute as passed in November 1990 in the Immigration Act of 1990 was mistakenly written in a way that would have required most children to travel outside of the United States in order to apply for permanent residency. This error was corrected in the Technical Amendments of 1991 § 302(d)(2), adding § 245(h).

47 INA § 237(h), 8 USC § 1227(h) See also INA § 237(c), 8 USC § 1227(c) excepting various grounds of deportation, including grounds relating to entry without proper documentation, termination of conditional residency, and failure to report change of address provides that "Paragraphs (1)(A)(1)(B), (1)(C).
since the application will almost surely be denied and the person can be placed in deportation proceedings. These grounds of inadmissibility include:

- people who INS has "reason to believe" are or have been drug traffickers
- people convicted as adults of a wide range of offenses, or who have made a formal admission of any drug offense or a "crime involving moral turpitude" (such as shop lifting, assault with a deadly weapon, or sex crimes).

If an eligible child might come within any of these categories, do not file an application until you have consulted with an expert in this area.

Drug trafficking is especially dangerous. Immigration authorities recognize that a disposition in juvenile court is not a "conviction" for any purpose. However, some actions can be the basis for inadmissibility (disqualification from immigrating) even if there is no conviction. Drug trafficking can be grounds for inadmissibility if the INS has strong evidence that they occurred, such as a juvenile court disposition. In some cases, where the INS has become aware that the child has participated in trafficking, either through the child's own admission in the interview or on the application form or through some other means. Although advocates can argue that a minor cannot form the intent necessary to commit drug trafficking, the INS probably will hold that if an INS officer has good "reason to believe" that the child has ever been a drug trafficker, then s/he is ineligible for special immigrant juvenile status. If the child just possessed or used drugs, this should not be a basis for inadmissibility.

A juvenile delinquency finding of prostitution or of behavior that indicates a "mental or physical disorder" or drug abuse/addiction also can support a finding of inadmissibility. But unlike drug trafficking, these grounds of inadmissibility can be waived (forgiven) in the discretion of the INS. See discussion of "Grounds of Inadmissibility That Can Be Waived," above.

This area is quite complex and this information is only introductory. If you are at all unsure of the implications of a specific criminal disposition, consult with an expert in the area. For more information on criminal grounds of inadmissibility see the ILRC manual, California Criminal Law and Immigration or see Immigration Law and Crimes listed in Appendix II and obtain legal assistance.

Children who were involved with prostitution, drugs, or other crimes, or who are HIV positive, or who have been deported in the past, may face special problems.

Get assistance before filing the application.

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48 Cases have held "drug trafficking" to mean that a person must have been a knowing and conscious participant or conduit in the transfer, passage, or delivery of narcotic drugs. The "reason to believe" means that INS should have reasonable, substantial and probative evidence of the trafficking.
49 A crime involving moral turpitude is not a basis for inadmissibility if it is the first offense, the offense was a misdemeanor, and the person received a formal sentence of six months or less.
51 The BIA has held that persons who plead guilty to drug trafficking in juvenile proceedings are inadmissible as drug traffickers despite the fact that there is no conviction. Matter of Favela, 16 I&N 753 (BIA 1979).
§ 2.12 Who Should Not Apply for Special Immigrant Juvenile Status

A child who is not already in deportation proceedings and who is ineligible either for special immigrant juvenile status or for adjustment of status should not even apply for special immigrant status, since he will be risking deportation for no reason. If a child would be eligible for adjustment if he could obtain a waiver of inadmissibility or deportation (as discussed in § 2.11), the case should be discussed with an immigration attorney or advocate before filing either application.

However, a child who already is in deportation proceedings and for whom special immigrant status is the only possible road towards a legal immigration status, should apply for special immigrant status, even if s/he will not be able to adjust status to lawful permanent resident. Since the INS already know the child, a denial of the petition will not prejudice the child any more. On the other hand, it may draw the INS' attention to the child's specific circumstances, which may lead to some other type of immigration relief that relies on the INS' discretion. Also, it is not clear that a special immigrant juvenile can be removed from the United States even if she is deportable and is not eligible for adjustment of status.
OFFICE OF REFUGEE RESETTLEMENT
Unaccompanied Alien Children

Program Objectives:

To provide a safe and appropriate environment for minors during the interim period between the minor's transfer into an Unaccompanied Alien Children's (UAC) program and the minor's release from custody by the ORR or removal from the United States by the Department of Homeland Security (DHS).

Program Description:

On March 1, 2003, the UAC care and placement program was transferred from the Immigration and Naturalization (INS) Commissioner to the Director of the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (DHHS) in accordance with section 452 of the Homeland Security Act of 2002.

Within ORR, UAC is located in the Division of Unaccompanied Children Services (DUCS). Effective March 1, 2003, ORR assumed responsibility for the care and placement for these children.

Among other requirements, the ORR Director is responsible for:

- Coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status;
- Making and implementing placement determinations; overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside;
- Reuniting children with guardians and/or sponsors, when appropriate;
- Conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside.

ORR is also responsible for responding to public inquiries regarding the location and welfare of detained unaccompanied children and related issues. This is to assure the public that the minors are receiving proper care in the least restrictive environment.

Services:

Unaccompanied alien children receive a number of temporary services for the interim period beginning when the minor is placed in the Shelter...

Care Program and ending when ORR releases the minor from custody, transfers him/her to another facility, or the minor is removed from the United States by DHS:

- Shelter care,
- Foster care, or group care (or a combination of these),
- Orientation,
- Family Reunification
- Routine and Emergency Medical/Dental Care,
- Individual Counseling,
- Group Counseling,
- Case Management,
- Acculturation/Adaptation
- Education,
- Recreation and Leisure Time,
- Visitation and contact with family members, and
- Other related services, including those that address needs of individual alien minors.

Services are provided in accordance with applicable State child welfare statutes and generally accepted child welfare standards, practices, principles, and procedures. All programs are licensed under applicable state law.

These minors, although placed in the physical custody of the ORR provider, remain in the legal custody and care of ORR.

Eligible Grant Applicants:

- Non-profit organizations incorporated under State law which have demonstrated child welfare, social service or related experience and are appropriately licensed, or can expeditiously meet applicable State licensing requirements and obtain such licensure, for the provision of shelter care, foster care, or group care and related services to dependent children are eligible to apply.
- For-profit organizations incorporated under State law which have demonstrated child welfare, social service or related experience and are appropriately licensed, or can expeditiously meet State licensing requirements and obtain such licensure, for the provision of shelter care, foster care, group care and other related services to dependent children and which can clearly demonstrate that only actual costs and not profits, fees or other elements above cost have been budgeted, are also eligible to apply.

Targeted Populations:

Unaccompanied alien children up to 17 years.

Geographic Area(s):

The program covers the contiguous United States. To date, there are facilities for the minors in 14 states.
Policy Info:

- **Homeland Security Act of 2002, Section 462, Children's Affairs.** Transfers functions from the Commissioner of the Immigration and Naturalization Services to the Director of the Office of Refugee Resettlement.
- **Flores vs. Reno Settlement Agreement.** Provides guidelines and standards to be followed by ORR and DHS.

Related Documents:

- Definition of Facilities
- Map of Facilities and DUCS Field Coordinator Regional Coverage
- DUCS Staff Contact Information
Definition of Facilities

There are five types of facilities:

- **Secure**: County juvenile detention facilities.

- **Staff Secure (Medium Secure)**: The staff secure facility provides 24-hour awake supervision, care, and treatment. The program is required to maintain stricter security measures and higher staffing ratios in order to control problem behavior and discourage flight. Security and accountability are maintained through procedures, staffing patterns, and effective communication rather than bars, locks, and restraints associated with juvenile detention.

A staff secure facility may have a fence, but it's not required. There should be some type of monitoring to and egress from the building can be controlled. The atmosphere should reflect a shelter rather than a prison. There are no lock-down procedures typically associated with traditional juvenile correctional facilities (i.e. strip searches, use of mechanical restraints, cell-like sleeping rooms, lack of privacy, razor wire etc.).

The facility should not exceed the level of security permitted under state law for a licensed shelter care facility which is necessary for the protection of the staff and type of children placed in its care. Specialized services should also be available for children with drug and alcohol problems and other special needs.

The staff secure facility should focus special attention on the security and staffing requirements detailed in the ORR Shelter Requirements and the Flores Agreement.

- **Shelter**: A residential program with all the programmatic components described in the Flores Agreement.

- **Foster Care**: Minors are placed in families who will provide the appropriate care and programs described in the Flores Agreement.

- **Mental Health/Therapeutic**: For therapeutic mental health residential treatment programs. Handles behavior modification, socially and mentally dysfunctional minors.

Related

- The Federal Resettlement
- Refugee Emergency Assistance
- Refugee Minors Assistance
- Formula Grants Programs
- Targeted Assistance
- Matching Grants Program
- Wilson/Fish Program
- Unaccompanied Refugee Minors Program
- Cuban/Haiti Initiative
- Torture Treatment Program
- Assistance to Victims of Trafficking Program
- Repatriation

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1/30/2004
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CASELAW

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SUPREME COURT OF THE UNITED STATES

No. 91-905

JANET RENO, ATTORNEY GENERAL, et al., PETITIONERS v. JENNY LISETTE FLORES et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 23, 1993]

Justice Scalia delivered the opinion of the Court.

Congress has given the Attorney General broad discretion to determine whether and on what terms an alien arrested on suspicion of being deportable should be released pending the deportation hearing. [n.1] The Board of Immigration Appeals has stated that "[a]n alien generally . . . should not be detained or required to post-bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." Matter of Patel, 15 I. & N. Dec. 666 (1976); cf. INS v. National Center for Immigrants' Rights (NCIR), 502 U. S. ___ (1991) (upholding INS regulation imposing conditions upon release). In the case of arrested alien juveniles, however, the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juveniles are arrested alone, i.e. unaccompanied by a parent, guardian, or other related adult. This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone)--as many as 70% of them unaccompanied. Brief for Petitioners 8. Most of these minors are boys in their mid teens, but perhaps 15% are girls and the same percentage 14 years of age or younger. See id., at 9, n. 12; App. to Pet. for Cert. 177a.

For a number of years the problem was apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations. In 1984, responding to the increased flow of unaccompanied juvenile aliens into California, the INS Western Regional Office adopted a policy of limiting the release of detained minors to " `a parent or lawful guardian,' " except in " `unusual and extraordinary cases,' " when the juvenile could be released to " `a responsible individual who agrees to provide care and be responsible for the welfare and well being of the

In July of the following year, the four respondents filed an action in the District Court for the Central District of California on behalf of a class, later certified by the court, consisting of all aliens under the age of 18 who are detained by the INS Western Region because "a parent or legal guardian fails to personally appear to take custody of them." App. 29. The complaint raised seven claims, the first two challenging the Western Region release policy (on constitutional, statutory, and international law grounds), and the final five challenging the conditions of the juveniles' detention.

The District Court granted the INS partial summary judgment on the statutory and international law challenges to the release policy, and in late 1987 approved a consent decree that settled all claims regarding the detention conditions. The court then turned to the constitutional challenges to the release policy, and granted the respondents partial summary judgment on their equal protection claim that the INS had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings [n.2] (whom INS regulations permitted to be paroled, in some circumstances, to persons other than parents and legal guardians, including other relatives and "friends," see 8 CFR § 212.5(a)(2)(ii) (1987)). This prompted the INS to initiate notice and comment rulemaking "to codify Service policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings." 52 Fed. Reg. 38245 (1987). The District Court agreed to defer consideration of respondents' due process claims until the regulation was promulgated.

The uniform deportation exclusion rule finally adopted, published on May 17, 1988, see Detention and Release of Juveniles, 53 Fed. Reg. 17449 (codified as to deportation at 8 CFR § 242.24 (1992)), expanded the possibilities for release somewhat beyond the Western Region policy, but not as far as many commenters had suggested. It provides that alien juveniles "shall be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who are [sic] not presently in INS detention," unless the INS determines that "the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others." 8 CFR § 242.24(b)(1) (1992).

If the only listed individuals are in INS detention, the Service will consider simultaneous release of the juvenile and custodian "on a discretionary case by case basis." § 242.24(b)(2). A parent or legal guardian who is in INS custody or outside the United States may also, by sworn affidavit, designate another person as capable and willing to care for the child, provided that person "execute[s] an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings." § 242.24(b)(3). Finally, in "unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent," juveniles may be released to other adults who execute a care and attendance agreement. § 242.24(b)(4).

If the juvenile is not released under the foregoing provision, the regulation requires a designated INS official, the "Juvenile Coordinator," to locate "suitable placement... in a facility designated for the occupancy of juveniles." § 242.24(c). The Service may briefly hold the minor in an-INS detention facility having separate accommodations for juveniles," § 242.24(d), but under the
terms of the consent decree resolving respondents' conditions of detention claims, the INS must within 72 hours of arrest place alien juveniles in a facility that meets or exceeds the standards established by the Alien Minors Care Program of the Community Relations Service (CRS), Department of Justice, 52 Fed. Reg. 15569 (1987). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, Flores v. Meese, No. 85-4544&RJK (Px) (CD Cal., Nov. 30, 1987) (incorporating the CRS notice and program description), reprinted in App. to Pet. for Cert. 148a 205a (hereinafter Juvenile Care Agreement).

Juveniles placed in these facilities are deemed to be in INS detention "because of issues of payment and authorization of medical care." 53 Fed. Reg., at 17449. "Legal custody" rather than "detention" more accurately describes the reality of the arrangement, however, since these are not correctional institutions but facilities that meet "state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children," Juvenile Care Agreement 176a, and are operated "in an open type of setting without a need for extraordinary security measures," id., at 173a. The facilities must provide, in accordance with "applicable child welfare statutes and generally accepted child welfare standards, practices, principles and procedures," id., at 157a, an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure time activities, family reunification services, and access to religious services, visitors, and legal assistance, id., at 159a, 178a 185a.

Although the regulation replaced the Western Region release policy that had been the focus of respondents' constitutional claims, respondents decided to maintain the litigation as a challenge to the new rule. Just a week after the regulation took effect, in a brief, unpublished order that referred only to unspecified "due process grounds," the District Court granted summary judgment to respondents and invalidated the regulatory scheme in three important respects. Flores v. Meese, No. CV 854544-RJK (Px) (CD Cal., May 25, 1988), App. to Pet. for Cert. 146a. First, the court ordered the INS to release "any minor otherwise eligible for release . . . to his parents, guardian, custodian, conservator, or other responsible adult party." Ibid. (emphasis added). Second, the order dispensed with the regulation's requirement that unrelated custodians formally agree to care for the juvenile, 8 CFR §§ 242.24(b)(3) and (4) (1992), in addition to ensuring his attendance at future proceedings. Finally, the District Court rewrote the related INS regulations that provide for an initial determination of prima facie deportability and release conditions before an INS examiner, see § 287.3, with review by an immigration judge upon the alien's request, see § 242.2(d). It decreed instead that an immigration judge hearing on probable cause and release restrictions should be provided "forthwith" after arrest, whether or not the juvenile requests it. App. to Pet. for Cert. 146a.

Respondents make three principal attacks upon INS regulation 242.24. First, they assert that
alien juveniles suspected of being deportable have a "fundamental" right to "freedom from
physical restraint," Brief for Respondents 16, and it is therefore a denial of "substantive due
process" to detain them, since the Service cannot prove that it is pursuing an important
governmental interest in a manner narrowly tailored to minimize the restraint on liberty.
Secondly, respondents argue that the regulation violates "procedural due process," because it
does not require the Service to determine, with regard to each individual detained juvenile who
lacks an approved custodian, whether his best interests lie in remaining in INS custody or in
release to some other "responsible adult." Finally, respondents contend that even if the INS
regulation infringes no constitutional rights, it exceeds the Attorney General's authority under 8
U.S.C. § 1252(a)(1). We find it economic to discuss the objections in that order, though we of
course reach the constitutional issues only because we conclude that the respondents' statutory
argument fails. [n.3]

Before proceeding further, however, we make two important observations. First, this is a facial
challenge to INS regulation 242.24. Respondents do not challenge its application in a particular
instance; it had not yet been applied in a particular instance--because it was not yet in existence--
when their suit was brought (directed at the 1984 Western Region release policy), and it had been
in effect only a week when the District Court issued the judgment invalidating it. We have before
us no findings of fact, indeed no record, concerning the INS's interpretation of the regulation or
the history of its enforcement. We have only the regulation itself and the statement of basis and
purpose that accompanied its promulgation. To prevail in such a facial challenge, respondents
"must establish that no set of circumstances exists under which the [regulation] would be valid."
United States v. Salerno, 481 U.S. 739, 745 (1987). That is true as to both the constitutional
challenges, see Schall v. Martin, 467 U.S. 253, 268, n. 18 (1984), and the statutory challenge, see
NCIR, 502 U. S., at ___ (slip op., at 4-5).

The second point is related. Respondents spend much time, and their amici even more,
condemning the conditions under which some alien juveniles are held, alleging that the
conditions are so severe as to belie the Service's stated reasons for retaining custody--leading,
presumably, to the conclusion that the retention of custody is an unconstitutional infliction of
punishment without trial. See Salerno, supra, at 746-748; Wong Wing v. United States, 163 U.S.
228, 237 (1896). But whatever those conditions might have been when this litigation began, they
are now (at least in the Western Region, where all members of the respondents' class are held)
presumably in compliance with the extensive requirements set forth in the Juvenile Care
Agreement that settled respondents' claims regarding detention conditions, see supra, at 5. The
settlement agreement entitles respondents to enforce compliance with those requirements in the
District Court, see Juvenile Care Agreement 148a 149a, which they acknowledge they have not
done, Tr. of Oral Arg. 43. We will disregard the effort to reopen those settled claims by alleging,
for purposes of the challenges to the regulation, that the detention conditions are other than what
the consent decree says they must be.

Respondents' "substantive due process" claim relies upon our line of cases which interprets the
Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive
component, which forbids the government to infringe certain "fundamental" liberty interests at
all, no matter what process is provided, unless the infringement is narrowly tailored to serve a
compelling state interest. See, e.g., Collins v. City of Harker Heights, 503 U. S. ___ (1992) (slip op., at 9); Salerno, supra, at 746; Bowers v. Hardwick, 478 U.S. 186, 191 (1986). "Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Collins, supra, at ___ (slip op., at 9); see Bowers v. Hardwick, supra, at 194-195. The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," Schall, supra, at 265, and where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so. Ibid. Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives: the challenged regulation requires such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing and able private custodian rather than of a government operated or government selected child care institution.

If there exists a fundamental right to be released into what respondents inaccurately call a "non custodial setting," Brief for Respondents 18, we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. It would presumably apply to state custody over orphans and abandoned children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child care institutions. Cf. Ankenbrandt v. Richards, 504 U. S. ___ (1992) (slip op., at 14). We are unaware, however, that any court--aside from the courts below--has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody. The mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it; the alleged right certainly cannot be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Salerno, supra, at 751 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in "preserving and promoting the welfare of the child," Santosky v. Kramer, 455 U.S. 745, 766 (1982), and is not punitive since it is not excessive in relation to that valid purpose. See Schall, supra, at 269.

Although respondents generally argue for the categorical right of private placement discussed above, at some points they assert a somewhat more limited constitutional right: the right to an individualized hearing on whether private placement would be in the child's "best interests"--followed by private placement if the answer is in the affirmative. It seems to us, however, that if institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child. "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making
the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion--much less the sole constitutional criterion--for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves. See, e.g., R. C. N. v. State, 141 Ga. App. 490, 491, 233 S. E. 2d 866, 867 (1977).

"The best interests of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities. Thus, child care institutions operated by the state in the exercise of its parens patriae authority, see Schall, supra, at 265, are not constitutionally required to be funded at such a level as to provide the best schooling or the best health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care. And the same principle applies, we think, to the governmental responsibility at issue here, that of retaining or transferring custody over a child who has come within the Federal Government's control, when the parents or guardians of that child are nonexistent or unavailable. Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements--to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention--is a policy judgment rather than a constitutional imperative.

Respondents' "best interests" argument is, in essence, a demand that the INS program be narrowly tailored to minimize the denial of release into private custody. But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest (here, the alleged interest in being released into the custody of strangers) demands no more than a "reasonable fit" between governmental purpose (here, protecting the welfare of the juveniles who have come into the government's custody) and the means chosen to advance that purpose. This leaves ample room for an agency to decide, as the INS has, that administrative factors such as lack of child placement expertise favor using one means rather than another. There is, in short, no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is (as we readily find it to be, assuming compliance with the requirements of the consent decree) good enough.

If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." Mathews v. Diaz, 426 U.S. 67, 81 (1976). "[O]ver no conceivable subject is the legislative power of Congress more complete." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oeanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). Thus, "in the exercise of its broad power over
immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.' " 430 U. S., at 792 (quoting Mathews v. Diaz, supra, at 79-80). Respondents do not dispute that Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings, see Carlson v. Landon, 342 U. S. 524, 538 (1952); Wong Wing v. United States, 163 U. S., at 235. And in enacting the precursor to 8 U.S.C. § 1252(a), Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General. See Carlson v. Landon, supra, at 538-540. Of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose--which it does, as we shall discuss later in connection with the statutory challenge.

Respondents also argue, in a footnote, that the INS release policy violates the "equal protection guarantee" of the Fifth Amendment because of the disparate treatment evident in (1) releasing alien juveniles with close relatives or legal guardians but detaining those without, and (2) releasing to unrelated adults juveniles detained pending federal delinquency proceedings, see 18 U.S.C. § 5034 but detaining unaccompanied alien juveniles pending deportation proceedings. The tradition of reposing custody in close relatives and legal guardians is in our view sufficient to support the former distinction; and the difference between citizens and aliens is adequate to support the latter.

We turn now from the claim that the INS cannot deprive respondents of their asserted liberty interest at all, to the "procedural due process" claim that the Service cannot do so on the basis of the procedures it provides. It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. See The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903). To determine whether these alien juveniles have received it here, we must first review in some detail the procedures the INS has employed.

Though a procedure for obtaining warrants to arrest named individuals is available, see 8 U.S.C. § 1252(a)(1); 8 CFR § 242.2(c)(1) (1992), the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe that the arrestee "is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained," 8 U.S.C. § 1357(a)(2). Arrested aliens are almost always offered the choice of departing the country voluntarily, 8 U.S.C. § 1252(b) (1988 ed., Supp. III); 8 CFR § 242.5 (1992), and as many as 98% of them take that course. See INS v. Lopez Mendoza, 468 U.S. 1032, 1044 (1984). Before the Service seeks execution of a voluntary departure form by a juvenile, however, the juvenile "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 CFR § 242.24(g) (1992). [n4] If the juvenile does not seek voluntary departure, he must be brought before an INS examining officer within 24 hours of his arrest. § 287.3; see 8 U.S.C. § 1357(a)(2). The examining officer is a member of the Service's enforcement staff, but must be someone other than the arresting officer (unless no other qualified examiner is readily available). 8 CFR § 287.3 (1992). If the examiner determines that "there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," ibid., a formal deportation proceeding is initiated through the issuance of an order to show cause, § 242.1, and within 24 hours the decision is made whether to continue the alien juvenile in custody or release him, § 287.3.
The INS notifies the alien of the commencement of a deportation proceeding and of the decision as to custody by serving him with a Form I 221S (reprinted in App. to Brief for Petitioners 7a 8a) which, pursuant to the Immigration Act of 1990, 8 U.S.C. § 1252b(a)(3)(A) (1988 ed., Supp. III), must be in English and Spanish. The front of this form notifies the alien of the allegations against him and the date of his deportation hearing. The back contains a section entitled "NOTICE OF CUSTODY DETERMINATION," in which the INS officer checks a box indicating whether the alien will be detained in the custody of the Service, released on recognizance, or released under bond. Beneath these boxes, the form states: "You may request the Immigration Judge to redetermine this decision." See 8 CFR § 242.2(c)(2) (1992). (The immigration judge is a quasi judicial officer in the Executive Office for Immigration Review, a division separated from the Service's enforcement staff. § 3.10.) The alien must check either a box stating "I do" or a box stating "[I] do not request a redetermination by an Immigration Judge of the custody decision," and must then sign and date this section of the form. If the alien requests a hearing and is dissatisfied with the outcome, he may obtain further review by the Board of Immigration Appeals, § 242.2(d); § 3.1(b)(7), and by the federal courts, see, e. g., Carlson v. Landon, supra, at 529, 531.

Respondents contend that this procedural system is unconstitutional because it does not require the Serviceto determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other "responsible adult." This is just the "substantive due process" argument recast in "procedural due process" terms, and we reject it for the same reasons.

The District Court and the en banc Court of Appeals concluded that the INS procedures are faulty because they do not provide for automatic review by an immigration judge of the initial deportability and custody determinations. See 942 F. 2d, at 1364. We disagree. At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge. It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented. Most are 16 or 17 years old and will have been in telephone contact with a responsible adult outside the INS--sometimes a legal services attorney. The waiver, moreover, is revocable: the alien may request a judicial redetermination at any time later in the deportation process. See 8 CFR § 242.2(d) (1992); Matter of Uluocha, 20 I. & N. Dec. ___ (Interim Dec. 3124, BIA 1989). We have held that juveniles are capable of "knowingly and intelligently" waiving their right against self incrimination in criminal cases. See Fare v. Michael C., 442 U.S. 707, 724-727 (1979); see also United States v. Saucedo Velasquez, 843 F. 2d 832, 835 (CA5 1988) (applying Fare to alien juvenile). The alleged right to redetermination of prehearing custody status in deportation cases is surely no more significant.

Respondents point out that the regulations do not set a time period within which the immigration judge hearing, if requested, must be held. But we will not assume, on this facial challenge, that an excessive delay will invariably ensue--particularly since there is no evidence of such delay, even in isolated instances. Cf. Matter of Chirinos, 16 I. & N. Dec. 276 (BIA 1977).

Respondents contend that the regulation goes beyond the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U.S.C. § 1252(a)(1). That contention
must be rejected if the regulation has a "reasonable foundation," *Carlson v. Landon*, supra, at 541, that is, if it rationally pursues a purpose that it is lawful for the INS to seek. See also *NCIR*, 502 U. S., at ___ (slip op., at 11). We think that it does.

The statement of basis and purpose accompanying promulgation of regulation 242.42, in addressing the question "as to whose custody the juvenile should be released," began with the dual propositions that "concern for the welfare of the juvenile will not permit release to just any adult" and that "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." *Detention and Release of Juveniles*, 53 Fed. Reg. 17449, 17449 (1988). The INS decided to "strick[e] a balance" by defining a list of presumptively appropriate custodians while maintaining the discretion of local INS directors to release detained minors to other custodians in "unusual and compelling circumstances." *Ibid.* The list begins with parents, whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children. See *Parham v. J. R.*, 442 U.S. 584, 602-603 (1979). The list extends to other close blood relatives, whose protective relationship with children our society has also traditionally respected. See *Moore v. East Cleveland*, 431 U.S. 494 (1977); compare *Village of Bell Terre v. Boras*, 416 U.S. 1 (1974). And finally, the list includes persons given legal guardianship by the States, which we have said possess "special proficiency" in the field of domestic relations, including child custody. *Ankenbrandt v. Richards*, 504 U. S., at ___ (slip op., at 14). When neither parent, close relative, or state appointed guardian is immediately available, the INS will normally keep legal custody of the juvenile, place him in a government supervised and state licensed shelter care facility, and continue searching for a relative or guardian, although release to others is possible in unusual cases.

Respondents object that this scheme is motivated purely by "administrative convenience," a charge echoed by the dissent, see, e. g., *post*, at 1-2. This fails to grasp the distinction between administrative convenience (or, to speak less pejoratively, administrative efficiency) as the *purpose* of a policy--for example, a policy of not considering late filed objections--and administrative efficiency as the reason for selecting one means of achieving a purpose over another. Only the latter is at issue here. Therequisite statement of basis and purpose published by the INS upon promulgation of regulation 242.24 declares that the purpose of the rule is to protect "the welfare of the juvenile," 53 Fed. Reg., at 17449, and there is no basis for calling that false. (Respondents' contention that the real purpose was to save money imputes not merely mendacity but irrationality, since respondents point out that detention in shelter care facilities is more expensive than release.) Because the regulation involves no deprivation of a "fundamental" right, the Service was not compelled to ignore the costs and difficulty of alternative means of advancing its declared goal. Compare *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972). It is impossible to contradict the Service's assessment that it lacks the "expertise," and is not "qualified," to do individualized child placement studies, 53 Fed. Reg., at 17449, and the right alleged here provides no basis for this Court to impose upon what is essentially a law enforcement agency the obligation to expend its limited resources in developing such expertise and qualification. *Ibid.* That reordering of priorities is for Congress--which has shown, we may say, no inclination to shrink from the task. See, e. g., 8 U.S.C. § 1154(c) (requiring INS to determine if applicants for immigrationare involved in "sham" marriages). We do not hold, as the dissent contends, that "minimizing administrative costs" is adequate justification for the Service's detention of juveniles, *post*, at 1; but we do hold that a detention program justified by the need to
protect the welfare of juveniles is not constitutionally required to give custody to strangers if that entails the expenditure of administrative effort and resources that the Service is unwilling to commit. [n.8]

Respondents also contend that the INS regulation violates the statute because it relies upon a "blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians. We have stated that, at least in certain contexts, the Attorney General's exercise of discretion under § 1252(a)(1) requires "some level of individualized determination." NCIR, 502 U. S., at ___ (slip op., at 11); see also Carlson v. Landon, 342 U. S., at 538. But as NCIR itself demonstrates, this does not mean that the Service must forswear use of reasonable presumptions and generic rules. See 502 U. S., at ___, n. 11 (slip op., at 12-13, n. 11); cf. Heckler v. Campbell, 461 U.S. 458, 467 (1983). In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation: Is there reason to believe the alien deportable? Is the alien under 18 years of age? Does the alien have an available adult relative or legal guardian? Is the alien's case so exceptional as to require consideration of release to someone else? The particularization and individuation need go no further than this. [n.9]

Finally, respondents claim that the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile in detention indefinitely. That is not so. The period of custody is inherently limited by the pending deportation hearing, which must be concluded with "reasonable dispatch" to avoid habeas corpus. 8 U.S.C. § 1252(a)(1); cf. Salerno v. United States, 481 U.S. 739, 747 (1987) (noting time limits placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only 30 days. See Juvenile Care Agreement 178a. There is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24, or that habeas corpus is insufficient to remedy particular abuses. [n.10] And the reasonableness of the Service's negative assessment of putative custodians who fail to obtain legal guardianship would seem, if anything, to increase as time goes by.

* * *

We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles. It may well be that other policies would be even better, but "we are [not] a legislature charged with formulating public policy." Schall v. Martin, 467 U. S., at 281. On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes

1 Title 8 U.S.C. 1252(a)(1), 66 Stat. 208, as amended, provides:
Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole . . . may be revoked at any time by the Attorney General, in his discretion . . . ."


Exclusion proceedings, which are not at issue in the present case, involve aliens apprehended before "entering" the United States, as that term is used in the immigration laws. See Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

The District Court and all three judges on the Court of Appeals panel held in favor of the INS on this statutory claim, see Flores v. Meese, 934 F. 2d 991, 995, 997-1002 (CA9 1991); id., at 1015 (Fletcher, J., dissenting); the en banc court (curiously) did not address the claim, proceeding immediately to find the rule unconstitutional. Although respondents did not cross petition for certiorari on the statutory issue, they may legitimately defend their judgment on any ground properly raised below. See Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 476, n. 20 (1979). The INS does not object to our considering the issue, and we do so in order to avoid deciding constitutional questions unnecessarily. See Jean v. Nelson, 472 U.S. 846, 854 (1985).

Alien juveniles from Canada and Mexico must be offered the opportunity to make a telephone call but need not in fact do so, see 8 CFR § 242.24(g) (1992); the United States has treaty obligations to notify diplomatic or consular officers of those countries whenever their nationals are detained, see § 242.2(g).

The regulation also provides for release to any person designated by a juvenile's parent or guardian as "capable and willing to care for the juvenile's well being." 8 CFR § 242.24(b)(3) (1992). "[T]o ensur[e] that the INS is actually receiving the wishes of the parent or guardian," 53 Fed. Reg. 17449, 17450 (1988), the designation must be in the form of a sworn affidavit executed before an immigration or consular officer.

The dissent maintains that, in making custody decisions, the INS cannot rely on "[c]ategorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons," because "[d]ue process demands more, far more." Post, at 25-26. Acceptance of such a proposition would revolutionize much of our family law. Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations. The dissent asserts, however, that it would prohibit such distinctions only for the purpose of "prefer[ring] detention [by which it means institutional detention] to release," and accuses us of "mischaracteriz[ing] the issue" in suggesting otherwise. Post, at 26, n. 29. It seems to us that the dissent mischaracterizes the issue. The INS uses the categorical distinction between relatives and nonrelatives not to deny release, but to determine which potential custodians will be accepted without the safeguard of state decreed guardianship.
By referring unrelated persons seeking custody to state guardianship procedures, the INS is essentially drawing upon resources and expertise that are already in place. Respondents' objection to this is puzzling, in light of their assertion that the States generally view unrelated adults as appropriate custodians. See post, at 6, n. 7 (dissent) (collecting state statutes). If that is so, one wonders why the individuals and organizations respondents allege are eager to accept custody do not rush to state court, have themselves appointed legal guardians (temporary or permanent, the States have procedures for both), and then obtain the juveniles' release under the terms of the regulation. Respondents and their amici do maintain that becoming a guardian can be difficult, but the problems they identify--delays in processing, the need to ensure that existing parental rights are not infringed, the "bureaucratic gauntlet"--would be no less significant were the INS to duplicate existing state procedures.

We certainly agree with the dissent that this case must be decided in accordance with "indications of congressional policy," post, at 15-16. The most pertinent indication, however, is not, as the dissent believes, the federal statute governing detention of juveniles pending delinquency proceedings, 18 U.S.C. § 5034 but the statute under which the Attorney General is here acting, 8 U.S.C. § 1252(a)(1). That grants the Attorney General discretion to determine when temporary detention pending deportation proceedings is appropriate, and makes his exercise of that discretion "presumptively correct and unassailable except for abuse." Carlson v. Landon, 342 U. S. 524, 540 (1952). We assuredly cannot say that the decision to rely on universally accepted presumptions as to the custodial competence of parents and close relatives, and to defer to the expertise of the States regarding the capabilities of other potential custodians, is an abuse of this broad discretion simply because it does not track policies applicable outside the immigration field. See NCIR, 502 U. S. ___ (1991) (slip op., at 9). Moreover, reliance upon the States to determine guardianship is quite in accord with what Congress has directed in other immigration contexts. See 8 U.S.C. § 1154(d) (INS may not approve immigration petition for an alien juvenile orphan being adopted unless "a valid home study has been favorably recommended by an agency of the State of the child's proposed residence, or by an agency authorized by that State to conduct such a study"); § 1522(d)(2)(B)(ii) (for refugee children unaccompanied by parents or close relatives, INS shall "attempt to arrange . . . placement under the laws of the States"); see also 45 CFR § 400.113 (providing support payments under § 1522 until the refugee juvenile is placed with a parent or with another adult "to whom legal custody and/or guardianship is granted under State law").

The dissent would mandate fully individualized custody determinations for two reasons. First, because it reads Carlson v. Landon, supra, as holding that the Attorney General may not employ "mere presumptions" in exercising his discretion. Post, at 19-20. But it was only the dissenters in Carlson who took such a restrictive view. See 342 U. S., at 558-559, 563-564, 568 (Frankfurter, J., dissenting). Second, because it believes that § 1252(a) must be interpreted to require individualized hearings in order to avoid " 'constitutional doubts.' " Post, at 16 (quoting United States v. Witkovich, 353 U.S. 194, 199 (1957)); see post, at 22. The "constitutional doubts" argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid serious constitutional doubts, Witkovich, supra, at 202, not to eliminate all possible contentions that the statute might be unconstitutional. We entertain no serious doubt that
the Constitution does not require any more individuation than the regulation provides, see *supra*, at 10-12, 16, and thus find no need to supplement the text of § 1252(a).

10 The dissent's citation of a single deposition from 1986, *post*, at 5 and n. 6, is hardly proof that "excessive delay" will result in the "typical" case, *post*, at 6, under regulation 242.24, which was not promulgated until mid 1988.
ARTICLES
RIGHTS OF JUVENILE ALIENS UNDER IMMIGRATION LAW

Paper presented at the Immigrant Children: Pro Bono or Pro Se? CLE Meeting

By
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February 7, 2004
RIGHTS OF JUVENILE ALIENS UNDER IMMIGRATION LAW

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I. INTRODUCTION:

Thousands of alien juveniles enter the United States every year, particularly at the Mexican border. They come from all over the world escaping from poverty, abuse, or persecution. Many arrive unaccompanied by adults and without legal immigration status. Most of these juveniles are in their teens, but some are as young as infants. The Department of Homeland Security ("DHS") apprehends some of these juveniles at the border or port of entry for lack of proper documents or for crossing the border without inspection. Over the past decade, the Department of Homeland Security ("DHS") has apprehended an increasing number of alien juveniles, of whom approximately seventy percent were unaccompanied minors. Annually, the DHS detains more than 4,700 unaccompanied alien juveniles at more than 90 juvenile detention centers, the majority of which are secure detention centers. Due to the increase in the number of detained juveniles, the DHS added 400 new detention bed spaces for juveniles under the age of eighteen between December 1995 and 1998. Between October 7 and October 14, 1996, the DHS detained 241 juveniles. Twenty eight percent of the detained juveniles were fifteen or under, and five percent were under ten years of age. More than half of the juveniles remain in detention for over a month, and twenty percent had been in detention for more than four months.

Once the DHS apprehends the juveniles, they are placed in removal proceedings before the Executive Office for Immigration Review (EOIR, i.e. Immigration Court). Like other aliens who are subject to removal proceedings, juveniles are entitled to counsel without any cost to the government. Although the government has no statutory obligation to provide legal counsel for aliens who cannot afford their own attorneys, the DHS regulations impose on DHS officials and immigration judges the duty to inform aliens of their right to counsel. DHS also must inform them of the existence of free legal services provided by non-governmental organizations, legal aid clinics, and pro bono lawyers’ associations groups. 8 CFR 240.10(c) reflects the recognition that unaccompanied alien minors are often incompetent to participate in or even comprehend the nature of legal proceedings. It precludes an immigration judge from accepting an admission to a charge of deportability made by an unaccompanied and underrepresented minor under the age of sixteen and not accompanied by a guardian, relative, or friend.

Unfortunately, current DHS procedures encourage the detained aliens to waive the right to a hearing and elect voluntary departure. Thus, precluding the detained aliens from applying for different types of relief that might be available for them in Court. Due to unavailability of counsel, illiteracy in English, inadequate translation, ignorance of the United States' culture and judicial system, lack of knowledge of their legal rights, unaccompanied detained juveniles often waive their right to a deportation hearing and consent to voluntary departure without knowledge that there are other alternatives available. For the waiver to be valid, it must be "knowing, voluntary, and intelligent" because the detained juveniles have substantial interests in the many alternatives available under the Immigration and Nationality Act.

This paper examines the different sources of law that govern the treatment of alien juveniles, the different types of immigration relief available to them, and the effect of juvenile adjudication of delinquency on their immigration status. Part I summarizes the laws governing the treatment of juveniles under international law and the United States laws, regulations, and procedures. Part II enumerates the immigration remedies that alien juveniles can pursue in Immigration Court. Part III lists the other immigration remedies that alien juveniles can apply for with the DHS. Part IV
discusses the effect of a juvenile adjudication on the immigration status of alien juveniles. The paper concludes with a list of suggestions to improve these conditions.

II. Legal Background:

The treatment of alien juveniles and the rules governing the appropriate conditions of detention of unaccompanied alien juveniles are governed by international law, United States law, and the DHS Juvenile Protocol Manual, which contains DHS policies and procedures. One of the main constraints on detention policy is related to the conditions of confinement. Because DHS may detain aliens only to the extent necessary to assure their presence for proceedings and not in order to punish them, their detention is regarded as civil and not criminal in nature. Just as the civil nature of removal proceedings deprives aliens of certain rights associated with the criminal process, the civil nature of removal implies greater obligations on the DHS than the criminal proceedings with respect to the conditions of confinement. Under the Federal Tort Claims Act, negligence in exercising the agency's custodial responsibilities may subject the DHS and/or its officials individually to liability to a detainee and to third parties injured in custody.

A. International law:

Several international treaties, conventions, and enactments focus entirely, or in part, on the protection of juveniles in general and incarcerated juveniles in particular. The most authoritative is the United Nations Convention on the Rights of the Child. The convention recognizes that children are entitled to special care and assistance, and that the best interest of the child must be a primary consideration in all actions concerning the children. Article 37 provides specific protection for detained children. It prohibits subjecting children to cruel, inhumane, or degrading treatment or punishments. It states categorically that arrest and detention must be "used only as a measure of last resort and for the shortest appropriate period of time." Article 37 lists the following rights for children deprived of their liberty: to maintain contact with their family through letters and visits, to have timely access to legal assistance, to be able to challenge their detention before an impartial, independent authority.

Similarly, the International Covenant on Civil and Political Rights, ratified by the United States in 1992, mandates that detained juveniles be separated from adults, and be "accorded treatment appropriate to their age and legal status." The United Nations General Assembly promulgated comprehensive rules to govern the treatment of detained juveniles. These rules establish that the conditions of detention facilities should guarantee to detained juveniles "the benefit of meaningful activities and programs which would serve to promote and sustain their health and self-respect." The Protocol Relating to the Status of Refugees prohibits the expulsion of any individual who has a well-founded fear of being persecuted on account of race, religion, nationality, and membership of a particular social group or political opinion.

B. United States Constitutional and Statutory Laws:

Based on its plenary power, the United States has the right to exclude aliens, but once they are inside its borders, whether legally or not, aliens are entitled to the guarantees of the Fifth Amendment's due process of law. The Supreme Court stated that the right to a deportation hearing "involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." The Immigration and Nationality Act has
established specific requirements for removal proceedings. At the hearing, the alien has the right to be represented by counsel, present evidence, cross-examine witnesses, and scrutinize and object to evidence offered by the Justice Department's attorney. The Immigration judge must inform aliens of available procedural rights and free legal services.

In 1967, the Supreme Court noted that the Fourteenth Amendment and the Bill of Rights apply to juveniles. The Court held that a juvenile in delinquency proceedings must be afforded Constitutional due process protections including notice of charges, access to legal counsel, and the right to confront and cross-examine witnesses. The Supreme Court reaffirmed this principle in 1979, declaring that "a child, merely on account of his minority, is not beyond the protection of the Constitution." Outside the context of criminal proceedings, the Supreme Court stated that, in resisting commitment to a mental institution, a juvenile has a "substantial liberty interest in not being confined unnecessarily." Moreover, the Juvenile Justice and Delinquency Prevention Act, which was enacted to protect juveniles' due process rights, establishes a presumption for the release of juveniles to a responsible party rather than detention. According to § 504 of the statute, a juvenile may be detained if the magistrate determines, after a hearing at which the juvenile is represented by Counsel, that detention is required to ensure the juvenile's timely appearance in court or to secure his safety or that of others.

The Court has long recognized that most constitutional provisions are applicable to noncitizens, including those who enter the U.S. without inspection or who otherwise violate immigration laws. In 1953, the Supreme Court declared that aliens "who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Similarly in Plyler v. Doe, the Supreme Court reaffirmed its commitment to protecting the rights of aliens. The court stated: "whatever his status under the immigration laws, an alien is surely a 'person' in the ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

### C. The Flores Agreement: History and Implementation of the Agreement

Prior to 1984, the DHS released these unaccompanied minors to responsible adults who agreed to bring the minors to court hearings. In 1984, the Western Regional office of the DHS implemented a new policy that allowed the release of unaccompanied aliens only to parents or legal guardians, except in "unusual and extraordinary cases." Four detained unaccompanied minors, led by Jenny Lisette Flores, challenged this policy by filing a class action suit. Plaintiffs claimed that the policy violated constitutional, statutory, and international law. They also objected to the conditions of detention. The District court granted partial summary judgment to the plaintiffs on their equal protection challenge and awarded partial summary judgment to the DHS on the statutory and international law charges. Moreover, the district court approved a consent decree settling the plaintiffs’ challenge of the living conditions in the detention centers.

To eliminate the equal protection challenge, the DHS adopted regulation 8CFR 242.24, which provided for uniform deportation and exclusion proceedings. The regulation allowed alien juveniles to be released to an available parent, legal guardian, or an adult relative. In "unusual and compelling circumstances" and at the discretion of the district director, the DHS could release the alien juveniles to other responsible adults, who signed care and attendance agreements. The plaintiffs
continued their legal action against the regulation. The district invalidated the regulation and granted summary judgment to plaintiffs on due process grounds. The Ninth Circuit Court of Appeals, by a divided panel, reversed and held that the regulation did not violate substantive due process and did not exceed the DHS statutory authority. On rehearing en banc, the Ninth Circuit Court of Appeals vacated the panel opinion and affirmed the district court's holding. The United States Supreme Court reversed the Ninth Circuit Court of Appeals' decision and held that alien juveniles do not have a fundamental right to be released to responsible adults. It also held that 8 CFR 242.24 did not facially violate the alien juveniles' due process, and did not exceed the scope of the Attorney General’s discretion to continue custody of aliens detained pursuant to U.S.C. §1252(a)(1).

As a result of the *Flores v. Reno* decision, the DHS agreed to a negotiated settlement, which set out national policy for the detention, release, and treatment of minors in its custody. The DHS published proposed regulations implementing the settlement agreement in July 1998. On Friday June 7, 2002 the DHS published the final delegation of authorities for various detention and removal authorities and the parole, detention, care and custody of alien juveniles. The daily oversight of functions relating to alien juveniles in the custody and care of the Service is transferred to the Director of the Office of Juvenile Affairs who reports to the commissioner of the DHS.

The Immigration and Naturalization Service Juvenile Protocol Manual entitled *Juvenile Aliens: A Special Population* contains policy and guidance for DHS personnel on issues related to apprehension, processing, detention, and release of juvenile aliens. The nationwide policy for the detention, release, and treatment of juveniles in DHS custody is based on the *Flores Agreement*. It became effective on February 24, 1997. The Agreement includes the following general policies. It defines a juvenile as a person under 18 years old. Minors who are emancipated by a court or convicted and incarcerated for a criminal offense as adults are not considered juveniles under the agreement. A person claiming to be a juvenile shall be treated as an adult for all purposes, including confinement and release on bond, if a reasonable person would conclude that such person is an adult.

The Agreement stipulates that all juveniles should be treated in a dignified, respectful manner and their particular vulnerability should be taken into consideration. Juveniles in "licensed programs," including those in shelter care facilities, must be provided educational services that are appropriate to their level of development and communication skills. The Agreement following the *Flores v. Reno* decision places a higher burden on the DHS to ensure family reunification. However, the DHS officers are not required to release juveniles from DHS custody to any person or agency if the Service feels that the juvenile may be harmed, neglected, or may fail to appear before the Immigration Court when requested. DHS should make every attempt to place juvenile aliens in the least restrictive setting appropriate to their age and special needs.

The settlement agreement in *Flores v. Reno* allows the DHS to keep children in secure detention in several circumstances. First, the DHS may hold children in secure detention for no more than five days while it finds a licensed placement, arranges transportation from remote areas, or locates interpreters for "unusual languages." Second, the DHS may hold juveniles in secure detention for an unspecified, but temporary period of time in the event of an "influx of minors into
the United States.\textsuperscript{xvi} Under this provision, the DHS must place juveniles with less secure facilities "as expeditiously as possible."\textsuperscript{xvii} Finally, juveniles may be kept in secure detention if they have been charged or convicted of crimes, are subject to delinquency proceedings, have committed or threatened to commit violent or malicious acts, have engaged in unacceptable and disruptive behavior in a licensed program, or are an escape risk. In addition, the DHS may hold juveniles in secure facilities to ensure their safety such as when the DHS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.\textsuperscript{xviii}

Even when the above-mentioned conditions apply, the \textit{Flores v. Reno} agreement stipulates that juveniles should be kept in a medium-security juvenile residential facility instead of a secure detention facility whenever possible.\textsuperscript{xix} When placed in a detention facility, juveniles should be placed in separate accommodations for DHS minors and must be provided with written notice of the reason for his or her placement in secure detention.\textsuperscript{xx}

\section{Immigration Remedies From Removal Available for Alien Juveniles Within the Jurisdiction of the EOIR}

Juveniles have a wide range of substantive immigration remedies that they can pursue in the immigration courts as a defense from removal. When a juvenile is placed in removal proceeding, these forms of relief fall within the exclusive jurisdiction of the Immigration Courts unless the juvenile is able to secure administrative closure or the termination of the court proceedings.

\subsection{Asylum}

To be eligible for asylum,\textsuperscript{xvi} a juvenile must meet the statutory definition of refugee: a "person who is unable or unwilling to return to his or her country of origin or last habitual residence 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."\textsuperscript{xvii} Juveniles are subject to the same burden of proof as adults for these forms of relief.\textsuperscript{xviii} However, the DHS has published guidelines for children’s asylum claims,\textsuperscript{xix} which are not binding on the Immigration Court, but do provide for child-friendly procedures.\textsuperscript{xx} The guidelines stipulate that the Immigration Judge can schedule pre-hearing conferences at his or her discretion to narrow issues, obtain stipulations, exchange information voluntarily, or simplify the proceedings for Juveniles.\textsuperscript{xxi}

Like other asylum seekers, the juvenile must prove that he/she has been persecuted in the past or has a well-founded fear of being persecuted in the future based on an individualized threat. The juvenile also must prove that the persecution is on account of the child’s membership in, one of the five enumerated grounds of race, religion, nationality, membership in a particular social group or actual or imputed political opinion.\textsuperscript{xvii} Additionally, the child must demonstrate that the experienced or feared persecution is at the hands of the government or of an agent that the government is unable unwilling to control.\textsuperscript{xxii} Because of the cap of 10,000 visa numbers per year allocated to asylees, it is now taking approximately eight years for asylees to obtain a green card.

\subsection{Withholding of removal}
Withholding of removal is a mandatory relief if the “clear probability” standard is met. An individual may not be returned to a country where it is determined that it is “more likely than not” that his/her life or freedom would be threatened on account of race, religion, national origin, political opinion, or membership in a particular social group.

C. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), ratified by the United States in 1994.

In order to qualify for CAT protection, the alien must prove that there is a clear probability that the applicant will be tortured by a government official or with governmental acquiescence.

D. Eligibility for United States Citizenship

If a juvenile is eligible to naturalize, the proceedings may be terminated. A juvenile may naturalize when he/she has a parent or grandparent who was a U.S. citizen; when a juvenile’s parents naturalized to become U.S. citizens; or when adopted by a U.S. citizen.

E. Adjustment of Status

A juvenile may adjust his/her status to that of a lawful permanent resident if lawfully admitted to the U.S. with an immediate visa number based on a family petition.

F. Cancellation of Removal under the Violence Against Women Act (VAWA)

To be eligible for the cancellation of removal under VAWA, the juvenile has to prove residency for three years in the United States in addition to the requisite showing that the child is a victim of domestic violence, defined as battery or extreme mental cruelty by a U.S. citizen or permanent resident parent, and would face extreme hardship if removed.

G. Cancellation of Removal for non-permanent residents

To be eligible for Cancellation of removal for non-permanent residents, a Juvenile must prove unlawful ten-year continuous residency in the U.S. and exceptional and extremely unusual hardship to a U.S. citizen or permanent resident parent, spouse, or child.

H. Voluntary Departure:

It is preferable for a juvenile, who entered the United States to pursue voluntary departure instead of removal when practicable so as to protect the child from the consequences of a formal removal order. Voluntary departure allows the child to reenter lawfully after one year if he or she can obtain a visa. It is also preferable for a juvenile, who is an arriving alien apprehended at a port of entry, to pursue withdrawal of his/her application for admission rather than receive a removal order. By withdrawing the application for admission, a juvenile will not be subject to the consequences of removal if he/she seeks to return, or returns, to the United States.
IV OTHER IMMIGRATION REMEDIES FOR ALIEN JUVENILES WITHIN THE JURISDICTION OF THE IMMIGRATION AND NATURALIZATION SERVICE (DHS)

There are certain forms of relief that fall exclusively under the jurisdiction of the DHS. If the juvenile qualifies solely for a DHS-based remedy while in removal proceedings, he/she can seek an adjournment or file a joint motion for administrative closure with DHS. The juvenile may also seek the termination of the proceedings where appropriate to allow for the DHS adjudication of the specific form of relief.

A. Special Immigration Juvenile Status

Special Immigration Juvenile Status (SIJS) provides lawful permanent residence in the United States for juveniles, who have been abused, neglected, or abandoned either in their country or here in the United States. There are two preconditions for the SIJS status. First, a juvenile court must determine that the applicant is dependent on the juvenile or state court and eligible for long-term foster care due to abuse, neglect or abandonment. Second, the juvenile or state court must determine that it would not be in the juvenile’s best interest to be returned to his/her previous country of origin. If the two conditions are satisfied, the DHS will grant the juvenile lawful permanent residence. A juvenile, who becomes a lawful permanent resident through the SIJS status will be permanently barred from filing a petition a family based petition for his/her parents even after becoming a United States citizen.

The different DHS District Directors have been inconsistent in determining whether to grant or withhold consent for detained juveniles to commence dependency proceedings in juvenile or state courts. Some District Directors consider whether the child is in fact abused, neglected, or abandoned in addition to his/her eligibility for SIJS status before granting. Others consider only the child’s eligibility for SIJS status and leave the question of abuse, neglect, or abandonment to be determined by the juvenile or state courts. Most advocates of juveniles’ rights believe that the latter approach is clearly more consistent with the letter and intent of the statute, especially since the juvenile or state courts have the expertise to determine the best interest of the juveniles.

B. Temporary Protected Status (TPS)

This status confers temporary permission to stay in the United States for people from designated countries afflicted by strife or disaster. The period is up to an initial 18 months. During that time, those who are granted TPS may apply for work authorization.

C. “T” Visa

It is a nonimmigrant visa with the possibility of securing lawful permanent residence status for victims of serious alien trafficking. To be eligible For a T visa, the juvenile must prove to the DHS that he or she has been a victim of a severe form of trafficking, including sex trafficking, recruitment, harboring or transportation of a person for labor services, involuntary servitude, slavery, or debt bondage, through the use of force, fraud, or coercion. The child will be required to show the following: that he/she has been a victim of a severe form of trafficking in persons, is physically present in the U.S. on account of the trafficking, has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 15
years of age, and would suffer extreme hardship involving unusual and severe harm if removed from the United States.

D. “U” visa

It is a nonimmigrant visa with the possibility of securing lawful permanent residence status for victims and witnesses of a serious crime. U visas are available to those who are victims of a serious crime, and have been or will be helpful in the investigation and prosecution of the crime. The applicant must establish the following: First, that he/she has suffered substantial physical or mental abuse as the result of being a victim of serious criminal activity occurring in the United States or abroad, including domestic violence, rape, incest, abusive sexual contact, prostitution, kidnapping, abduction, extortion, or serious assault. Second, that the applicant or, if under age 16, the child’s parent, guardian, or next friend possesses information about this criminal activity. Third, that the applicant or, if under age 16, the parent, guardian, or next friend, has or will be helpful in the investigation or prosecution or criminal activity as certified by a judge, prosecutor, or other official. The regulations for the U visa have not been published by the DHS yet.

E. “V” Visa

It is a nonimmigrant visa under the Legal Immigration Family Equity Act of 2000 (LIFE Act). It is available for an unmarried child under 21 with an immigrant visa petition filed by a lawful permanent resident parent before December 21, 2000, who has been waiting at least three years for the issuance of a visa.

F. “K-4” Visa

It is a nonimmigrant visas under the LIFE Act that is available for an unmarried child under 21 of a parent/step-parent who qualifies as a K-3 nonimmigrant visa applicant, as the spouse of a U.S. citizen. This visa is available for a juvenile, who is a beneficiary of a pending immigrant visa petition.

G. Deferred action

A DHS discretionary administrative relief that allows the juvenile to remain in the U.S. for a certain period for emergency reasons.

V. EFFECT OF A JUVEILE ADJUDICATION OF DELINQUENCY ON THE IMMIGRATION STATUS OF ALIEN JUVENILES

In 1996, Congress passed both the Antiterrorism And Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform Act (IIRIRA). IIRIRA replaced the prior system of exclusion, for people who did not enter the United States, and deportation proceedings, for people who entered the United States, with a single removal hearing, for both inadmissibility and deportation. AEDPA added several crimes to the list of crimes that may result in removal for a convicted alien such as commercial bribery, counterfeiting, forgery, and certain kinds of stolen vehicles. Both the AEDPA and IIRIRA significantly expanded the definition of a “conviction” for purposes of removability. Most importantly, IIRIRA reduced the sentence requirement to trigger removability from five years to one year for crimes previously added by the
AEDPA as well as crimes of violence, theft, receipt of stolen property, burglary, alien smuggling, document fraud.

Recent changes in the law have both broadened the spectrum of crimes for which convicted aliens can become subject to removal and limited the availability of relief from deportation\(^{cxvi}\). Moreover, past offenses committed decades ago may now be grounds of removal because the 1996 statutory changes apply retroactively\(^{cxvii}\). Two categories of crimes are particularly important: “aggravated felonies” and “crimes of moral turpitude.” An alien is removable if he or she is convicted of an aggravated felony at any time after admission to the United States.\(^{cxviii}\) Section 101 of The Immigration and Naturalization Act (INA) provides a wide-ranging list of categories of aggravated felonies. The list makes reference to specific federal crimes such as illicit trafficking in a controlled substance as well as broad categories of crimes such as “a crime of violence” for which the term of imprisonment is at least one year.\(^{cxix}\) In addition to the “crime of violence,” many of the other crime definitions also include a term of imprisonment or possible sentence. Furthermore, aliens convicted of aggravated felonies are ineligible for most forms of discretionary relief such as asylum, cancellation of removal, withholding of removal, and voluntary departure.\(^{cxx}\) An alien is also removable if he/she has committed a crime of moral turpitude for which a sentence of one year or longer may be imposed, within five years after the date of admission to the United States.\(^{cxxi}\) In addition, an alien will be removable if he/she commits two crimes of moral turpitude, not arising out of a single scheme, at any time after admission.\(^{cxxii}\) The term “crime of moral turpitude” is not defined in the INA, so courts generally define it as a crime that shocks the public conscience by being inherently base, vile, or depraved, and contrary to the rules of morality.\(^{cxxiii}\) Like aggravated felonies, crimes of moral turpitude can preclude relief from removal such as cancellation of removal.\(^{cxxiv}\)

In terms of the status of juvenile offenses with regard to removal proceedings, the Board of Immigration Appeals (BIA) has consistently held that juvenile delinquency proceedings are not criminal proceedings and that the findings of juvenile delinquency hearings are not convictions for immigration purposes.\(^{cxxv}\) The BIA held the following:

A. The BIA relies and follows the Federal Juvenile Delinquency Act (FDJA)\(^{cxxvi}\), which governs whether an offense is to be considered an act of delinquency or a crime. The FDJA is clear on the fact that a juvenile delinquency proceeding results in the adjudication of status rather than conviction for a crime.\(^{cxxvii}\)

B. The definition of “juvenile” according to the FDJA is a person under 18 years of age; and a “juvenile delinquency” is a federal crime committed by a juvenile. This definition applies to any person below the age of 21 who has committed an offense before reaching his or her 18th birthday.\(^{cxxviii}\)

C. Practitioners must be aware that state courts are at liberty to decide whether a person is or is not a juvenile. Neither the federal courts, nor the BIA have jurisdiction to determine how a state courts reaches this type of decision.\(^{cxxix}\) In *In Re Devison*, the NY state regulations were upheld because they were similar to the FDJA regulations. However, it is unclear whether similarity between the state and FDJA regulations is a requirement. In *Viera v. DHS*, the 5th Circuit court refused to question a waiver of juvenile status by the state of Rhode Islands. The Court stated
that “once adjudicated by the state court, as either a juvenile or an adult, we [the court] are bound by that determination.”

D. The BIA will also apply the FDJA in cases where the juvenile committed and was convicted of a crime under foreign law. Under those circumstances, the BIA will apply FDJA to determine whether the juvenile’s conduct would be deemed criminal by United States standards.

E. Special situations:
1. Section 383 of the IIRIRA stipulates that an alien, who has committed an act of juvenile delinquency that, if committed by an adult, would be classified as a felony crime of violence, will be excluded from the Family Unity Program.
2. Resentencing of a youthful offender does not disturb the underlying youthful offender adjudication. In addition, the Court does not have the power to convert youthful offender adjudication into a judgment for conviction, and therefore does not constitute a “conviction” within the meaning of INA §101(a)(48)(A).
3. In *Mestre Morera*, the court held that the Congressional policy of deportation for narcotics offenders conflicted with another Congressional policy of rehabilitation for young offenders whose convictions were erased under the Federal Youth Corrections Act (repealed by the Comprehensive Crime Control Act of 1984), and that FYCA expungement provisions were acceptable as a defense to deportation.
4. INA provides a Juvenile exception for a crime of moral turpitude, if the crime was committed when the individual was under the age of 18 and more than five years prior to the date of application for visa or admission.

VI. LEGAL RIGHTS AND ISSUES OF DETAINED JUVENILES

Right to a deportation hearing

Current DHS procedures encourage the detained aliens to waive the right to a hearing and elect voluntary departure. Due to unavailability of counsel, illiteracy in English, inadequate translation, ignorance of the United States' culture and judicial system, lack of knowledge of their legal rights, unaccompanied detained juveniles often waive their right to a deportation hearing and consent to voluntary departure without knowledge that there are other alternatives available. Juveniles may apply for political asylum, withholding of removal, temporary protected status, special immigrant status, cancellation of removal and adjustment of status, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States in 1994. For the waiver to be valid, it must be "knowing, voluntary, and intelligent" because the detained juveniles have substantial interests in the many alternatives available under the Immigration and Nationality Act.

Based on its plenary power, the United States has the right to exclude aliens, but once they are inside its borders, whether legally or not, aliens are entitled to the guarantees of the Fifth Amendment's due process of law. The Supreme Court stated that the right to a deportation hearing "involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." The Immigration and Nationality Act has established specific requirements for removal proceedings. At the hearing, the alien has the right to be represented by counsel, present evidence, cross-examine witnesses, and scrutinize and object to evidence offered by the Justice Department's attorney. The Immigration judge must inform aliens of available procedural rights and free legal services.
Access to meaningful legal information

Many juveniles do not fully understand their legal situation. Most do not know why they have been detained, or for how long the DHS will keep them in detention. Detained juveniles, like other aliens who are subject to removal proceedings, are entitled to counsel without any cost to the government. Although the government has no statutory obligation to provide legal counsel for aliens who cannot afford their own attorneys, the DHS regulations impose on DHS officials and immigration judges the duty to inform aliens of their right to counsel. 8 CFR 240.10(c) reflects the recognition that unaccompanied alien minors are often incompetent to participate in or even comprehend the nature of legal proceedings. It precludes a special inquiry officer (an immigration judge) from accepting an admission to a charge of deportability made by an unaccompanied and unrepresented minor under the age of sixteen and not accompanied by a guardian, relative, or friend.

Lack of information

While DHS is required to inform detainees of the existence of free legal services provided by non-governmental organizations, legal aid clinics, and pro bono lawyers’ associations groups, at some detention centers there is no pro bono list posted at the facility, so the juvenile detainees are unaware of the availability of free legal services for those who can not afford to hire their own counsel.

According to 8 CFR 236.1(e), detained aliens have the right to communicate with the consular or diplomatic officers of the country of their nationality. The regulation lists a number of countries that have signed treaties with the United States. These treaties require the DHS to communicate with the appropriate diplomatic officers whenever nationals of those countries are detained even if the detained aliens did not request any communication. Most detainees do not know that they had the right to contact their countries’ diplomatic officials.

Detention: Duration & Location

Of those unaccompanied alien children detained last year, more than 30 percent were placed in juvenile jails alongside criminals, where they were subjected to shackling and strip searches, even though most had no criminal record. Although the Flores v. Reno agreement stipulates that juveniles should be separated from the general prison population, in many instances DHS detainees and juvenile offenders have extensive contact with juveniles charged as delinquents during meals, classes, physical training, and unstructured time. While the median length of an unaccompanied child’s stay in DHS detention is 15 days, the average is 43.5 days, and some have been held for up to six months.

DHS routinely transfers detainees from one detention center to another, without prior notification to juveniles, their families, or attorneys, again in violation of the Flores agreement. Juveniles, who already have counsel, often end up in centers thousands of miles away from their attorneys. Many facilities are located in remote locations, far from urban areas and strong immigrant advocacy communities and far from the juveniles’ families, friends, or attorneys.

VII. ETHICAL CONFLICTS

Conflict of interest for DHS
One of the most crucial legal issues unaccompanied juveniles faced until recently stemmed from the fact that detained juveniles "are subject to the enforcement of the immigration laws by the same agency responsible for their care and protection." This created a serious conflict of interest because the DHS, which is usually seeking the children's removal from the U.S., has little incentive to ensure that children receive this help.

During the question-and-answer session a hearing held by the Senate Judiciary Committee’s Subcommittee on Immigration (February 28, 2002), Chairman Edward M. Kennedy (D-Mass.) emphasized the inherent conflict of interest between the DHS’s historic dual function of law enforcement versus supportive measures and commented that its law enforcement function has tended to dominate the landscape when it comes to the Service’s approach to unaccompanied alien children. One of the witnesses at the hearing, Ms. Wendy Young, Director of Government Relations and U.S. Programs for the Women’s Commission on Refugee women and Children, also underscored the inherent conflict between the DHS’s enforcement and service functions, a conflict that was exacerbated in 2000 when the DHS consolidated its children’s programs under its detention and removal branch.

The DHS published a final rule on June 7, 2002, and effective on the same day, delegating authorities related to the detention and removal of aliens, including the detention, care, and custody of juveniles. Under the reorganization, the daily oversight of overall detention and removal functions will be transferred to the Deputy Executive Associate Commissioner for Detention and Removal, who will still report to the Executive Associate Commissioner for Field Operations. The daily oversight of functions relating to alien juveniles in the custody and care of the DHS is transferred to the Director of the new Office of Juvenile Affairs (OJA) under the DHS Commissioner.

The final rule delegates authority to grant parole, make decisions on the expedited removal of aggravated felons, issue and cancel Notices to Appear, issue warrants of removal, continue detention of inadmissible criminals or other aliens beyond the removal period, issue administrative stays of removal, grant extensions of time to depart, issue subpoenas, and issue warrants of arrest, to the Deputy Executive Associate Commissioner for Detention and Removal, the Directors of the Detention and Removal field offices (who report to the Deputy Executive Associate Commissioner for Detention and Removal), and the OJA Director, as appropriate. Under the final rule, the OJA Director is given the sole authority to determine parole for juveniles and issues concerning the detention and release of juveniles. District directors and chief patrol agents will no longer have this authority. The OJA Director, a position created in April 2002 under the supervision of the DHS Commissioner, is responsible for planning, directing, managing, and coordinating all DHS operational, adjudicative, and policy functions relating to alien juveniles in the custody and care of the DHS. The final rule, was published in 67 Fed. Reg. 39255-60 (June 7, 2002).

VIII. LEGISLATION

Pending Legislation-Unaccompanied Alien Child Protection Act of 2003

On January 22, 2001, Sen. Dianne Feinstein (D-Cal) introduced the “Unaccompanied Alien Child Protection Act of 2001” (S.121). The objectives of this bill are to: (1) recognize the special needs and circumstances unaccompanied alien children encounter when navigating the U.S. immigration system; (2) establish new governmental structures to ensure that the U.S. government
meets the special needs of unaccompanied alien children; (3) ensure that U.S. government authorities hold the best interests of the child paramount when making decisions regarding an unaccompanied alien child; (4) establish government policy in favor of family reunification whenever possible and, when family reunification is not possible, placement of unaccompanied alien children in foster care with qualified, adult guardians or with voluntary agencies, rather than placing such children in detention; (5) provide minimum standards for custody of unaccompanied alien children; (6) ensure that unaccompanied alien children in immigration proceedings have appointed counsel and guardians ad litem, and that such individuals have access to the child; (7) ensure that children awaiting adjudication of their immigration status not "age-out" while awaiting processing by the Service of their petitions and applications; and (8) strengthen opportunities for permanent protection of such children for whom such protection is warranted. As of March 2002, Sen. Feinstein’s bill has six Senate cosponsors.

The "Unaccompanied Alien Child Protection Act of 2001" (H.R. 1904), introduced on May 30 by Rep. Zoe Lofgren (D-Cal.), is a companion bill to legislation sponsored by Sen. Feinstein (S. 121). As of March 2002, this house bill had 35 co-sponsors and was pending before the House Judiciary Committee’s Subcommittee on Immigration Claims.

In December Congress passed the Homeland Security Act, which folded in important provisions of the children’s legislation. Specifically, the provisions transferred responsibility for care and placement of newcomer children from the immigration authorities to the Office of Refugee Resettlement (ORR) within the Department for Health and Human Services. This is an important step forward in protecting these children.

Sen. Dianne Feinstein introduced S112d9, the unaccompanied Alien Child Protection Act of 2003, which builds on the provisions passed last year in the Homeland Security Act by providing a structure for pro bono counsel, and allowing the appointment of guardians ad litem, to ensure the children’s best interests are taken into account during legal proceedings.

CONCLUSION

There are various forms or relief that a juvenile may qualify for under the Immigration Law of the United States. However, the majority of detained Juveniles do not have access to legal representation and legal information and end by being removed from the United States. Although transferring the responsibility for care and placement of juveniles from DHS to ORR is an important step forward in protecting unaccompanied alien juveniles, a lot needs to be done in order to fully ensure that juveniles receive access to meaningful legal representation that takes into consideration their best interests.

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2 *Id.*
Human Rights Watch, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service (1997)* quoting “Juvenile Report, 10/7/97 – 10/14/97, provided by the DHS.

The EOIR is the administrative body within the Department of Justice that oversees immigration adjudication. EOIR includes the immigration courts and the Board of Immigration Appeals (BIA). It is a separate entity from the DHS.

INA § 240(b)(4)(A).

INA § 239; 8 U.S.C.A. 1229.

INA § 239 (b)(2).


8 C.F.R § 240.48(b).

See Scharf, *supra*, note 1 at 114.

Id. at 115.


Id.

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Id. 1449-53.

Flores v. Reno, Case No. CV 85-4544-RJK (C.D.Cal. May 25, 1988). The District Court's opinion was unpublished; Settlement Agreement Cited as attachment 1 in DHS manual, 


Id. at 1-2.

Id.

Settlement Agreement Cited as attachment A1-1 - A1-12. in DHS manual, 

Id. at A1-7.

Id.

Id. at A1-8 - A1-10.

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Id.
xviii See, e.g., Chen, “Elian or Alien? The Contradictions of Protecting Undocumented Children Under The Special Immigrant Juvenile Statute,” 27 Hastings Const. L.Q. 597 (2000); and “Federal Judge Orders DHS District Director to Consent to Juvenile Court Proceeding,” 15 Immigrants’ Rts. Uptdate 12 (Nat’l Immigration Law Center 2001). There has been some successful litigation to compel DHS consent, on file with authors.

xix Latham & Watkins memorandum of law.

244 INA § 244
245 INA § 245(I)(1), (3).

71 Supra note 71

72 Supra note 72. Thus far, the Departments of Justice and State have published an interim rule on trafficking, 8 CFR Part 1100, Protection and Assistance for Victims of Trafficking, but have yet to publish final regulations. The interim rule, which implements § 107(c) of the Trafficking Victims Protection Act of 2000, Div. A, Pub. L. No. 106-386, is discussed and reproduced in 78 Interpreter Releases 1239 (July 30, 2001).

15 INA § 101(a)(15), (U); INA § 214(n); INA § 245(I)(1), (3).

71 Supra note 71

101(a)(15)(T); INA § 214(n); INA § 245(I)(1), (3).

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70 § 214(n); INA § 245(I)(1), (3).

Latham & Watkins memorandum of law.


Operations Instruction (OI) § 242.1(a)(22), which might be warranted for sympathetic factors including age.


INA § 101(a)(43), 8 USC § 1101(a)(43).

See IIRIRA §§ 301-321; AEDPA §§ 431-443.

110 See note 110.

237(a).

237(a).


See note 105.

Viera v. DHS, 239 F.3d 409, 413 (5th Circuit COA, 2001)

Mestre Morera v. DHS, 462 F.2d 1030 (1st Cir. 1972).

Kolios v. DHS, 532 F2d 786, 789 (1st Cir. 1976).

 INA § 212(a).

105 See note 105.

Viera v. DHS, 239 F.3d 409, 413 (5th Circuit COA, 2001)

Id.


Id.

Id.

Id.

Id.

Id.

W. v. DHS, 462 F.2d 1030 (1st Cir. 1972).

Kolios v. DHS, 532 F2d 786, 789 (1st Cir. 1976).

INA § 212(a)(2)(A)(ii)(II).


Id. at 115.

INA § 208; 8 U.S.C.A. 1158.

INA § 241(b)(3); 8 U.S.C.A. 1231
INA § 244; 8 U.S.C.A. 1254.


INA § 240A; 8 U.S.C.A. 1229b.


Id.

Id.


Id.


INA § 240(b)(4)(A).

INA § 240(b)(4)(B).

INA § 239; 8 U.S.C.A. 1229.

See note 70.

See note 72.


Id.


8 C.F.R § 240.48(b).

INA § 239 (b)(2).

8 C.F.R § 236.1(e) (1998).

Id.

Id.

Id. at 334.

Joe Becher, Report by Human Rights Watch

Id.

79 NO. 10 Interpreter Releases 333, 335 (March 2000), statement of Sen. Sam Brownback (R-Kan.), testimony of Edwin Larios Munoz, a 14-year-old Honduran held in DHS custody after he escaped an abusive situation in his home country.

79 NO. 10 Interpreter Releases 333, 334-35 (March 2002).

Id. At 335.

79 NO. 24 Interpreter Releases 908 (June 2002).

Id.

Id.

Id. at 909. "Initial Restructuring Measures," DHS Mem. HQOU 0/20 (Apr. 17, 2002). The DHS has appointed Boston District Director Steve Farquharson as interim head of the OJA. Mr. Farquharson recently told Interpreter Releases that he hopes to focus on training and child placement issues, as well as coordination with state and local agencies. He also said that he anticipates being involved in regulations now under development that would establish specific standards for the care of children in DHS detention. For more on the DHS's recent restructuring announcements, see 79 Interpreter Releases 591 (Apr. 22, 2002). The legal issues surrounding unaccompanied alien children were discussed in depth in Nugent and Schulman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," 78 Interpreter Releases 1569 (Oct. 8, 2001).

78 NO. 8 Interpreter Releases 404, 404-05 (February 2001).

79 NO. 10 Interpreter Releases 333 (March 2002).

78 NO. 24 Interpreter Releases 1035, 1038 (June 2001).

79 NO. 10 Interpreter Releases 333, 336 (March 2002).
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A NEW ERA IN THE LEGAL TREATMENT OF ALIEN CHILDREN: THE HOMELAND SECURITY AND CHILD STATUS PROTECTION ACTS

by Christopher Nugent and Steven Schulman*

The past year presented many challenges to aliens in the U.S., from mandatory registration to indefinite detention, but 2002 may have been a watershed year for alien children, given the passage of two key pieces of legislation: the Homeland Security Act of 2002 (HSA)¹ and the Child Status Protection Act of 2002 (CSPA).² Both Acts improve the treatment of

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alien children under U.S. immigration law and policy in the discrete areas of detention and immigration benefits, respectively.

Over the last several years, the plight of more than 5,000 unaccompanied alien children detained in INS custody garnered significant attention from Congress, the executive branch, the legal community, and the public.³ The HSA dramatically reforms the treatment of these children, incorporating core features of the bipartisan Unaccompanied Alien Child Protection Act of 2001,⁴ to transfer care, custody, and placement decisions over unaccompanied alien children from the INS to the Director of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS).

Congress also acted to prevent some alien children from losing their immigration benefits due to INS and/or consular delay by passing the CSRA. The CSRA responded to the fact that over the past decade, with growing backlogs in immigrant visa and refugee processing due to limited governmental resources, alien children were confronting not only protracted processing times but also the loss of legal immigration status altogether.

Both the HSA and CSRA represent a relatively newfound approach to addressing the needs of alien children by treating them as children first and foremost within the framework of immigration law.⁵ This article discusses both pieces of legislation, their primary substantive provisions, their potential impact, and areas for further reform.

NEW HOPE FOR UNACCOMPANIED ALIEN CHILDREN THROUGH THE HOMELAND SECURITY ACT OF 2002

The HSA, which represents the largest restructuring of the federal government over the past 50 years, is hardly known for providing benefits for children. The HSA is principally known for its consolidation of 22 existing agencies and more than 170,000 employees into a new Department of Homeland Security (DHS) in order to prepare for and prevent terrorist attacks in the U.S.⁶ The HSA has a substantial impact on immigration enforcement and services: it dismantles the INS and assigns INS service and enforcement functions to two separate bureaus, the Bureau of Border Security (BBS) and the Bureau of Citizenship and Immigration Services (BCIS);⁷ recognizes the Executive Office for Immigration Review (EOIR) and leaves it as an agency under the Department of Justice (DOJ), but with broader oversight by the Attorney General, rather than transferring it to the DHS;⁸ and transfers

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⁴ For background on S. 121, see supra note 3.

⁵ Other recent legislative initiatives reflective of this child-centric approach include the Development, Relief, and Education for Alien Minors Act of 2001 (DREAM Act) (S. 1291), introduced by Sen. Orrin G. Hatch (R-Utah) but not approved by the 107th Congress, which, according to its preamble, was designed to “permit States to determine State residency for higher education purposes and to authorize the cancellation of removal and adjustment of status of certain alien college-bound students who are long-term United States residents,” and the Child Citizenship Act of 2002 (CCA), H.R. 2883, Pub. L. No. 106-395, 114 Stat. 1631, which was signed into law on October 30, 2000, and took effect February 27, 2001. For a discussion of the DREAM Act, see 79 Interpreter Releases 940, 942 (June 24, 2002). For a discussion of the CCA, see 77 Interpreter Releases 1562, 1564 (Nov. 6, 2000); see also 78 Interpreter Releases 1065 (July 2, 2001) (INS interim rule on CCA); 78 Interpreter Releases 495 (Mar. 12, 2001) (INS guidance on CCA). For a critique of the framework of U.S. immigration law vis-à-vis children’s rights, see Thronson, “Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law,” 63 Ohio St. L.J. 979 (2002).


⁷ HSA tit. IV(D), §§ 441–446 (BBS), and tit. IV(E), §§ 451–462 (BCIS).

⁸ Id. tit. XI(A), § 1102. The ABA, along with the American Immigration Lawyers Association and other organizations,
to ORR the custody, care, and placement of “unaccompanied alien children,” defined in the HSA as children without lawful immigration status in the U.S. who have not attained 18 years of age, and who have no parents or legal guardians in the U.S., or no parents or legal guardians in the U.S. who are available to provide care and physical custody.

In transferring the responsibility for unaccompanied alien children to the ORR, the HSA incorporates core features of prior legislative initiatives to address some of the fundamental problems unaccompanied alien children have faced while in INS custody. In recent years, concerns have mounted over the INS’s treatment of more than 5,000 unaccompanied alien children, particularly given the INS’s perceived conflict of interest by serving simultaneously as the jailer, prosecutor, and caretaker of these children. For instance, the DOJ’s Office of Inspector General found that the INS overserved secure detention facilities, resulting in up to 35 percent of the children being commingled with adjudicated delinquents at some point in their journey through INS custody. Critics also found that the INS’s detention of children created obstacles to access to legal representation for these children, with more than 50 percent unrepresented in their proceedings while detained.

In addition, the INS was faulted for its alleged failure to follow the Flores v. Reno class action settlement agreement governing both the conditions of custody for alien children under age 18, and the terms of their release and family reunification.

In response to these types of concerns, Sens. Dianne Feinstein (D-Cal.) and Lincoln D. Chafee (R-R.I.) co-sponsored the Unaccompanied Alien Child Protection Act (UACPA), which provided for: (i) an independent Office of Children’s Services within the DOJ, separate and apart from the INS and its enforcement functions, to be responsible for the care and custody of the children and to ensure that children’s interests would be respected at all stages of immigration processes and while in immigration custody; (ii) access to guardians ad litem and pro bono counsel (and paid counsel as a last resort) for detained children; (iii) standards for the care, release, and family reunification of detained children; and (iv) modifications in age-determination and consent procedures under Special Immigrant Juvenile Status (SJS) for detained children.

While the HSA, as finally enacted, provides for ORR jurisdiction over unaccompanied alien children, it omits the

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14 S. 121. For background on S. 121, see supra note 3.


16 See OIG Report, supra note 3.

17 See, e.g., Hearing on S. 121, supra note 3 (statements of Edwin Larios Munoz; Andrew Morton, Attorney, Latham & Watkins; and Wendy Young, Director of Governmental Relations and U.S. Programs, Women’s Commission for Refugee Women and Children).
UACPA’s explicit statutory guarantees for guardians and pro bono counsel and reform of the age-determination and SJS consent processes. These issues are expected to be addressed in legislation making technical corrections to the HSA and/or in other bills introduced during the 108\textsuperscript{th} Congress.\textsuperscript{17}

The primary change for unaccompanied alien children resulting from the HSA is structural, inasmuch as responsibilities for the care, custody, and placement of unaccompanied alien children are simply transferred from the INS to the ORR. Yet, the effect that switching responsibilities from a law enforcement agency to a human services agency will have on the discrete population of more than 5,000 alien children in INS custody annually cannot be understated.

A comparison of the INS mission statement with the mission statement of the ORR reveals the agencies’ respective openness (or lack thereof) to child welfare issues. The DOJ strategic plan for fiscal years 2001–2006 states, for example, that “INS deters, apprehends, and removes persons who violate our immigration laws. It works with U.S. attorneys to investigate and prosecute violators of immigration statutes, including purveyors of fraudulent documents. At the same time, INS provides an array of services and benefits to those who enter and reside in the United States.”\textsuperscript{18} The ORR’s mission statement, on the other hand, recognizes that “[r]efugees come to the United States for protection from persecution and in search of freedom, peace and opportunity for themselves and their families. The mission of the Office of Refugee Resettlement is to help refugees and other beneficiaries of our program to establish a new life that is founded on the dignity of economic self-support and encompasses full participation in opportunities which

Americans enjoy.”\textsuperscript{19}

The transfer of functions to the ORR will also benefit family members of unaccompanied alien children and their pro bono or private attorneys, who for years have struggled with a system in need of reform.\textsuperscript{20} The ORR is specifically mandated by the HSA to “ensure that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.”\textsuperscript{21} The overhaul thus promises a more child-friendly atmosphere and treatment for unaccompanied alien children pending their immigration proceedings. The DHS, for its part, will inherit the INS’s traditional enforcement functions and will be responsible for arresting, prosecuting, and repatriating unaccompanied alien children, but will not participate directly in their care.

Additionally, while the HSA does not specifically guarantee counsel or guardians, it does contemplate that children’s access to counsel and guardians will be improved by the ORR. The HSA charges the ORR with the responsibility of “compiling, updating and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children” and “to develop a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on the date of enactment.”\textsuperscript{22} Through close coordination with the legal

\textsuperscript{18} See, e.g., “Shift of Care for Immigrant Children Alone,” The New York Times, Nov. 27, 2002, at A15, quoting ABA President A. P. Carlton that “children who arrive at our borders alone and unprotected will no longer have their prosecutor serve as their caretaker”; Davies supra note 17, quoting Wendy Young of the Women’s Commission for Refugee Women and Children, “it means kids will receive better treatment,” and quoting Rallie Deffenbaugh of Lutheran Immigration and Refugee Service, that “[t]he INS was never in the child welfare business nor should it be. People are shocked when they learn that newcomer children arriving alone at our borders are picked up by the INS and held sometimes for more than a year in juvenile jails before appearing before an immigration judge—often without benefit of counsel and wondering what they did wrong.”
\textsuperscript{20} See, e.g., “Shift of Care for Immigrant Children Alone,” The New York Times, Nov. 27, 2002, at A15, quoting ABA President A. P. Carlton that “children who arrive at our borders alone and unprotected will no longer have their prosecutor serve as their caretaker”; Davies supra note 17, quoting Wendy Young of the Women’s Commission for Refugee Women and Children, “it means kids will receive better treatment,” and quoting Rallie Deffenbaugh of Lutheran Immigration and Refugee Service, that “[t]he INS was never in the child welfare business nor should it be. People are shocked when they learn that newcomer children arriving alone at our borders are picked up by the INS and held sometimes for more than a year in juvenile jails before appearing before an immigration judge—often without benefit of counsel and wondering what they did wrong.”
\textsuperscript{21} HSA §§ 462(b)(1)(A), 462(b)(1)(D). Section 292 of the INA provides aliens in removal proceedings with the right to representation at no expense to the government. Regarding children’s constitutional right to counsel, see
community, including the private bar and particularly the EOIR where Chief Immigration Judge (IJ) Michael J. Creppy has exercised leadership in improving the judicial treatment of children, the ORR may use these new provisions to help ameliorate the lack of legal representation for the majority of children in removal proceedings.23

The HSA took effect on January 24, 2002, and the transfer of jurisdiction to the ORR is contemplated to be made along with the transfer of the rest of the INS to the DHS, on March 1, 2003.24 While the ORR will inherit and oversee the INS’s contracted network of up to 90 shelter and secure facilities, the HSA provides for greater accountability than exists currently by requiring the ORR to identify “qualified individuals, entities and facilities to house unaccompanied alien children” and to conduct “investigations and inspections of facilities and other entities in which children reside.”25 The HSA further specifically encourages the ORR to use the refugee children foster care system for the placement of unaccompanied alien children.26 This conceivably could result in a decrease in the use of both shelter and secure facilities to hold the children.

Other notable child welfare-oriented provisions of the HSA include the ORR’s responsibility to coordinate and consult with appropriate juvenile justice professionals, the Director of the BCIS, and the Assistant Secretary of the BBS so that placement determinations ensure that unaccompanied alien children are likely to appear for all of their hearings or proceedings; are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitative activity; and are placed in settings where they are not a danger to themselves or others.27 The ORR is also barred from releasing any child from custody on his or her own recognizance.28 This provision reasonably furthers child protection because no unaccompanied child should be released by him- or herself without a family or other suitable sponsor or agency available to care for the child. Additionally, the ORR is now charged with maintaining very detailed statistical information and other data on all client children in ORR custody, and with collecting and compiling statistical information from the DOJ (including the EOIR) and the DHS vis-à-vis each department’s actions relating to unaccompanied alien children.29

Finally, the landmark Flores settlement agreement governing the treatment of children arguably will continue to apply as an “agreement” or “pending civil action” to the ORR and the DHS.30 The HSA provides that the savings provisions located in Title XV apply to the transfer of functions relating


This transfer deadline was set forth in the administration’s DHS Reorganization Plan. For a discussion of the plan and a related chart identifying the HSA’s immigration-related effective dates and deadlines, see 79 Interpreter Releases 1777 (Dec. 9, 2002).

INA § 412(d), 8 USC § 1522(d). The refugee foster care system has been administered by ORR through contracts with voluntary agencies, including the U.S. Conference of Catholic Bishops and the Lutheran Immigration and Refugee Service. There are currently 15 refugee foster care programs in the following communities: Phoenix, Ariz.; Washington, D.C.; Boston, Mass.; Grand Rapids and Lansing, Mich.; Jackson, Miss.; Fargo, N.D.; Newark, N.J.; Philadelphia, Pa.; Richmond, Va.; Seattle and Tacoma, Wash.; Rochester and Syracuse, N.Y.; and Houston, Tex. See Fact Sheet on Refugee Foster Care for Unaccompanied Refugee Minors, on file with authors.

27 HSA § 472(b)(2)(A)(i)–(iii).
28 Id. § 472(b)(2)(B).
29 Id. § 472(b)(2)(D)(i)–(v), (K). INS data gathering on children has been the subject of criticism by the Office of Inspector General. See OIG report, supra note 3.
30 In December 2001, the Flores settlement agreement, which was set to expire in early 2002, was extended by stipulation with the INS until 45 days past the adoption of final regulations incorporating its substantive provision. Flores v. Ashcroft, No. 85–4544–RJK (C.D. Cal.) (Dec. 1, 2001) (Kelleher, J.) (stipulation and order).
to children’s affairs “in the same manner as such provisions apply to a transfer of functions under this Act to the Department of Homeland Security.” Consistent with provisions in the HSA, any agreement or contract to which the INS was a party would thus continue in full effect against the ORR and the DHS following the transition of children’s affairs. The continued vitality of the Flores settlement agreement as a basic framework for the custody and care of alien children will facilitate the transition of jurisdiction and functions from the INS to the ORR.

PROTECTING CHILDREN’S ACCESS TO IMMIGRATION BENEFITS THROUGH THE CHILD STATUS PROTECTION ACT OF 2002

While the HSA focuses on structural change in the custody of children, the CSRA is substantive, improving children’s access to certain immigration benefits. The CSRA amends the INA to account for INS or consular processing delays by using the age of the child on the date of the relevant filing, not the date of processing of a petition or an application for adjustment of status, as the relevant date for purposes of classification as an immediate relative. Its provisions apply to any petition for a child pending as of August 6, 2002, the effective date of the CSRA, or thereafter before the DOI or the DOS. For purposes of the CSRA, a “child” is defined as an unmarried individual under the age of 21 (the definition of child for most benefits derived from a parent), as opposed to the HSA, which defines “child” as an individual under the age of 18.

Section 2 of the CSRA amends INA § 201 and provides age-out protection for immediate relatives in family-sponsored petitions, for children of U.S. citizens. Under § 2, the child of the U.S. citizen will retain the status of child as of the date the petition is filed. This age-out protection further applies to children of naturalized citizens, as long as the child was under age 21 when the naturalization occurred. This provision also applies to divorced children of U.S. citizens, if the divorce occurred before the child reaches the age of 21.

Section 3 of the CSRA amends § 203 of the INA to provide age-out protection for children of permanent residents or prospective permanent residents through family, employment, or diversity visa program-sponsored immigration petitions. The age will be frozen to the date of the immigrant visa petition, but when the priority date becomes due and the

31 HSA § 462(g)(2).
32 HSA § 1512(a)(1) provides that “completed administrative actions of an agency shall not be affected by the enactment of this Act or the transfer of such agency to the Department, but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside or revoked in accordance with law.” The HSA further defines “completed administrative action” as including “orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, licenses, registrations, and privileges.” Id. § 1512(a)(2). Finally, the HSA clarifies that “pending civil actions shall continue notwithstanding the enactment of this Act or the transfer of any agency to the Department, and in such civil actions, proceedings shall be had, appeals taken, and judgments rendered and enforced in the same manner and with the same effect as if such enactment or transfer had not occurred.” Id. § 1512(c).
33 The Flores settlement agreement was not, however, crafted with the same degree of specificity found in the INS detention standards applicable to approximately 200,000 adults at over 400 facilities. For example, the Flores settlement agreement does not specifically provide for access to free phone calls, legal materials, pre-representation consultations, and rights presentations by attorneys without requiring the attorney’s filing of a Form G–28, Notice of Entry of Appearance as Attorney or Representative. See, e.g., Pritchard, Helton, and Magoner, “The American Dream Betrayed: The Plight of Detained Immigrant and Refugee Children,” 30 Int’l L. News 1 (2001). The adult detention standards were discussed in 77 Interpreter Releases 1637 (Nov. 20, 2000) and are also available online at http://www.iss.usdoj.gov/graphics/lawsregs/guidance.htm.
34 CSRA pmbl. This article discusses the key provisions of the CSRA in broad strokes; for a more comprehensive analysis of the CSRA, see Shusterman and Keles, “An Analysis of the Child Status Protection Act,” 35th Annual Immigration & Naturalization Institute, PLI Order No. B0–01/02 (Practising Law Institute Oct.-Nov. 2002). See also Memorandum from Dea Carpenter, INS Deputy General Counsel, “The Child Status Protection Act,” HQCOU 90/16.5/16.7 (Sept. 15, 2002), discussed and reproduced in 79 Interpreter Releases 1747 (Nov. 25, 2002); Memorandum from Johnny N. Williams, INS Executive Associate Commissioner for Field Operations, “The Child Status Protection Act,” HQADN 70/6.1.1 (Sept. 20, 2002), discussed and reproduced in 79 Interpreter Releases 1503 (Oct. 7, 2002); Memorandum from Joseph E. Langlois, Director, INS Asylum Division, “H.R. 1220—Child Status Protection Act,” HQAO 120/129 (Aug. 7, 2002), discussed and reproduced in 79 Interpreter Releases 1433 (Sept. 23, 2002). For the text of a recent State Department cable on the CSRA, see article #8 in this Release.
35 CSRA § 8.
36 Cf. CSRA § 4 with HSA § 462(g)(2).
37 8 USC § 1151.
38 8 USC § 1153.
Petition for Alien Relative (Form I-130) is adjudicated, the age will unfreeze and the child must file the relevant immigrant visa or adjustment of status application within one year, or before his or her 21st birthday, whichever is later. For beneficiaries of the diversity visa program, the child's age will freeze as of the date the diversity visa program period opened, and unfreeze on the date the visa number becomes available.

Sections 4 and 5 provide for age-out protection for children of asylees and refugees, amending INA §§ 208(b)(3) and 207(c)(2), respectively. For children of asylees, the age will be frozen on the date of the asylum application if he or she turned age 21 while the asylum application was pending. For children of refugees, the age will be frozen on the date of the refugee application if he or she turned age 21 while the application was pending. It is imperative that the child be included on the application before adjudication.

Section 6 of the CSPA amends INA § 204 to allow for the transfer of preference categories for children of naturalized citizens, but only if desired. Section 7 preserves battered alien children’s eligibility for benefits under the Violence Against Women Act of 1994 (VAWA). The VAWA created a self-petitioning process for permanent residence in those cases where the alien child can make the requisite showing that he or she is a victim of domestic violence, defined as battery or extreme mental cruelty, at the hands of a U.S. citizen or permanent resident parent, who might otherwise have filed a family preference visa petition on the child’s behalf.

The CSPA’s impact may be far-reaching, as it fundamentally reforms the process for determining whether a child has “aged out” of eligibility for visa issuance or adjustment of status in most immigrant visa categories. The CSPA fails, however, to address the pressing age-out problems for detained or non-detained abused, abandoned, or neglected children seeking permanent residence through SIJS, a legal benefit for alien children who are dependents of a juvenile court. Many children reportedly age out of eligibility for SIJS, where the Petition for Asmerisan, Widow(er), or Special Immigrant (Form I-360) must be adjudicated by the time the child reaches the age of 21, due to INS processing delays.

Detained children further face aging out of eligibility at age 18 due to INS processing delays and/or outright refusals of requests for INS consent for the child to be placed in state dependency proceedings. Most states will not exercise jurisdiction over a child above the age of 18 for dependency proceedings, and thus will not issue an order that the child is abused, abandoned or neglected, eligible for long-term foster care, and that it is in the child’s best interest not to be returned to the country of nationality or last residence. Such an order is a predicate for SIJS eligibility. As a result, and in the absence of regulations on SIJS consent procedures, there have been several individual federal court actions around the country by children challenging the INS’s action or inaction in the consent process when they face aging out of dependency proceedings and thus the loss of SIJS eligibility.

Most recently, in M.B. v. Quarantillo, 301 F.3d 109 (3rd Cir. 2002), the court held that a child who was detained pending the completion of the SIJS process was eligible for SIJS at age 18, even though the INS had not issued a consent order.

39 8 USC §§ 1158(b)(3) and 1157(c)(2), respectively.
40 See Langlois memorandum, supra note 34.
41 8 USC § 1154.
42 See also Williams memorandum, supra note 34, explaining that in some categories the priority date for petitions of children of citizens is actually earlier than the priority date for the children of legal permanent residents.
44 INA § 204(a)(1)(A) & (B), 8 USC § 1154(a)(1)(A) & (B). Contact Gail Pendleton of the National Immigration Project of the National Lawyers Guild, phone: (617) 227–9727; e-mail: nippgail@nlg.org, for expertise in the area of the VAWA and registration on her domestic violence listserv.
In September 2002, a federal court in Arizona relied heavily on the Third Circuit's reasoning to find that the INS had abused its discretion in refusing to grant consent to juvenile court jurisdiction over a 17-year-old boy from Guatemala in INS custody. Less than two weeks before the boy was to turn 18 (and therefore fall outside of the juvenile court’s jurisdiction), the federal court issued a preliminary injunction ordering the INS’s Acting Director of Juvenile Affairs to grant consent. The court found that the INS had abused its discretion in withholding consent because its decision was based on a determination that the boy could be cared for in Guatemala, a decision that was not only unsupported by any evidence but also more properly within “the province of state courts, not the federal government.” Consistent with the Third Circuit’s analysis in M.B., the court limited the INS’s role in the granting of consent to state juvenile court to a determination of whether the juvenile would qualify for SIJS once a dependency order was granted, leaving the state courts to determine whether the juvenile has in fact been abused, abandoned, or neglected and is eligible for long-term foster care.

CONCLUSION

The child-related provisions of the HSA and the CSPA, along with the evolving case law on SIJS, reflect a growing concern over the INS’s treatment of alien children. The recent legislation reflects congressional intent that alien children should be treated as children first, and aliens second. The SIJS decisions, though decided in a different context, are in accord with this policy shift. While 2003 will be a challenging year for all stakeholders involved with alien children given the many structural changes that are now underway, the changes of 2002 are a positive sign that alien children will find better treatment in the U.S. in the very near future, even if their stay here is only temporary.

1. BIA Reaffirms Matter of Lozada

In a February 12, 2003, decision, the Board of Immigration Appeals (BIA) upheld its ruling in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), aff’d, 857 F.2d 10 (1st Cir. 1988), in which it recognized a right to assert an ineffective assistance of counsel claim in immigration proceedings. Matter of Assaad, 23 I&N Dec. 553 (BIA 2003).

The respondent, a native and citizen of Syria, entered the U.S. in 1993 as a nonimmigrant visitor. According to the record, he was granted conditional permanent resident status because of his marriage to a U.S. citizen. After the termination of the respondent’s status, the Board noted, removal proceedings were instituted against him in 1997. In proceedings before an Immigration Judge (IJ), the respondent sought a waiver under INA § 216(c)(4)(B) to remove the conditional basis of his permanent resident status. Denying the request, on the basis that the respondent knew little about his wife and had provided limited evidence on which to assess the qualifying marriage, the IJ ordered him removed from the U.S. in an April 2, 1998, decision.

Although the respondent reserved the right to appeal, his attorney submitted the appeal a week late and the Board accordingly dismissed the appeal as untimely on September 19, 2000. In a footnote, the Board observed that the respondent had been competently represented at his hearing, but that he retained new counsel after those proceedings concluded, who filed the late appeal. Also in a footnote, the Board cited INA § 101(a)(47)(B)(ii) to point out that the IJ’s order became final when the respondent’s appeal was not timely filed.

For a summary of M.B. v. Quarantillo, see 79 Interpreter Releases 1351, 1352 (Sept. 9, 2002).

The Algerian boy was represented by Latham & Watkins and the Hebrew Immigrant Aid Society in New York.

Saqiq v. Curda, No. CV 02-1652-PHX-EHC (D. Ariz., Sept. 10, 2002) (Carroll, J.) (slip op.). The boy was represented in district court pro bono by Judy Flanagan of Phoenix, through the pro bono referral program of the children’s project at the Florence Immigrant and Refugee Rights Project. Latham & Watkins is assisting Ms. Flanagan in the Ninth Circuit appeal brought by the INS.

The BIA’s decision in Lozada was digested in 65 Interpreter Releases 994 (Sept. 26, 1988).

For summaries of other recent BIA precedent decisions, see 80 Interpreter Releases 150 (Feb. 3, 2003); 80 Interpreter Releases 44 (Jan. 13, 2003); 79 Interpreter Releases 1819 (Dec. 16, 2002).