CAIR
Capital Area Immigrants' Rights
COALITION

PRACTICE MANUAL FOR *PRO BONO* ATTORNEYS

Representing Unaccompanied Immigrant Children

Asylum · U visa · T visa · Special Immigrant Juvenile Status

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The Capital Area Immigrants' Rights (CAIR) Coalition welcomes questions and comments about this manual and is available to consult with attorneys on cases involving clients who are unaccompanied minors or young immigrants. Inquiries may be directed to Ashley Ham Pong, Supervising Attorney for CAIR Coalition's Detained Children's Program, at the contact information listed above.

NOTE

This manual is intended to provide practical and useful information for attorneys acting as *pro bono* counsel for unaccompanied minors in the immigration detention and removal system. It is provided with the understanding that neither CAIR Coalition, nor Sidley Austin LLP, is rendering legal or other professional advice to any person or entity.

This manual shall not be deemed to create an attorney-client relationship with any reader. No reader may rely upon any of the statements contained herein for purposes of any specific matter. If legal advice is desired, the services of a competent legal professional should be engaged.

Practitioners using these materials are advised that the authors have no obligation to update or amend these materials or account for developments in this area of law. Practitioners should not rely solely on this manual. This manual serves as a guide and does not replace an attorney's obligation to conduct thorough, independent research.

SAMPLE MATERIALS

CAIR Coalition maintains an online resource library with useful materials, including government memos, practice advisories, and sample briefs and submissions. These online resources and sample materials, however, simply serve as a guide and do not replace an attorney's obligation to conduct thorough, independent research. Practitioners using our sample materials are advised that the authors have no obligation to update or amend these materials or account for legal developments, and are not rendering any legal or other professional advice to any person or entity.

In order to access this resource, users must submit an online request through the CAIR Coalition website at https://www.caircoalition.org/pro-bono-resources/resource-library. An individualized email will then be generated with a password allowing access. Attorneys who need immediate access to one of the posted resources should contact their *pro bono* mentor. For cases where multiple *pro bono* attorneys are representing a child, CAIR Coalition requests that each individual working on the team complete an online request, rather than sharing passwords, to maintain the integrity of the library.

INTRODUCTION

The Capital Area Immigrants' Rights (CAIR) Coalition is the only non-profit organization in the D.C. metropolitan area with a program dedicated to providing legal services to unaccompanied minors detained by immigration in Virginia. Through the Detained Children's Program, we have served over 700 undocumented and unaccompanied minors between the ages of 10 and 17 who are facing removal to their home countries. Many are victims of gang violence, abuse and neglect, or human trafficking.

To increase access to high-quality legal counsel, CAIR Coalition frequently partners with local law firms where we conduct in-depth trainings for *pro bono* attorneys. Through our trainings and continued expert mentorship, our *pro bono* attorneys have won legal relief for many unaccompanied minors, both locally and throughout the U.S.

As part of CAIR Coalition's ongoing efforts and dedication to unaccompanied minors, we have created this manual to provide an overview of U.S. immigration laws and issues that practitioners typically face when representing unaccompanied minors. Because immigration laws relating to unaccompanied minors are continually changing, this manual addresses topics that are at the forefront of this relatively new and growing field of immigration law.

The purpose of this manual is to serve as an introduction and point of departure for *pro bono* attorneys with little or no background in immigration law who have volunteered to represent an unaccompanied minor. In addition, this manual includes practice tips and suggestions on how to best serve this young, vulnerable population of immigrants. While this manual is designed as a practical guide to assist these attorneys in familiarizing themselves with and navigating the detention and removal system, it is not exhaustive. Therefore, we urge *pro bono* attorneys in all cases to consult with seasoned immigration practitioners and mentors.

Nevertheless, it is our hope that this manual will serve as a useful resource for *pro bono* attorneys as they encounter the challenging issues that often arise in these cases. We firmly believe that, with the proper resources and support, *pro bono* attorneys can step into this area of great need and protect the rights and dignity of unaccompanied minors who would otherwise be left to fend for themselves in a system that does not provide children with a right to a free attorney when facing deportation.

We are immensely grateful to the attorneys at the Washington, D.C. law office of Sidley Austin LLP, who worked on this practice manual alongside us to research and draft the chapters of this manual: Robert Keeling, Melissa Hung, Seema Kakad Jain, Elizabeth Phelps, John Hebden, and Erica Guy. We have benefited enormously from the generous contributions of

Sidley Austin LLP in producing and printing this manual, and we very much appreciate the firm's continued support of our work with young immigrants.

Thank you to our partners for supporting our organization and for your commitment to the unaccompanied minors who we all serve together.

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COMMONLY-USED ACRONYMS

A Number	Alien Registration Number
A File	Alien File
ACF	Administration for Children and Families (subdivision of DHHS)
AG	Attorney General (referring to counsel for DOJ)
AILA	American Immigration Lawyers Association
BIA	Board of Immigration Appeals (subdivision of EOIR)
CBP	Customs and Border Protection (subdivision of DHS)
DHS	Department of Homeland Security
DHHS	Department of Health and Human Services
DOJ	Department of Justice
EOIR	Executive Office for Immigration Review (subdivision of DOJ)
FGM	Female Genital Mutilation
HSA	Department of Homeland Security Act of 2002
ICE	Immigration and Customs Enforcement
IJ	Immigration Judge
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service (legacy immigration agency whose duties are now split between DHS and DOJ)
ORR	Office of Refugee Resettlement (subdivision of ACF)
NTA	Notice to Appear
OCC	Office of Chief Counsel (referring to DHS counsel in removal proceedings)
SIJ(S)	Special Immigrant Juvenile (Status)
TA	Trial Attorney (referring to DHS counsel in removal proceedings)
TVPRA	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UAC	Unaccompanied Alien Child
UNHCR	United Nations High Commissioner for Refugees
USCIS	U.S. Citizenship and Immigration Services (subdivision of DHS)

The Immigration and Nationality Act is codified at 8 U.S.C. § 1101 *et seq*.

The Department of Homeland Security Act of 2002 is codified at 6 U.S.C. § 279.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 is published at Pub. L. No. 110-457, 122 Stat. 5044 (2008).

Department of Justice regulations pertaining to removal proceedings are at 8 C.F.R. Chapter V.

Department of Homeland Security regulations pertaining to removal proceedings are at 8 C.F.R. Chapter I.

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"In a nation that prides itself on the fact that everyone accused of a crime – murderers, rapists – has the right to a lawyer, undocumented immigrants, even when they are unaccompanied children, are not entitled to a public defender. Although some children are represented by *pro bono* lawyers or, for the few whose families can afford it, private lawyers, it's estimated that more than half of them go to court alone. These children – some as young as 2 years old – have no one to help them make the case that they should not be deported. . . . And yet, while more recent legislation has improved the odds, only around 7 percent of those who were placed in federal custody between 2007 and 2009, and who had received a ruling by mid-2010, were winning their cases. *Not surprisingly, those with legal representation were nearly nine times more likely to win*."

– Sonia Nazario, *Child Migrants Alone in Court*, N.Y. TIMES, Apr. 10, 2013

DETAINED CHILDREN'S PROGRAM

What is the Detained Children's Program?

Nearly four years ago, the Capital Area Immigrants' Rights (CAIR) Coalition expanded its free legal services to serve the younger immigrant population in detention in Virginia. The impetus behind the Detained Children's Program was to provide legal services to detained youth in Virginia, ages 13 to 17 years old, who are classified by the Department of Homeland Security ("DHS") as being "unaccompanied." The term "**unaccompanied alien child**" ("UAC") means someone who is under the age of 18 years old with no lawful U.S. status, and who has no parent or legal guardian in the U.S. or no such person to provide care and physical custody.[1] DHS turns over these unaccompanied minors to the care and custody of the Office of Refugee Resettlement ("ORR"), a branch of the Administration for Children and Families within the Department of Health and Human Services ("DHHS"). These children are placed in a variety of settings, ranging from shelters to secure juvenile facilities.

CAIR Coalition is the only non-profit organization with a legal services program dedicated to unaccompanied minors detained by immigration in Virginia. Unaccompanied minors are particularly vulnerable due to their young age and are a growing population among detained immigrants. In the past, approximately 8,000 undocumented and unaccompanied children have arrived in the U.S. and been placed in the custody of ORR each year. However, that number doubled in 2012, when ORR reported that over 16,000 unaccompanied children crossed the borders due to worsening country conditions in Mexico, Honduras, El Salvador, and Guatemala. By the end of 2013, this number exceeded 24,000. Of the thousands of unaccompanied children who arrive each year, some come to the United States to be reunited with family members, but an overwhelming number of minors are fleeing gang violence, domestic abuse, and other dangerous situations at home. Others are victims of human trafficking. In addition to the hardships they have suffered at home, many children making their way north on their own become victimized a second time during the extremely dangerous journey to the United States.

While the U.S. government will provide unaccompanied immigrant children with shelter, it will not provide them with attorneys. As a result, almost half of all children who appear before

[1] 6 U.S.C. § 279(g)(2).

an immigration judge do not have legal representation. Although many of these children may be eligible for some type of relief that would permit them to remain in the United States, it is virtually impossible for an adult, much less a vulnerable child, to successfully navigate the immigration process without the assistance of an attorney.

Through the Detained Children's Program, CAIR Coalition staff provide free legal services to the youth detained at the three ORR facilities in Virginia: the Northern Virginia Juvenile Detention Center in Alexandria ("NOVA"), Youth for Tomorrow in Bristow, and the Shenandoah Valley Juvenile Center in Staunton ("Shenandoah"). CAIR Coalition staff also provide free legal services to unaccompanied children in federal long-term foster care in Richmond, whose care is overseen by ORR through a non-profit organization called Commonwealth Catholic Charities. Since the program's inception, CAIR Coalition has provided legal services to over 700 detained unaccompanied minors.

"For us, freedom is a long road. I don't know any shortcuts; if you do, please tell me."

- 16-year-old Mexican boy who has lived in the U.S. since he was 7 and was severely abused by his mother, discussing detention life with CAIR Coalition staff

"Every day in detention feels like an eternity."

- 17- year-old Honduran boy at Shenandoah eligible for SIJS and a T visa, waiting for reunification with a family sponsor

What do we do?

CAIR Coalition staff visit the youth at NOVA and Youth for Tomorrow every week, and the youth at Shenandoah on a bi-weekly basis. During these visits, CAIR Coalition staff conduct Know Your Rights ("KYR") presentations in either English or Spanish to every new arrival at the center. These presentations give a brief overview of the U.S. immigration system and removal proceedings so that the youth understand why they are being detained and what to expect in the coming weeks. CAIR Coalition staff also explain the remedies available to unaccompanied minors, whether the remedy includes staying and fighting their cases in the U.S. or returning to their home countries.

After the youth learn about their rights, CAIR Coalition staff meet with every child privately to provide an individual screening. Screening typically lasts anywhere from 20-45 minutes, during which time staff ask a range of questions targeted at screening a child for relief from removal. With this information, CAIR Coalition provides follow-up legal services that may include working with a child on his or her declaration, obtaining records, and contacting family members.

The Detained Children's Program attorneys also appear as a "friend of the court" for the unaccompanied minors who appear on the detained juvenile docket before the immigration judge in Arlington, Virginia. Because a child does not have the right to a free immigration attorney,

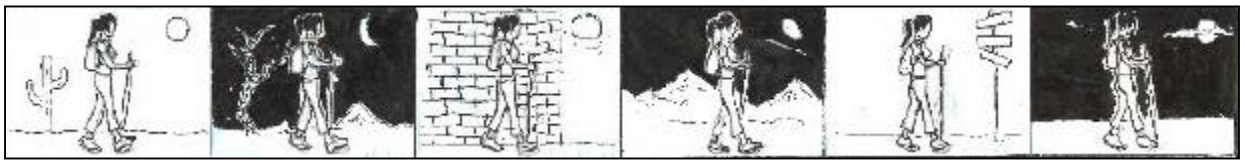
CAIR Coalition's services are immensely important to ensuring that the best interests of every detained unaccompanied minor in Virginia are properly represented.

For unrepresented children at the three ORR facilities, CAIR Coalition may find a *pro bono* attorney from a local law firm to provide direct representation to an unaccompanied minor. In these cases, CAIR Coalition will conduct a training with the firm and *pro bono* attorneys, as well as provide sample materials and useful resources. Throughout the *pro bono* representation, CAIR Coalition attorneys offer thorough guidance and expert insight into removal proceedings and applications for relief.

CAIR Coalition staff also provide direct representation to unaccompanied minors residing with foster families through ORR's federal long-term foster care program in Richmond, Virginia. CAIR Coalition staff visit the Richmond program twice a month. Representation most commonly includes initiating custody proceedings before the local Virginia juvenile court and then representing a child in his or her petition for Special Immigrant Juvenile Status before the federal immigration authorities.

Who are the detained youth that we serve?

Since we began the program, we have served over 700 unaccompanied minors in detention, the majority of whom are from Central America. Specifically, nearly 50% have been from Mexico, 20% from Honduras, 20% from El Salvador, 10% from Guatemala, and the rest from South America, the Caribbean, Canada, or West Africa.



An overwhelming majority of these children choose to leave their home countries because they have been victims of gang violence, human trafficking, and/or child abuse and neglect. For most, the journey to the U.S. is long and rough. Because these children are unaccompanied, they often leave their homes alone and with little or no money. Children often walk for weeks or months through rainforests and deserts. Many children opt to jump aboard the "Death Train," a freight train which runs from the south of Mexico and stops close to the U.S.-Mexico border. These children spend days on the roof of the train, risking dangers such as loss of limbs, kidnapping by drug cartels, robbery by gangs, and death. In some cases, they or their family may have paid a smuggler, also known as a coyote, to bring them across the river and accompany them across the U.S. border.

The majority of the children that CAIR Coalition has screened have been victims of domestic violence, neglect, or abandonment, some of whom grew up on the streets not knowing their parents. At the same time, many youth screened by CAIR Coalition staff have fled their home countries to escape dangerous, illegally organized criminal groups or gangs such as MS-13 or the 18th Street gang, who repeatedly terrorize youth, especially young males, in an effort to recruit them. Young girls are often sent north by their parents to prevent them from being sexually violated because their brothers or other male family members have refused to join a gang. Unfortunately, some girls have already been sexually violated and are sent up by their families shortly thereafter to avoid further violations.

Some children have left to escape the widespread poverty in Central American countries plagued by a history of civil war. With hopes of a better future, many end up victimized during their trip or shortly after their arrival in the U.S. An increasing number of children have come to the U.S. only to be exploited and trafficked for sex or labor by family members or other people they trusted. Many have also been victims of violent or serious crimes committed in the U.S.

At the other end of the spectrum, CAIR Coalition meets with many children who have been in the U.S. since they were very young and do not even remember their initial crossing over the border. Those children often feel more comfortable communicating in English and consider the U.S. to be their home, having no knowledge or recollection of their country of origin.

What forms of relief are available to unaccompanied minors?

In recognizing the unique vulnerability of certain types of immigrants, Congress has created various forms of humanitarian relief that can often lead to permanent residence. These protections include, but are not limited to, asylum for people who fear persecution in their home country on account of a protected ground, U visas for victims of crimes committed in the U.S. or a U.S. territory, T visas for victims of human trafficking, and Special Immigrant Juvenile ("SIJ") status for children under the age of 21 who have been abandoned, abused, or neglected. U.S. immigration laws are frequently changing in an effort to provide additional protections for victims. Please see our Asylum, SIJS, U visa and T visa sections for more information and recommended resources regarding these humanitarian forms of relief available to unaccompanied minors.

Do CAIR Coalition's unaccompanied minors qualify for humanitarian relief?

Many of CAIR Coalition's detained unaccompanied minors are eligible for these four most common forms of relief: U visa, T visa, SIJ status, and asylum. Of the approximately 700 children we have screened, almost 50% were eligible for SIJ status because they had been abandoned, abused, or neglected; about 20% were eligible for asylum because they feared persecution in their home countries; about 10% were eligible for U visas because they were victims of serious crimes committed in the U.S.; and approximately 5% were eligible for T visas because they had been trafficked for sex or labor.

JUVENILE DETENTION

Overview of the Office of Refugee Resettlement

When immigrant children are detained by immigration, they are not always detained with adults and often go through slightly different administrative procedures than adults. This was not always the case. Before 2002, the Immigration and Naturalization Service ("INS") was responsible for the care and custody of unaccompanied minors.[2] This meant that children would be detained in juvenile hall settings among juvenile criminal offenders for their civil immigration violations, or among the adult immigration detention population.

In 1996, legacy INS settled a class action lawsuit known as *Flores v. Reno*. The Flores settlement agreement provided new uniform INS policies with respect to the detention, processing, and release of unaccompanied minors and gave rise to the Juvenile Protocol Manual.[3] However, it was not until years later, after the U.S. Supreme Court decided *Reno v. Flores* in 1993[4] and Congress passed the Homeland Security Act ("HSA") of 2002,[5] that there was a significant change with respect to the care and custody of detained unaccompanied minors. Notably, the HSA of 2002 shifted detention of unaccompanied minors to the Office of Refugee Resettlement, a branch within the Department of Health and Human Services.[6] ORR is now responsible for the care and custody of unaccompanied minors, whereas DHS maintains enforcement and administrative powers. The Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 gave unaccompanied minors additional rights with respect to care and custody as well as forms of relief.[7]

There are many different ORR facilities in the U.S., ranging from low to high levels of security, including residential treatment centers and long-term foster care. Notably, only 1% of ORR facilities are "secure" or high-level security facilities, two of which are located in Virginia and served by CAIR Coalition. The Shenandoah Valley Juvenile Center in Staunton, VA is a mixed detention center offering 30 bed spaces to children in "secure" and "staff-secure" (medium-level security) settings. The Northern Virginia Juvenile Detention Center in

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[2] On March 1, 2003, INS ceased to exist under that name. Under the Homeland Security Act of 2002, its functions were transferred to three new entities within the newly created DHS: U.S. Citizenship and Immigration Services ("USCIS"), U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Protection ("CBP").

[3] Published by INS in March 1999.

[4] *Reno v. Flores*, 507 U.S. 292 (1993).

[5] Pub. L. No. 107-296, 116 Stat. 2135.

[6] *Id.* at § 462; 6 U.S.C. § 279.

[7] Pub. L. No. 110-457, 122 Stat. 5044.

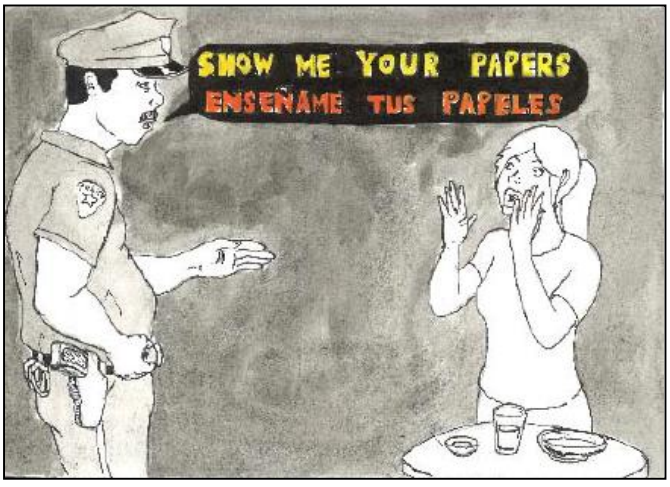
Alexandria, VA is also a mixed detention center and has 20 bed spaces in "secure" and "staff-secure" settings. The third facility served by CAIR Coalition, Youth for Tomorrow in Bristow, VA, is a shelter (low-level security) facility offering approximately 60 bed spaces to minors ages 10 to 17, as well as some children as young as 8 or 9 years old who are apprehended by immigration with an older sibling. In addition, Youth for Tomorrow has a residence dedicated to "Mommy and me" bed spaces for teenage mothers who are apprehended with infants or who are pregnant. Through the federal long-term foster care program in Richmond, VA, ORR and Commonwealth Catholic Charities provide long-term care to approximately 10 to 15 children each year and assist them in adjusting to life in the U.S. through the intensive support of social workers and foster parents.

For more information on the ORR program, please visit: http://www.acf.hhs.gov.

How are unaccompanied minors apprehended and how do they end up in juvenile custody?

Because most unaccompanied children cross the U.S.-Mexico border alone and on foot, it is very common for them to be apprehended by Customs and Border Protection ("CBP") in the desert after crossing the border. Children who are trafficking victims forced by cartels or smugglers to enter the U.S. will often turn themselves in to authorities if they have the chance to escape their traffickers. Like adults, it is also common for unaccompanied minors to be apprehended as a result of criminal misconduct. Other unaccompanied minors have been arrested by Immigration and Customs Enforcement ("ICE") due to misidentification, at hospitals, or because someone in the community has notified ICE.

Notably, under the TVPRA of 2008, DHS must notify DHHS within 48 hours whenever it apprehends someone it suspects to be an unaccompanied alien child.[8] In addition, the TVPRA requires DHS to transfer the child to DHHS within 72 hours of determining that a child is unaccompanied, absent exceptional circumstances.[9] While some children come to the U.S. carrying a birth certificate, others have no documentation and must undergo a bone density test to approximate their age before DHS will transfer them.



[8] Pub. L. No. 110-457, 122 Stat. 5044, § 236(c)(2)(B).
[9] *Id.* at § 236(c)(3).

What happens to unaccompanied minors after they arrive at ORR?

ORR provides food, shelter, schooling, clothing, recreational activities, and other necessities for unaccompanied minors. In addition, unaccompanied children have assigned caseworkers and clinicians who meet with them on a regular basis to evaluate their cases with respect to care and custody.

ORR aims to place a child in the least restrictive setting, in accordance with ORR procedures. As such, children who are placed in a higher level of security than necessary may be "stepped down" to a lower security level within a few weeks. Most UACs, however, are placed in ORR shelters and group homes.

ORR may also "reunify" a child with a "sponsor" such as a family friend or relative. Reunification is a temporary alternative to having the minor stay in detention while s/he resolves his or her immigration case. In some cases, the "sponsor" is a parent or legal guardian because DHS may have mislabeled the child as being unaccompanied. In all these instances, ORR must follow the release guidelines mentioned above to ensure that the sponsor is an appropriate and safe placement for the child. Regardless of where s/he is reunified or transferred, a child's immigration case will follow him or her, and the child will still be required to appear at immigration court until the case is resolved. If a child has no sponsor reunification options, s/he may be eligible for ORR short- or long-term foster care programs, provided the child meets certain criteria.

Throughout a minor's detention in Virginia, CAIR Coalition staff continue to meet with a child to work on his or her legal case. Where possible, CAIR Coalition attorneys will place the case with a local *pro bono* attorney and continue to serve as *pro bono* mentors throughout the representation.

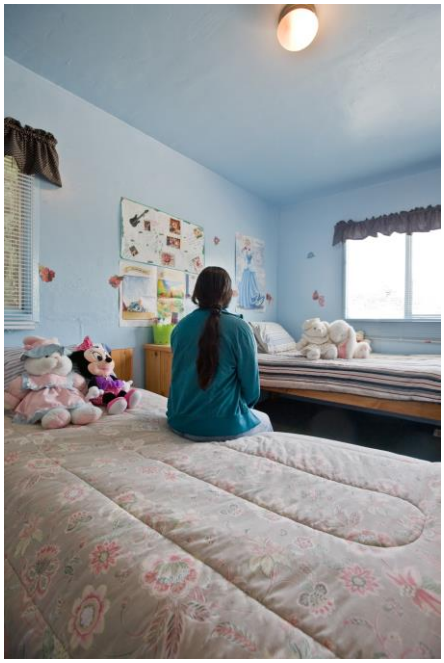
– Artwork by 17-year-old Honduran boy who was happy to be transferred to a residential treatment center, but sad that he would no longer work with CAIR Coalition staff

HELPFUL HINTS FOR *PRO BONO* ATTORNEYS

In most cases, the *pro bono* attorney who represents an unaccompanied minor will find the experience to be incredibly rewarding, enlightening, and positively memorable. Nevertheless, there are special considerations that a *pro bono* attorney should be mindful of throughout the attorney-client relationship.

The *pro bono* attorney should keep in mind that unaccompanied minors who have faced trauma before coming to the U.S. can often carry with them extra anxiety, insecurity, and lack of structure. Many may hesitate to talk about past experiences in order to avoid reliving their trauma. In addition, past trauma combined with a minor's young age, lack of education, cultural background, and lack of financial resources can often impact a minor's ability to understand that there are consequences, either good or bad, for the actions they take. Without understanding the consequences, minors may be at a higher risk of engaging in bad behavior or not maintaining constant communication with their attorneys.

Keeping this in mind, it is important to develop a trusting relationship with the minor, which can often be accomplished through regular check-ins to discuss not only the legal case, but also the minor's day to day life. Creative ways to bond with the client, such as organizing lunch, coffee, ice cream, or another fun outing, are always encouraged. Here are some helpful hints:



1. **Communication**: Maintain and encourage open communication. The more trusting the minor is of the *pro bono* attorney, the more forthcoming s/he will be with information and the stronger the case will be.

2. **Scheduling**: Minors may not be accustomed to the structures of a professional setting. As such, they may often call outside of business hours, may not arrive promptly for meetings, and may not remember to bring documents to meetings. When scheduling an appointment, attorneys are encouraged to send a written letter or e-mail to the child explaining the date, time, location, and items s/he should bring. In addition to the written letter, it is often helpful to remind the minor of the anticipated meeting several times via phone leading up the meeting.

3. **Duty to your client**: Your duty is to the minor. Often times, a sponsor such as a parent or family member may call regarding the child's case. The sponsor may call to report bad behavior or concerns, or to inquire about sensitive information. No matter what the situation, remember that your duty is to the child and that you are representing him or her with respect to the immigration matter.

4. **Financial considerations**: Children lack financial means and can be a financial strain on their sponsors. Minors without an employment authorization document (work permit) will be unable to work while their immigration applications are pending. In addition, many will be unable to obtain a driver's license. As such, many children may not be able to afford frequent travel to the D.C. metropolitan area, which means their sponsors will often have to take time off work and pay for transportation. Considerations as to your client's financial position may mean you accommodate him or her by meeting the child closer to his or her home, or using the phone when an in-person visit is not required.

5. **Keep the minor focused**: Create short-term and long-term goals with the client. This will allow him or her to see the big picture, but also work on one thing at a time. Short-term goals can serve as a constant reminder of the minor's behavior, making him or her aware of positive paths to pursue and negative choices to avoid.

6. **Criminal conduct**: There may be a time when a minor engages in criminal conduct during representation that leads to an arrest and, ultimately, a juvenile delinquency finding or an adult conviction. Please review your retainer agreement and consult with your *pro bono* coordinator to see whether you are authorized to advise the minor and represent him with respect to his criminal case. If your representation prevents you from providing legal representation in criminal matters, inform the minor accordingly. In some instances, the minor may be eligible for a public defender or may be able to hire a private criminal defense attorney. If a defense attorney has questions regarding the immigration consequences of a particular outcome in the criminal proceeding, you may tell the public defender to contact the mentoring attorney at CAIR Coalition for clarification. In all cases, it is vital that the child receive thorough advice regarding the immigration consequences of any criminal disposition.

7. **Know your boundaries**: If a child has become unresponsive, uncooperative, or has engaged in conduct that has jeopardized his or her immigration case, consider addressing the problem with the minor and discussing potential consequences of his or her actions. In certain instances, you may discuss the possibility of terminating representation. In other instances, a warning to the client may be enough to correct the issue. Whatever the issue, know your boundaries as the minor's attorney and please bring this to the attention of the CAIR Coalition mentoring attorney.

8. **Use CAIR Coalition as a resource**: Every *pro bono* attorney who accepts a case through CAIR Coalition will be assigned a CAIR Coalition *pro bono* mentor, an expert in unaccompanied minor immigration law and removal proceedings. Your mentoring attorney will provide you with helpful resources and sample materials at the outset of the representation, as well as ongoing assistance throughout the case. No matter what hurdle or dilemma you are facing (confusion, frustration, legal road block), your mentoring attorney is here to help!

ASYLUM

Familia sin nombre (Family without a name)

My father is in Guatemala,
My mother is in heaven,
Part of me is in the United States,
The other part of me is still in Guatemala.

– Poem by a 17-year-old detained at Shenandoah, for whom CAIR Coalition won asylum based on ethnic persecution in Guatemala.

INTRODUCTION TO ASYLUM

Antonio left Honduras when he was 9 years old because of problems with the MS-13 gang. His older brother had been murdered by MS-13, and when his family reported it to authorities, the lead gang member was arrested and charged with murder. As a result of the family's actions, the gang retaliated. The gang began threatening Antonio and his father at gunpoint or with a machete. During this time, MS-13 also killed Antonio's uncle and raped his aunt, claiming the family had disrespected the gang. Fearing for his safety, Antonio fled Honduras and applied for asylum in the U.S.

Although fictional, Antonio's story is representative of a legitimate and viable claim for asylum. Asylum is a form of lawful status for those who meet the definition of "refugee" and who are of special humanitarian concern to the United States. Refugees are generally people outside their home country who are unable or unwilling to return home because they fear serious harm. Traditionally, immigration courts and asylum offices have more commonly granted asylum to those seeking protection from racial, ethnic, religious, or politically-motivated persecution.

However, many minors are now claiming fear based on other grounds. With an estimated 70,000 gang members in Central America, gang violence is especially prevalent in countries like Honduras, El Salvador and Guatemala. Many of CAIR Coalition's minors are victims of the two major Central American gangs – MS-13 and the 18th Street gang – as these gangs try to recruit and terrorize youth in an effort to amplify manpower and gang territory. Similarly, many Mexican youth or minors traveling through Mexico en route to the U.S. are kidnapped, held for ransom, and exploited by Mexican drug cartels such as the Zetas or the Gulf cartel. Because gangs target youth who are poor, from unstable homes, or otherwise vulnerable, CAIR Coalition's youth are particularly at-risk of being victims because they are unaccompanied.

Antonio's story echoes a growing fear faced by many unaccompanied minors, which can be attributed to the increase in illegal criminal activity and drug wars over the past few years. In Antonio's case, he could be successful with his asylum claim if he shows he has a well-founded fear of persecution on account of his "membership in a particular social group," for example, because gangs are targeting his family.

Courts have often struggled with the term "particular social group," finding that a minor's social group is not well-defined because it lacks particularity and/or social visibility. Legal practitioners often face the significant challenge of defining a social group for unaccompanied minors facing kidnappings, violence, and exploitation by gangs and drug cartels who seemingly target almost anybody. Consequently, legal practitioners are often challenged into using their most creative and innovative legal arguments with respect to Mexican and Central American juvenile asylum claims.

Whether an asylum claim is based on membership in a particular social group or another protected ground, special protections exist under the law with respect to young asylum-seekers. In preparing a child's asylum claim, legal practitioners often enjoy working with a child to articulate his or her fear accurately and to gather personal documents that prove the child's

credibility. In addition to learning about the child's individual fear, attorneys conduct extensive country conditions research, allowing them to gain thorough knowledge of a country's current and past government, social structure, and political climate.

> *"I am a little sad here in detention, but I have hope for my case. When I think of my life, I have no one. I am alone. But on the other hand, I have God in the sky and He has helped me a lot, and I have an angel, and that angel is you."*
>
> – Letter to CAIR Coalition attorney from 18-year-old who aged out into ICE custody and for whom CAIR Coalition eventually won asylum based on ethnic persecution in Guatemala

OVERVIEW OF ASYLUM LAW

Asylum is a form of lawful status that may be granted to those who meet the definition of "refugee" and who are of special humanitarian concern to the United States.[10] Under the Immigration and Nationality Act ("INA"), a "refugee" is defined as:

> any person who is outside any country of such person's nationality . . . 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.[11]

The same definition applies to all individuals, regardless of their age.[12] Asylee status may be granted to an individual who meets the above definition and is either physically present in the U.S. or located at a land border or port of entry at the time the person seeks refuge.[13]

> *"The United States is proud of its history of welcoming immigrants and refugees. The U.S. refugee resettlement program reflects the United States' highest values and aspirations to compassion, generosity and leadership. Since 1975, Americans have welcomed over 3 million refugees from all over the world. Refugees have built new lives, homes and communities in towns and cities in all 50 states."*
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> – U.S. Department of State website

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[10] Under the INA, asylum may be granted at the discretion of the Attorney General or Department of Homeland Security. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

[11] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In some circumstances, asylum may be granted to persons still within their country of nationality. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

[12] UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* at 12 (Feb. 1997), *available at* http://www.unhcr.org/refworld/docid/3ae6b3360.html. The Handbook notes that "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." *Id*. at 10.

[13] INA § 208(a), 8 U.S.C. § 1158(a).

I. Elements of an Asylum Claim

A person seeking asylum must demonstrate that s/he has: (1) a well-founded fear; (2) of persecution; (3) on account of; (4) one of five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion).

A. "Well-Founded Fear"

i. *Well-Founded Fear Generally*

Any asylum applicant must first demonstrate a "well-founded fear" of persecution.[14] This does not require the applicant to have suffered persecution in the past,[15] but it does require both subjective and objective fear of persecution. Subjective fear requires the applicant to demonstrate "a genuine apprehension or awareness of danger in another country."[16] To prove the objective element, an applicant must establish a "reasonable possibility of suffering such persecution if s/he were to return to that country."[17] Courts have suggested that even a 10% chance of future persecution – a standard lower than a preponderance of the evidence – may be sufficient to demonstrate a well-founded fear.[18]

In *Matter of Mogharrabi*, the Board of Immigration Appeals ("BIA") set forth a four-pronged test that an applicant must satisfy in order to demonstrate a well-founded fear of persecution. The applicant must show that: (1) the applicant possesses a belief or characteristic that a persecutor seeks to overcome in others by means of punishment; (2) the persecutor is aware, or could become aware, that the applicant possesses that belief or characteristic; (3) the persecutor has the ability to punish the applicant; and (4) the persecutor has the inclination to punish the applicant.[19]

An applicant need not prove that s/he would be singled out individually for persecution, as long as the applicant can establish a pattern or practice of persecution toward a group of persons similarly situated to the applicant.[20] To demonstrate this, the applicant must present evidence of systematic persecution toward that group and that the persecutors target the group specifically on account of one of the five protected grounds.

ii. *Reasonable Relocation*

In order to prove a "well-founded fear," an applicant must be unwilling or unable to return to his or her country of origin.[21] The fear of returning must extend to the entire country,

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[14] *See, e.g.*, *M.A. v. INS*, 899 F.2d 304, 307 (4th Cir. 1990).
[15] *See Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).
[16] *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985).
[17] 8 C.F.R. § 208.13(b)(2)(i)(B); *see also Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999) (applicant must demonstrate that a "reasonable person in like circumstances would fear persecution").
[18] *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)).
[19] *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).
[20] 8 C.F.R. § 208.13(b)(2)(iii); *see also Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999).
[21] 8 C.F.R. § 208.13(b)(2)(ii) ("An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so.").

not just to a particular location. Generally, the applicant bears the burden of establishing that it would be unreasonable to relocate within his or her country of origin.[22] However, where the applicant has proven that s/he suffered past persecution, or that the government is conducting the persecution or sponsoring the persecutor, internal relocation is presumed unreasonable unless the government establishes by a preponderance of the evidence that relocation is reasonable.[23]

The availability of reasonable relocation is determined on a case-by-case basis. Thus, while there is no presumption that reasonable relocation is unavailable to children, the particular vulnerability of children is taken into account when determining whether internal relocation is reasonable.[24] This issue frequently arises in asylum claims stemming from gang-related activities in Central America, where gangs typically focus their recruitment efforts on young people who are poor, homeless, or from marginalized segments of society.[25] The UN High Commissioner for Refugees ("UNHCR") Guidance Note on Refugee Claims Relating to Victims of Organized Gangs explains:

> Experiences of individuals fleeing gang violence often reveal that the victim may have sought protection internally within his/her country or relocated in the region, in order to escape the gangs. Such attempts have often been unsuccessful as gangs can locate the individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members. Young people, without adult support, are likely to face even more difficulties relocating without their family's assistance.[26]

B. "Of Persecution"

i. *Persecution Generally*

The second element of an asylum claim is persecution, which the BIA has defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive,"[27] including "the infliction of harm or suffering . . . to overcome a characteristic of the victim."[28] Although an applicant need not prove permanent or serious

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[22] *Id.*
[23] *Id.*
[24] *See* UN High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* at 21 (Mar. 2010), *available at* http://www.unhcr.org/refworld/docid/4bb21fa02.html [hereinafter UNHCR *Guidance Note on Gangs*]. For a discussion of the likelihood of abandoned children relocating, *see* Washington Office on Latin America, *Central American Gang-Related Asylum Guide* (May 2008). *See also Matter of* ---, AILA InfoNet Doc. No. 12091953 (June 21, 2012) (Arlington, VA) (Schmidt, IJ) (reasonable relocation was not an option where child stayed at home with her mother, and her mother assisted her in moving twice, but gangs followed her).
[25] UNHCR *Guidance Note on Gangs*, *supra* note 24, at 7.
[26] *See id* at 19.
[27] *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).
[28] *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996). *But see Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

injuries,[29] mere harassment is insufficient.[30] In making determinations about whether a series of events constitutes persecution, courts consider the cumulative effects of the actions, rather than the severity of each isolated incident.[31]

The BIA has recognized that persecution need not be physical for the purposes of an asylum claim. For example, economic deprivation may rise to the level of persecution where the deprivation is severe enough to "constitute a threat to an individual's life or freedom."[32] Other forms of persecution that courts have recognized include: threats without physical harm,[33] forced abortion or sterilization,[34] custodial interrogation,[35] forced medical examination,[36] persecution arising from emotional trauma,[37] and stripping of an applicant's citizenship.[38]

Some forms of harm that do not necessarily qualify as persecution for adults may nonetheless constitute persecution for a child. Immigration and Naturalization Services ("INS") and U.S. Citizenship and Immigration Services ("USCIS") both issued guidelines on adjudicating children's asylum claims which state that factors such as a child's age and mental development should be taken into account when determining whether a particular form of harm qualifies as persecution.[39] Similarly, the UN Committee on the Rights of the Child notes that the particular vulnerabilities of the child should be considered, including the child's "health, physical, psycho-social, material and other protection needs."[40] For child applicants, the

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[29] *See, e.g.*, *Crespin-Valladares v. Holder*, 632 F.3d 117, 126-27 (4th Cir. 2011) (targeted death threats constitute persecution); *Matter of O-Z- and I-Z-*, 22 I. & N. Dec. 23, 25-26 (B.I.A. 1998) (persecution "encompasses a variety of forms of adverse treatment, including non-threatening violence and physical abuse or non-physical forms of harm").

[30] *See, e.g.*, *Ivanishvili v. Gonzales*, 433 F.3d 332, 340 (2nd Cir. 2006); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998); *Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991); *Matter of A-E-M-*, 21 I. & N. Dec. 1157, 1159 (B.I.A. 1998).

[31] *See Baharon v. Holder*, 588 F.3d 228 (4th Cir. 2009) (reversing BIA's denial of asylum where it focused on the violence suffered by the applicant in jail without considering the effect of violence to his family).

[32] *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985); *see also Li v. Gonzales*, 405 F.3d 171 (4th Cir. 2005); *Matter of T-Z-*, 24 I. & N. Dec. 163 (B.I.A. 2007).

[33] *See Baballah v. Ashcroft*, 367 F.3d 1067, 1074 (9th Cir. 2004).

[34] *See Wang v. Ashcroft*, 341 F.3d 1015, 1020 (9th Cir. 2003); *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003).

[35] *See Baba v. Holder*, 569 F.3d 79, 84-86 (2d Cir. 2009).

[36] *See Li v. Ashcroft*, 356 F.3d 1153, 1158-59 (9th Cir. 2004) (en banc).

[37] *See Abay v. Ashcroft*, 368 F.3d 634, 640-42 (6th Cir. 2004).

[38] *See Haile v. Gonzales*, 421 F.3d 493, 495-96 (7th Cir. 2005).

[39] Jeff Weiss, INS Memorandum, *Guidelines for Children's Asylum Claims* at 18-19 (Dec. 10, 1998), *available at* http://cgrs.uchastings.edu/documents/legal/gender_guidelines/DHS_INS_children_guidelines.pdf; USCIS Asylum Officer Basic Training Course, *Guidelines for Children's Asylum Claims* at 36-37 (Sept. 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf; *see also* Joseph E. Langlois, USCIS Asylum Division, *Updated Procedures for Minor Principal Applicant Claims, Including Charges to RAPS* (Aug. 14, 2007), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/procedures-minor-children-raps.pdf (advocates should emphasize factors such as age, vulnerability, and developmental level in cases where the harm may not rise to the level of persecution for adults).

[40] UN Committee on the Rights of the Child, General Comment No. 6, *Treatment of Unaccompanied and Separate Children Outside Their Country of Origin* at 11 (June 2005), *available at* http://www2.ohchr.org/english/bodies/crc//GC6.pdf (providing guidance on the protection, care, and proper treatment of unaccompanied and separated children based on the Convention on the Rights of the Child).

persecution of family members is also particularly relevant in determining whether a child has a well-founded fear.[41]

ii. *Past Persecution*

An applicant who establishes past persecution creates a rebuttable presumption that s/he has a well-founded fear of future persecution.[42] Once the presumption has been established, the government bears the burden of rebuttal[43] and must establish by a preponderance of the evidence that: (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in his or her country of nationality;[44] or (2) the applicant could avoid future persecution by relocating to another part of his or her country of nationality.[45] However, courts have held that if the past persecution is "permanent and continuing," the presumption cannot be rebutted.[46]

Even if the government rebuts the presumption of an applicant's well-founded fear, the applicant may still receive a discretionary grant of asylum. An applicant may be granted "humanitarian asylum" by demonstrating that: (1) there are compelling reasons for being unwilling to return to the country of origin, or (2) there is a reasonable possibility that the applicant may suffer other serious harm upon removal to his or her home country.[47] The Fourth Circuit has recognized severe past persecution as a compelling reason to grant humanitarian asylum.[48] The Department of Justice has considered "other serious harm" to include harm that is not inflicted on account of a protected ground but is nonetheless "so serious that it equals the severity of persecution."[49]

C. "On Account Of" (Nexus)

The third element of asylum requires an applicant to show that the persecution is "on account of" a protected ground. Although an applicant need not prove the persecutor's subjective intent, s/he must "provide *some* evidence of it, direct or circumstantial."[50] In "mixed motive" cases where an applicant is persecuted for more than one reason, the REAL ID Act of

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[41] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶ 43 (Jan. 1992) (applicant need not show a threat of persecution based on personal experience, as evidence concerning relatives may support the conclusion that fear is well-founded).
[42] 8 C.F.R. § 208.13(b)(1)(i).
[43] *Id.* § 208.13(b)(1)(ii); *see also Naizgi v. Gonzales*, 455 F.3d 484, 488-89 (4th Cir. 2006); *Gonahasa v. INS*, 181 F.3d 538, 542 (4th Cir. 1999) (Department of State reports are "highly probative" and in most cases will provide substantial evidence to rebut presumption).
[44] 8 C.F.R. § 208.13(b)(1)(i); *see also Gonahasa*, 181 F.3d at 542.
[45] 8 C.F.R. § 208.13(b)(1)(i); *see also Essohou v. Gonzales*, 471 F.3d 518, 522-23 (4th Cir. 2006) (where the government fails to demonstrate that the applicant can be relocated or that relocation is reasonable under the circumstances, the IJ's decision denying asylum must be reversed).
[46] *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (B.I.A. 2003).
[47] 8 C.F.R. § 208.13(b)(1)(iii)(A)-(B).
[48] *See Niang v. Gonzales*, 492 F.3d 505, 514 n.13 (4th Cir. 2007) (humanitarian asylum may be an option for woman facing "Sophie's choice" scenario).
[49] *See Dieng v. Mukasey*, 284 F. App'x 2, 9 n.5 (4th Cir. 2008) (citing 65 Fed. Reg. 76,121, 76,127 (2000)).
[50] *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (emphasis in original).

2005 requires that the protected ground be "at least one central reason" for the persecution."[51] The Fourth Circuit and BIA have interpreted this provision to mean that the protected ground "cannot be incidental, tangential, superficial, or subordinate to another reason for harm."[52] The protected ground therefore need not be "*the* central reason or even a dominant central reason for the persecution."[53]

D. Protected Grounds

The fourth element of asylum requires a showing that the persecution is based on at least one of five protected grounds enumerated in the INA: race, religion, nationality, membership in a particular social group, or political opinion. This element can be satisfied by showing that the persecution was based on a characteristic that the persecutor imputed or attributed to the applicant, even if the applicant did not actually possess that characteristic.[54]

i. *Race*

Race has been broadly defined to include "all kinds of ethnic groups that are referred to as 'races' in common usage,"[55] including tribes and indigenous groups.

ii. *Nationality*

Nationality has been defined to include citizenship or membership in an ethnic or linguistic group, and frequently overlaps with race.[56]

iii. *Religion*

In 1998, Congress passed the International Religious Freedom Act to invoke an understanding of religion based on international instruments. Defining "religion" to include an individual's thought, conscience, and belief allows for a broad interpretation of this protected ground.[57] Persecution on the basis of religion may arise in a variety of forms, such as prohibiting membership in a religious community, forbidding religious worship or education, or

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[51] INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added) (applies to all cases filed on or after May 11, 2005).

[52] *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (internal quotation marks omitted) (quoting *Matter of J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007)).

[53] *Id* (emphasis in original)*; see also Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 358-59 (4th Cir. 2006) (applicant beaten and raped in jail could not show the violence was on account of her political opinion); *Menghesha v. Gonzales*, 450 F.3d 142, 147-49 (4th Cir. 2006) (where individual was prosecuted for obstruction of justice while serving as a government security officer, IJ's failure to inquire into other motives for prosecution was reversible error).

[54] USCIS Asylum Officer Basic Training Course, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* at 15 (Mar. 12, 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/%20& %20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf.

[55] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶ 68 (Jan. 1992).

[56] *Id.* at ¶ 74.

[57] USCIS Asylum Officer Basic Training Course, *The International Religious Freedom Act (IRFA) and Religious Persecution Claims* at 11 (Mar. 12, 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/%20& %20Asylum/Asylum/AOBTC%20Lesson%20Plans/Intl-Religious-Freedom-Act-31aug10.pdf (citing International Religious Freedom Act of 1998, Pub. L. No. 105-292, 11 Stat. 2787 (codified at 22 U.S.C. §§ 6401-6481)).

discriminating based on practice or membership in a religious organization.[58] The Fourth Circuit has provided little guidance on this ground, but other circuits have generally held that having to cease practicing one's desired religion in order to avoid harm constitutes persecution.[59] Although adjudicators might closely examine an applicant's knowledge of the religion in question, some courts have found that denial of relief based on an applicant's perceived lack of doctrinal knowledge constitutes reversible error.[60] While there is some overlap with persecution based on political opinion, courts have recognized persecution based on imputed religious views.[61]

iv. *Membership in a Particular Social Group*

The BIA has identified three required elements to defining a particular social group:

- Immutability: In *Matter of Acosta*, the Board held that members of a particular social group must possess a "common, immutable characteristic," which may be "an innate one such as sex, color, kinship ties" or, in some circumstances, "a shared past experience, such as former military leadership or land ownership."[62] The characteristic must be one that members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[63]

- Particularity: Any proposed social group must also have "particular and well-defined boundaries" such that it "can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[64]

- Social visibility: Lastly, a particular social group must "possess a recognized level of social visibility."[65] For a group to be socially visible, the "shared characteristics of the group should generally be recognizable by others in the community."[66]

Courts have varied in their adoption of the BIA's definition. Some require all three elements to be met, while others focus on the *Acosta* definition.

The Fourth Circuit Court of Appeals has endorsed the immutability and particularity requirements, but has not yet explicitly ruled on whether the social visibility requirement is a

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[58] *Id.* at ¶ 72.
[59] *See, e.g.*, *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1353-55 (11th Cir. 2009); *Edu v. Holder*, 624 F.3d 1137, 1143-47 (9th Cir. 2010).
[60] *See Jiang v. Gonzales*, 485 F.3d 992, 995 (7th Cir. 2007); *Mezvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1295-97 (11th Cir. 2006).
[61] *Mezvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1296 (11th Cir. 2006).
[62] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
[63] *Id.* (membership in a taxi collective is not "membership in a social group" because the individual is free to leave the group).
[64] *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582, 584 (B.I.A. 2008).
[65] *Id.* at 582.
[66] *Id.* at 586. This prong is focused on the existence and visibility of a group within that society, rather than with "statistical or actuarial groups, or with artificial group definitions." *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (finding that individuals resisting gang membership lack social visibility).

reasonable interpretation of the INA.[67] The court has, however, considered the social visibility requirement with regard to particular cases. In a recent Fourth Circuit decision, *Temu v. Holder*, the court clarified that social visibility does not mean ocular (or on-sight) visibility, but rather, "a group can qualify as a social group even if one cannot identify members of the group by sight."[68] The court further found that social visibility does not require "20/20 visibility," explaining that although persecutors may be overbroad in assigning a label to individuals, it does not follow that social visibility is lacking.[69] The court used as an example an anti-Semitic government that – in an attempt to massacre its Jewish citizens – kills all individuals with Jewish surnames, Jews and non-Jews alike.[70] The court reasoned that although Jews and non-Jews are both murdered, this does not contradict the fact that Jews possess social visibility as a group.[71]

The Fourth Circuit has further specified that a particular social group cannot "be defined exclusively by the fact that its members have been targeted for persecution."[72] Although jurisdictions vary in their interpretation of this protected ground, some particular social groups have been recognized in multiple jurisdictions, including clan membership,[73] sexual orientation,[74] and HIV/AIDS status.[75]

v. *Political Opinion*

Showing persecution on the basis of political opinion requires that the applicant maintain an active specific opinion or belief.[76] This category extends beyond electoral or formal political ideology or behavior and has been defined to include "opinions not tolerated by the authorities, which are critical of their policies or methods."[77] However, the BIA has rejected the notion that neutrality constitutes political opinion.[78] In assessing political opinion claims, courts take into account the political context of an applicant's country of origin.[79] Furthermore, imputed political opinion – that is, an opinion the persecutor believes the applicant to have – has been recognized as a basis for asylum, regardless of the applicant's actual political opinion.[80]

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[67] *Martinez v. Holder*, No. 12-2424, at 15 (4th Cir. Jan. 23, 2014); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 124-27 (4th Cir. 2011); *Zelaya v. Holder*, 668 F.3d 159, 165-66 (4th Cir. 2012).
[68] *Temu v. Holder*, No. 13-1192, at 10 (4th Cir. Jan. 16, 2014).
[69] *Id*. at 12.
[70] *Id*. at 13.
[71] *Id*. at 14.
[72] *Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012).
[73] *See, e.g.*, *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005); *Matter of H-*, 21 I. & N. Dec. 337 (B.I.A. 1996).
[74] *See, e.g.*, *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941 (11th Cir. 2010); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1994).
[75] *See* David A. Martin, Memorandum from INS Office of the General Counsel, *Seropositivity for HIV and Relief from Deportation* (Feb. 16, 1996), *reported in* 73 INTERPRETER RELEASES 909, 909 (July 8, 1996).
[76] *See Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) ("For behavior to be political, it must be motivated by an ideal or conviction of sorts.").
[77] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶ 80 (Jan. 1992).
[78] *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985). *But see, e.g*., *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir. 1997) (showing neutrality may constitute political opinion in some environments).
[79] *See, e.g.*, *Castro v. Holder*, 597 F.3d 93, 102-06 (2d Cir. 2010).
[80] *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

E. Government Unwilling or Unable to Protect

In addition to the elements above, an asylum applicant must further demonstrate that: (1) the government is unable or unwilling to control the persecutors; or (2) the persecution is inflicted by the government or by persons or an organization that the government is sponsoring.[81] A successful asylum claim does not require a showing that government refused to protect the applicant (based on a protected ground or otherwise)[82] or that the applicant reported the abuse to government officials or the police.[83] Courts have routinely found that Central American governments are unwilling or unable to control private actors that inflict persecution, such as organized gangs.

II. Establishing Refugee Status: Credibility and Corroboration

In assessing whether an applicant has proven the required elements of an asylum claim, an adjudicator must make a determination of the applicant's credibility by assessing the "totality of the circumstances and all relevant factors."[84] There is no presumption of an applicant's credibility as an initial matter, but the applicant has a rebuttable presumption on appeal if no adverse credibility determination has been explicitly made.[85]

The REAL ID Act of 2005 provides that further corroboration of an applicant's refugee status is not necessary where the trier of fact is satisfied that the "applicant's testimony is credible, is persuasive, and refers to specific facts to demonstrate that the applicant is a refugee."[86] However, even if the applicant is found to be credible, an immigration judge ("IJ") *may* require corroborative evidence where an applicant has not met his or her burden of proof, unless the corroboration is not readily available.[87] In determining whether the burden of proof has been met, the IJ may consider the applicant's credible testimony as well as other evidence in the record.[88]

With regard to children, developmental factors are taken into account when evaluating whether a child applicant's testimony is credible, including the child's age, maturity,

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[81] *See, e.g.*, *Aliyev v. Mukasey*, 549 F.3d 111, 118-19 (2d Cir. 2008). Note, however, that prosecution by itself is generally not considered persecution. *See Matter of Nagy*, 11 I. & N. Dec. 888 (B.I.A. 1966).
[82] *See Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 502 F.3d 285, 288-89 (3d Cir. 2007).
[83] *See Alaya v. U.S. Att'y Gen.*, 605 F.3d 941, 950 (11th Cir. 2010).
[84] The trier of fact may base credibility on "demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).
[85] *Id.*
[86] INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii); *see also* 8 C.F.R. § 208.13(a) (applicant's testimony, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, "*may* be sufficient to sustain the applicant's burden of proof without corroboration." (emphasis added)).
[87] INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) ("Where a trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.") (emphasis added).
[88] INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

psychological makeup, and ability to recall events.[89] Guidelines for asylum officers handling children's applications note that children will respond differently to interview techniques than adults, stressing that a lack of detail or discrepancy in a child's testimony does not necessarily mean the child is not credible.[90]

III. Bars to Asylum

Congress has mandated a number of statutory bars to granting asylum that may apply even if an applicant successfully proves all the required elements of an asylum claim.[91] Asylum will be denied for any of the following:

A. Persecution of Others

The definition of "refugee" bars asylee status to "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."[92] If evidence indicates the applicant participated in such an act, the applicant bears the burden of proving by a preponderance of the evidence that s/he did not.[93]

B. One-Year Time Limit (Not Applicable to UACs)

Asylum will be denied if an applicant does not file the claim within one year after his or her last arrival in the U.S.[94] An exception may be granted if the applicant can show either: (1) changed circumstances that materially affect his or her eligibility for asylum, or (2) extraordinary circumstances relating to the filing delay, such as serious illness or ineffective assistance of counsel.[95] Changed circumstances may include:

- Changes in conditions in the country of nationality;
- Changes in U.S. law;

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[89] USCIS Asylum Officer Basic Training Course, *Guidelines for Children's Asylum Claims* at 32-33 (Sept. 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf; Jeff Weiss, INS Memorandum, *Guidelines for Children's Asylum Claims* at 14-15 (Dec. 10, 1998), *available at* http://cgrs.uchastings.edu/documents/legal/gender_guidelines/DHS_INS_children_guidelines.pdf.

[90] *See generally* Weiss, *Guidelines for Children's Asylum Claims*; *see also* Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, § 235(d)(8) (discussing a UAC's specialized needs and requiring asylum officers to have specialized training to work with UACs).

[91] INA § 208(a)(2), (b)(2), 8 U.S.C. § 1158(a)(2), (b)(2).

[92] INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

[93] INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i); 8 C.F.R. § 208.13(c); *see also Matter of A-H-*, 23 I. & N. Dec. 774, 783-85 (A.G. 2005). The degree of assistance in persecution necessary to constitute persecution is a point of contention for courts. For a greater discussion of this point, *see* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 536-37 (13th ed. 2012).

[94] INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii).

[95] INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(4)-(5).

- Changes in the applicant's circumstances, including any activities outside the country of origin that place the applicant at risk of persecution; or

- Changes in the applicant's demographic status (*e.g.*, aging out, becoming divorced or widowed) that require an applicant to file his or her own asylum application.[96]

The time limit does not apply to unaccompanied alien children ("UACs") as defined under 6 U.S.C. § 279(g)(2).[97] Even if a child loses UAC status, perhaps by reunifying with a parent or legal guardian or turning 18 years old, and fails to comply with the one-year filing limit, an immigration judge may nonetheless consider the applicant's previous UAC status as being an extraordinary circumstance.[98]

C. Prior Denial of Asylum

If an applicant previously applied for and was denied asylum by an IJ or the BIA, further applications will be denied unless changed circumstances exist that materially affect the applicant's eligibility.[99] However, for unaccompanied minors applying for asylum, the asylum office (an agency within USCIS) has initial jurisdiction to adjudicate these cases. If the asylum office finds that the UAC does not meet the eligibility requirements for asylum, the asylum office will nevertheless refer the case for adjudication before an immigration judge, and the child will have the opportunity to present his or her case again.[100] In this case, a referral to the immigration court is not a denial of the asylum application.

D. Serious Crimes

A claim for asylum will also be barred based on a finding that the applicant:

- Committed a serious, non-political crime outside the U.S.;[101]

- Was convicted of a "particularly serious crime," such as an aggravated felony;[102]

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[96] 8 C.F.R. § 208.4(a)(4)(i).

[97] INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E). The exception for UACs was created by TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, § 235(d)(7)(A); *see also* USCIS Q&A, *USCIS Initiates Procedures for Unaccompanied Minors Seeking Asylum* (Mar. 25, 2009), *available at* http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf.

[98] 8 C.F.R. § 208.4(a)(5) (extraordinary circumstances may include legal disability during the 1-year period after arrival, where, for example, "the applicant was an unaccompanied minor or suffered from a mental impairment"); *see also Matter of Y-C-*, 23 I. & N. Dec. 286 (B.I.A. 2002) (extraordinary circumstances existed where minor was in INS custody for more than 1 year after his arrival and sought to file an application 5.5 months after release to his uncle's custody).

[99] INA § 208(a)(2)(C)-(D), 8 U.S.C. § 1158(a)(2)(C)-(D); 8 C.F.R. § 208.4(a)(3).

[100] 8 C.F.R. § 1208.14.

[101] INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i).

[102] INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii); *see also Matter of N-A-M-*, 24 I. & N. Dec. 336, 342-43 (B.I.A. 2007) (focusing on "the nature of the crime, and not the likelihood of future serious misconduct"); *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (criteria for determining if the crime is particularly serious include: (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of

- Poses a danger to U.S. security;[103] or

- Engaged in, or is likely to engage in, terrorist activity, including providing material support to a terrorist organization.[104]

Note that juvenile delinquency findings are not considered "convictions" under section 101(a)(48)(A) of the INA.[105]

E. Safe Third Country (Not Applicable to UACs)

If an applicant may be removed, pursuant to a bilateral or multilateral agreement, to a safe third country in which the person's life or freedom would not be threatened and where s/he would have access to a full and fair asylum procedure, asylum will be denied unless the Attorney General ("AG") or other Department of Homeland Security ("DHS") officials find it in the public interest to grant asylum.[106] Like the one-year time limit, this bar to asylum does not apply to UACs.[107]

F. Firm Resettlement

Asylum will also be denied if the applicant was firmly resettled in another country prior to arriving in the U.S.[108] The applicant will be deemed "firmly resettled" if s/he received from that country "an offer of resident status, citizenship, or some other type of permanent resettlement status."[109] The applicant will not be considered firmly resettled if s/he can establish that: (1) gaining the status was a necessary consequence of flight from persecution, the applicant remained in that country only as long as necessary to make further travel arrangements, and the applicant did not establish additional ties to that country; or (2) conditions of residence in the country were "so substantially and consciously restricted" by the country that the applicant was not actually resettled.[110]

Many unaccompanied minors from Central American countries travel by land and must cross through other countries, including Mexico. It is common for unaccompanied minors to leave home with very little, having to stay for months at a time in another country to work and

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sentence imposed; and (4) whether the type and circumstances of the crime indicate that the respondent is a danger to the community).

[103] INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv); s*ee also Matter of A-H-*, 23 I. & N. Dec. 774, 787 (A.G. 2005) (level of danger need not be serious, significant or grave and therefore any non-trivial level of danger to the nation's defense, foreign relations or economic interests is sufficient to trigger the provision).

[104] INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v).

[105] *Matter of Devison*, 22 I. & N. Dec. 1362 (B.I.A. 2000). For a discussion on juvenile delinquency findings with respect to immigration relief, please consult Immigration Legal Resource Center, Practice Advisory, *Legal and Ethical Considerations in Disclosure of Delinquent Conduct* (Mar. 2010).

[106] INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A).

[107] TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, § 235(d)(7)(A); INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E).

[108] *See* INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi).

[109] 8 C.F.R. § 208.15.

[110] *Id*. Some circuits have found that once firm resettlement is established, the bar remains even if that country will no longer accept the applicant because of expired travel documents. *See, e.g*., *Sultani v. Gonzales*, 455 F.3d 878, 883-84 (8th Cir. 2006); *Vang v. INS*, 146 F.3d 1114, 1117 (9th Cir. 1998). Note that the firm resettlement bar is not applicable to a person who settled in a third country but has a well-founded fear of remaining in that country.

earn money to come to the U.S. This can give the appearance of having settled in another country prior to coming to the U.S. In these cases, a child should be sure to convey to the adjudicator that s/he was never granted any lawful status and had no desire or intent to resettle in another country. Firm resettlement can also be negated by showing minimal or no ties to the country, such as a lack of family or property.

In *Matter of A-G-G-*, the BIA set forth a framework for evaluating whether an applicant was firmly resettled prior to arriving in the U.S.:[111]

- Direct evidence by DHS: DHS bears the burden of presenting *prima facie* evidence of an offer of firm resettlement. DHS "should first secure and produce direct evidence of governmental documents indicating an alien's ability to stay in a country indefinitely," such as evidence of refugee status, a passport, or travel documents.

- Indirect evidence by DHS: If DHS cannot produce direct evidence, it may rely on indirect evidence having "a sufficient level of clarity and force" to establish permanent residence. This may include evidence of the country's immigration laws or refugee process; the applicant's length of stay in the country or intent to settle; and/or the applicant's family, business, property, and other social and economic ties to the country.

- Applicant's burden: If DHS establishes a *prima facie* case, the applicant must demonstrate, by a preponderance of the evidence, that an offer of resettlement has not been made or that s/he would not qualify for it. The applicant's refusal to accept an offer of firm resettlement or failure to renew permanent residence bars a grant of asylum.

- IJ's decision: The IJ must consider the totality of the evidence and determine whether the applicant has rebutted DHS's evidence.

G. Discretionary Denial

In addition to the mandatory grounds for denial, asylum may be denied as a matter of discretion. The INA provides that an alien *may* be granted asylum at the discretion of the Attorney General, placing the burden on the applicant to demonstrate that his or her claims warrant a favorable exercise of that discretion.[112] Courts have stated that the decision should be based upon the totality of the circumstances, but they have noted that the denial of asylum on discretionary grounds is "exceedingly rare" and requires "egregious negative activity" by an otherwise qualified applicant.[113] The Fourth Circuit has suggested the following positive and negative criteria a court might consider:[114]

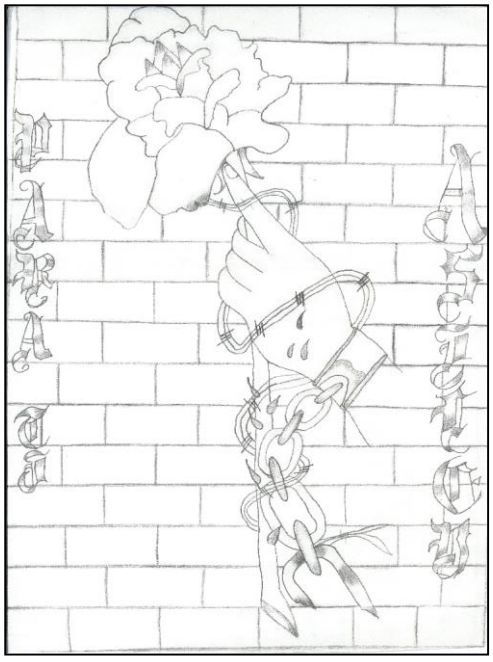
[111] *Matter of A-G-G-*, 25 I. & N. Dec. 486 (B.I.A. 2011).
[112] INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).
[113] *Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987); *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008).
[114] *See Zuh*, 547 F.3d at 511.

Positive Factors	Negative Factors
• Family, business, community, and employment ties to the U.S. and length of residence and property ownership • Evidence of hardship if deported, particularly lack of family reunification • Evidence of community service and rehabilitation • General humanitarian factors (*e.g.*, applicant's age or health) • Other relief granted (*e.g.*, withholding of removal or CAT)	• Nature and underlying circumstances of exclusion ground • Significant violations of immigration laws • Criminal record and the severity and recency of the record, including recidivism • Lack of candor with immigration officials, including adverse credibility finding • Other evidence of bad character or undesirability as a resident

Keeping this in mind, a child's declaration can be the most powerful way to document discretionary grounds for asylum. Consider including discretionary points in a child's declaration to leave the adjudicator with a positive impression. For a sample declaration, *see infra* p. 55. Minors should be encouraged to include a discussion of their future goals in the U.S., such as wanting to graduate high school, join the military, or become a teacher, and wanting to be successful and have a family. Many minors also claim their lives have improved since coming to the U.S. or being in detention if they have received social services and clinical treatment for any victimization suffered.

"I am going to get an education, because no one can take that away from me."

– 17-year-old at Youth for Tomorrow



Further, many minors will suffer extreme hardship if deported because of their particular vulnerability due to young age, lack of familial and economic support, and lack of education. Some children may be very creative and may want to include artwork in their application that show their talent and potential, while also documenting their sentiments.

– 17-year-old Guatemalan, drawing his conflicting sentiments regarding detention

GANG-BASED ASYLUM CLAIMS

I. Opposition to Gangs or Resistance to Gang Recruitment

Opposition to gangs and resistance to recruitment are common reasons for an applicant to flee his or her country of origin and seek asylum in the U.S. However, succeeding on these claims under current asylum law is challenging. These claims are generally brought under one of two protected grounds: (1) political opinion or (2) membership in a particular social group.

A. Opposition to Gangs as Political Opinion

Refusal or resistance to joining a gang could be construed as an expression of a political opinion, *e.g.*, belief in the rule of law, opposition to gangs' violation of human rights, or opposition to the government's policy on gangs.[115] However, courts have been reluctant to embrace this interpretation. Succeeding on this claim requires showing that: (1) the applicant has a political opinion or one imputed to him or her, and (2) the gang targeted the applicant on account of that opinion. Even where courts have found that applicants clearly expressed anti-gang sentiments, such claims have generally been unsuccessful because applicants failed to establish the requisite nexus between their opposition to the gang and the harm suffered.

In *INS v. Elias-Zacarias*, the Supreme Court held that a guerilla organization's attempt to coerce the respondent into performing military service did not necessarily constitute persecution on account of the respondent's political beliefs.[116] If anything, the recruitment was on account of the persecutor's political opinion, rather than the victim's. The court found that "the mere existence of a generalized 'political' motive underlying the guerillas' forced recruitment is

[115] For further discussion of this point, as well as a range of helpful analysis, practice suggestions, and discussion of relevant cases (on this point and other gang-related claims), *see* Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS 1 (Oct. 2012). For an older but still helpful overview and additional practice tips, *see also* Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008).
[116] *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

inadequate to establish . . . that Elias-Zacarias fears persecution *on account of* political opinion."[117]

This decision is an obstacle to using forced recruitment as a basis for asylum, but it should not necessarily be read as foreclosing such claims. In *Martinez-Buendia v. Holder*, the Seventh Circuit found that the petitioner's resistance to the FARC guerillas in Colombia, and their subsequent harassment of her, was on account of her political opinion.[118] The Court concluded that *Elias-Zacarias* "does not stand for the proposition that attempted recruitment by a guerilla group will never constitute persecution on account of the asylum-seeker's political beliefs," as it appears some courts have believed.[119] Rather, *Elias-Zacarias* merely instructed courts to "carefully consider the factual record of each case" and "[did] not draw a bright-line rule one way or the other."[120]

The BIA and several other federal circuits, however, have routinely denied political opinion claims for either failure to establish a political opinion or failure to demonstrate a sufficient nexus:

- In *Matter of S-E-G-*, a group of young men from El Salvador claimed that MS-13 was targeting them based in part on their anti-gang political opinion.[121] Applying the Supreme Court's analysis in *Elias-Zacarias*, the BIA held that the men's resistance to gang recruitment did not rise to the level of a political opinion. The Board found no evidence that the respondents "were politically active or made any anti-gang political statements" or "that the MS-13 gang members . . . had any motives other than increasing the size and influence of their gang."[122]

- In *Matter of E-A-G-*, the BIA again found that refusal to join a gang, without more, does not constitute a political opinion.[123] Specifically, the fact that *gangs* in Honduras are "against the government" was irrelevant to determining the *victim's* political opinion.[124]

- In *Marroquin-Ochoma v. Holder*, the Eighth Circuit denied asylum to a woman from Guatemala who was threatened for refusing to join MS-13 and for refusing to give the gang money from her job in the payroll department of a large export company.[125] The court found there was insufficient evidence to conclude that the gang was targeting Marroquin-Ochoma based on her political opinion, but it held open the possibility that there could be circumstances in which recruitment or extortion could be on account of political opinion.[126]

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[117] *Id.* at 482 (emphasis in original).
[118] *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010).
[119] *Id.* at 716.
[120] *Id.*
[121] *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008).
[122] *Id.* at 589.
[123] *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008).
[124] *Id.* at 597.
[125] *Marroquin-Ochoma v. Holder*, 574 F.3d 574 (8th Cir. 2009).
[126] *Id.* at 577-79.

- In *Barrios v. Holder*, the Ninth Circuit similarly found that the respondent failed to present evidence that he was politically or ideologically opposed to the gang that recruited him or that the gang imputed to him any particular political belief.[127]

- In *Rivera-Barrientos v. Holder,* the Tenth Circuit found that MS-13's continued harassment of the petitioner was unrelated to her political opinion. Despite petitioner's claim that she repeatedly told the gang, "I do not believe in what you do," the court found there was not enough evidence that her anti-gang sentiments were a central reason for her persecution.[128]

- The Fourth Circuit has not issued any binding decisions on whether opposition to gangs can qualify as a political opinion for the purposes of an asylum claim. In one unpublished opinion from 2011, the court found that a father and his children, citizens of El Salvador, were not targeted for extortion by gangs based on their political opinion. In denying their claims, the court pointed to their failure to show that the gangs targeted them "for any reason other than the gangs' desires to increase their own coffers."[129]

In light of these decisions, an unaccompanied minor who is alleging persecution based on his or her political opinion of opposing gangs should include as much evidence as possible to show that the gang was aware of the child's political opinion. Evidence of a child's anti-gang activities – such as participating in anti-gang organizations, cooperating with authorities against gangs, or a child's family's history of opposing gangs – are compelling facts that show the child was projecting a political opinion of which the gang was aware. To prove a nexus linking the persecution to the child's political opinion, a child should also include any oral or written statements by gang members which reference the child's anti-gang sentiments.

B. Resistance to Gang Recruitment as Particular Social Group

Some applicants have also argued that they are part of a particular social group as a result of their opposition to gang recruitment or extortion. As with political opinion claims, courts have been reluctant to embrace this line of reasoning. In the wake of the BIA's decision in *Matter of S-E-G-*, these cases often turn on the applicant's failure to meet the particularity and social visibility requirements of the particular social group test. Bringing a claim under this argument requires close attention to the facts of earlier cases and an ability to distinguish the applicant from the population at large and other "amorphous" groups.[130]

While the Supreme Court has not ruled on this issue, the Fourth Circuit has historically rejected social group claims of this nature:

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[127] *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *see also Santos-Lemus v. Mukasey*, 542 F.3d 738, 946-47 (9th. Cir. 2008) (suggesting resistance to gang recruitment does not establish imputed political opinion).
[128] *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012).
[129] *Contreras v. Holder*, 419 F. App'x 431, 433 (4th Cir. 2011).
[130] *See D.M. v. Holder*, 396 F. App'x 12, 14 (4th Cir. 2010) (petitioners failed to show they were "at a greater risk of being victims of violent acts at the hands of criminal gangs than any other member of the general population of El Salvador"); *Rivas-Rodriguez v. Holder*, 355 F. App'x 740, 742 (4th Cir. 2009) (finding gangs in San Salvador were indiscriminate in who they targeted).

- In *Lizama v. Holder*, the court held that "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" did not constitute a particular social group.[131] These were all "amorphous characteristics that neither 'provide an adequate benchmark for determining group membership' . . . nor embody concrete traits that would readily identify a person as possessing those characteristics."[132] In support of this proposition, the court cited *Matter of S-E-G-* and *Matter of A-M-E & J-G-U-*, which held that "affluent Guatemalans" did not constitute a particular social group.[133]

- Similarly, in *Zelaya v. Holder*, the Fourth Circuit held that "young Honduran males who refuse to join MS-13, have notified the authorities of MS-13's harassment tactics, and have an identifiable tormentor within MS-13 do not qualify as a 'particular social group.'"[134] The court found Zelaya's proposed group to be especially weak on particularity, noting that "opposition to gangs is an amorphous characteristic providing neither an adequate benchmark for determining group membership nor embodying a concrete trait . . . Resisting gang recruitment is similarly amorphous."[135]

Like the Fourth Circuit, the BIA and other federal circuits have found that resistance to recruitment lacks both the particularity and social visibility required of a particular social group:

- The most relevant BIA case on point, widely cited by circuit courts, is (again) *Matter of S-E-G*.[136] In addition to the political opinion argument discussed above, the respondents in that case claimed membership in the particular social group of "Salvadoran youths who have resisted gang recruitment." The court found the proposed group lacked particularity because it encompassed a "potentially large and diffuse segment of society" and lacked social visibility because it was not perceived as a group by society or more likely to be targeted than the general population.[137] Because gangs "directed harm at anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power," the respondents were "not in a substantially different situation from anyone who has crossed the gang, or is perceived to be a threat to the gang's interests."[138]

- In *Larios v. Holder*, the First Circuit rejected the proposed social group of "young Guatemalan men recruited by gang members who resist such recruitment," finding that the proposed group lacked social visibility and particularity.[139] Similarly, the court in *Mendez-Barrera v. Holder* held that "young [El Salvadoran] women recruited

[131] *Lizama v. Holder*, 629 F.3d 440 (4th Cir. 2011).
[132] *Id.* at 447 (internal citations omitted).
[133] *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (B.I.A. 2007).
[134] *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012).
[135] *Id.* at 166 (citing *Lizama*, 629 F.3d at 447).
[136] *Matter of S-E-G*, 24 I. & N. Dec. 579 (B.I.A. 2008).
[137] *Id.* at 587-88.
[138] *Id.* at 587.
[139] *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010).

by gang members who resist such recruitment" also failed to meet the social visibility and particularity requirements.[140]

- In *Orellana-Monson v. Holder*, the Fifth Circuit held that "Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to a principled opposition to gangs" did not constitute a particular social group.[141] According to the court, the group lacked particularity because it was "exceedingly broad and encompasse[d] a diverse cross section of society."[142] Further, the group lacked social visibility because "there is little evidence that people who are recruited to join gangs but refused to do so would be 'perceived as a group' by society."[143]

- In *Ramos-Lopez v. Holder* and *Barrios v. Holder*, the Ninth Circuit granted *Chevron* deference to the BIA's determination in *Matter of S-E-G* (see above) that young men who have been recruited by gangs but refuse to join lack particularity and social visibility as a group, finding that the BIA's interpretation was reasonable.[144]

Note that two recent cases provide some promise for particular social group claims related to gang opposition:

- Though it ultimately rejected the claim on the issue of social visibility, the Tenth Circuit in *Rivera-Barrientos v. Holder* held that "El Salvadoran women between the ages of 12 and 25 who have resisted gang recruitment" satisfied the particularity requirement, because "a discrete class of young persons sharing the past experience of having resisted gang recruitment can be a particularly defined trait."[145]

- In an unpublished decision, an immigration judge in Arlington, VA found that "juvenile Honduran males who resist gang recruitment and are forced to participate in a peripheral manner in gang activities, yet never join the gang and continue to actively resist gang membership" met the requirements of a particular social group, even under *S-E-G-* criteria.[146] In granting asylum, the IJ emphasized that the experience of peripheral gang involvement "establishes a unifying characteristic that pulls together the respondent's otherwise diverse and disconnected social group." The IJ also found that the respondent's first-hand knowledge of Mara-18's criminal activities made his resistance "highly visible" to the gang.

[140] *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010).
[141] *Orellana-Monson v. Holder*, 685 F.3d 511, 521-22 (5th Cir. 2012).
[142] *Id.* at 521.
[143] *Id.* at 522.
[144] *Ramos-Lopez v. Holder*, 563 F.3d 855, 861 (9th Cir. 2009); *Barrios v. Holder*, 581 F.3d 849, 855-56 (9th Cir. 2009).
[145] *Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012).
[146] *Matter of* --- (Aug. 4, 2009) (Arlington, VA) (Hladylowycz, IJ). Note that the IJ rejected the claim that the applicant was persecuted on account of his political opinion.

II. Family-Based Claims

As illustrated above, the BIA and federal courts have repeatedly rejected the notion that gang victims persecuted simply for refusing recruitment constitute a "particular social group" for the purposes of an asylum claim.[147] Recently, however, a significant Fourth Circuit decision found that family members of those who oppose gangs may qualify as a particular social group under the INA.[148]

A. Background of *Crespin*

Crespin and his uncle cooperated with the Salvadoran police following the murder of Crespin's cousin by MS-13. Gang members subsequently threatened Crespin's uncle with death, on one occasion at gunpoint. Crespin himself received written and oral death threats from his cousin's killers. Crespin sought asylum in the United States, together with his wife and children, arguing that his family comprised a particular social group.[149]

An immigration judge granted the Crespins asylum and the government appealed to the BIA. The BIA vacated on the fourfold grounds that: (1) the Crespins had not alleged membership in a recognized particular social group; (2) the Crespins had not suffered persecution, but rather mere threats and harassment; (3) Crespin's family membership had not been the real cause of his harassment (rather, according to the BIA, this was due to Crespin's own cooperation with the police); and (4) the Salvadoran government was willing and able to protect the Crespins from mistreatment.[150] The Fourth Circuit found that the BIA's first and second conclusions were manifestly contrary to law, and the third and fourth conclusions had been reached by the wrong standard of review.

B. Holding of *Crespin*

The Fourth Circuit found that the BIA had mischaracterized the Crespins' proposed particular social group. The Crespins had sought asylum as the family members of an anti-gang witness, but the BIA had characterized their proposed social group as "those who actively oppose gangs . . . by agreeing to be prosecutorial witnesses."[151] The confusion arose because Crespin was both the relative of a witness (his uncle) and a witness himself.

Applying the BIA's three-part test for particular social group, the court found that "the family provides a prototypical example of a particular social group" and therefore qualified

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[147] *See, e.g.*, *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (affirming BIA's finding that "young women recruited by gang members who resist such recruitment" did not comprise a particular social group); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584-85 (B.I.A. 2008) (holding that neither Salvadoran youths who resisted recruitment nor their families were a particular social group); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594-95 (B.I.A. 2007) (holding that neither resisters of gang membership nor perceived gang members constituted a particular social group).

[148] *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-126 (4th Cir. 2011).

[149] *Id.* at 119-121.

[150] *Id.* at 120-22, 124.

[151] *Id.* at 125.

easily under the INA.[152] First, the court noted that family membership is "paradigmatically immutable," "innate," and "unchangeable."[153] With regard to particularity, the court reasoned that family "possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."[154] Lastly, as to the social visibility requirement, the court could "conceive of few groups more readily identifiable than the family."[155] The court further pointed out that "every circuit to have considered the question has held that family ties can provide a basis for asylum."[156]

The BIA's second conclusion was also contrary to law; the court found that MS-13's harassment of Crespin was sufficient for Crespin to hold a well-founded fear of persecution.[157] The BIA's third and fourth conclusions were reached by an incorrect standard of review, and the case was remanded on these points. On the question of whether Crespin's persecution was "on account of" his own anti-gang testimony, or by his family ties with his uncle, the court observed that Crespin "need not show that his family ties provide the central reason or even a dominant central reason for his persecution";[158] rather, Crespin merely needed to show that his family ties were "more than an incidental, tangential, superficial, or subordinate reason for his persecution."[159]

C. *Zelaya v. Holder*

Following the *Crespin* decision, the Fourth Circuit again addressed the issue of family-based persecution in *Zelaya v. Holder*.[160] In that case, Zelaya fled to the United States from Honduras, where he had been persecuted by MS-13. He sought asylum as a member of a particular social group, namely "young Honduran males who refuse to join MS-13, have notified the authorities of MS-13's harassment tactics, and have an identifiable tormenter within MS-13."[161] The immigration judge and BIA denied Zelaya's applications, and the Fourth Circuit affirmed. In doing so, the Fourth Circuit unfavorably contrasted Zelaya's proposed particular social group with that in *Crespin*, finding that Zelaya's group lacked "the immutable characteristic of family bonds . . . the self-limiting feature of the family unit . . . [and] the easily recognizable innate characteristic of [the] family relationship."[162]

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[152] *Id.* at 125 (internal quotation marks omitted) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)).
[153] *Id.* at 124-125 (citing *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006); *In re H-*, 21 I. & N. Dec. 337, 342 (B.I.A. 1996); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)).
[154] *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011).
[155] *Id.* at 125-26 (citing *Sanchez-Trujillo*, 801 F.2d at 1576). *Crespin* may appear inconsistent with the BIA's ruling in *Matter of S-E-G-*, but in that case, the BIA specifically noted that the applicant was not claiming that only her particular family was being persecuted. 24 I. & N. Dec. 579, 590 n.2 (B.I.A. 2008) (observing that *all* local families were being menaced by the gang in question).
[156] *Crespin*, 632 F.3d at 125.
[157] *Id.*at 126-27 (4th Cir. 2011).
[158] *Id.* at 127.
[159] *Id.* (internal quotation marks omitted) (quoting *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009)).
[160] *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012).
[161] *Id.* at 165.
[162] *Id.* at 166.

– Yellow rose by a 16-year-old Salvadorian boy who was the last person to see his uncle alive and later found his uncle's body with his feet and hands cut off, a signature of the MS-13 gang. Because of his family's cooperation with authorities to arrest MS-13 members who murdered his uncle, MS-13 continued to verbally and physically attack the boy. A *pro bono* attorney from the Washington, D.C. office of Morgan, Lewis & Bockius LLP agreed to represent the minor in his *Crespin*-based asylum claim.

D. Families Targeted for Other Reasons

It is unclear whether *Crespin* applies only to families of prosecutorial witnesses or, more broadly, to families targeted by gangs for other reasons (such as resisting recruitment). Although *Crespin* speaks only of "family members of those who actively oppose gangs . . . by agreeing to be prosecutorial witnesses" against the gangs, the opinion offers no ground for supposing that a family targeted by gangs for other reasons would not qualify as a particular social group. *Crespin*'s discussion of immutability, particularity, and social visibility is concerned exclusively with the immutability, particularity, and social visibility of the family, and not with any factors unique to prosecutorial witnesses.[163]

Indeed, several immigration court decisions have interpreted *Crespin* to apply generally to family members of persons targeted by gangs. In one unpublished 2012 case from Arlington, the asylum-seeker and her family had been persecuted by MS-13, originally because of her brother's membership in a rival gang.[164] The immigration court noted that the MS-13's repeated death threats had been "family wide,"[165] referencing other family members whom they had killed and telling the asylum-seeker that "she was next."[166] The gang "stated that they intend[ed] to kill . . . and '[would] stop only with the last member of the family.'"[167] Citing *Crespin*, the

[163] *See Crespin*, 632 F.3d at 121-26.
[164] *Matter of* ---, AILA InfoNet Doc. No. 12091953 at *8 (June 21, 2012) (Arlington, VA) (Schmidt, IJ).
[165] *Id.* at *8.
[166] *Id.* at *5.
[167] *Id.* at *8.

immigration judge recognized the woman's "membership in a particular social group comprised of members of her family."[168] The court characterized *Crespin* as "holding that a family who was targeted for persecution by a Salvadoran gang constitutes a particular social group under the INA."[169] This suggests that *why* a gang begins to persecute a family may not be determinative of whether the family comprises a particular social group.

The Arlington asylum office has also interpreted *Crespin* to include family members of people who are not prosecutorial witnesses against a gang, or who have not publicly retaliated against a gang. In a 2013 case referred to Sidley Austin LLP by CAIR Coalition, a young Salvadoran boy was granted asylum by the Arlington asylum office on the grounds that he would be persecuted on account of his membership in a particular social group of family members who failed to meet extortion demands from gangs. The boy's father, a recent deportee from the U.S., had refused to pay an extortion fee to the gangs, which led to his murder. The boy, who had witnessed his father's murder, received death threats from the gang in the form of written notes, both before and after his father's murder. He was also threatened at gunpoint and told he was "next" because the gang connected him to his father and the unpaid extortion fee. The asylum office accepted the attorney's argument that the case mirrored *Crespin*.

In two other successful asylum claims in 2009 and 2011, the social group of the family was delineated narrowly. In a 2009 Baltimore immigration court case, the particular social group was defined as a "subset of [the asylum-seeker's] nuclear . . . family at which MS-13 directed its persecution." The court found that a social group limited to nuclear family members satisfied the social visibility and particularity requirements.[170] Similarly, in a 2011 Arlington case, the immigration court granted asylum based on the narrowly-formulated particular social group of "*immediate* relatives of Salvadoran police officers involved in anti-gang efforts."[171]

In addition, CAIR Coalition won a case before the Arlington asylum office in March 2012 for a young Honduran boy whose family had been persecuted by MS-13 after reporting a family murder to police and identifying the murderer. After the murder was reported, MS-13 retaliated by physically beating the boy after school, verbally threatening him and his mother at gun point, stalking the family, and robbing them. After the boy left Honduras and fled to the United States, MS-13 continued to verbally and physically persecute the family, kidnapping and killing the boy's uncle and raping one of his aunts. Although the asylum office's decision did not address the basis for granting asylum, CAIR Coalition filed a cover letter and supplemental documents arguing the family comprised a particular social group under *Crespin*.

III. Witnesses or Informants Against Gangs

Social group claims relating to cooperation with the government or law enforcement have enjoyed moderate success relative to other gang-based claims. Applicants have commonly claimed membership in two social groups: (1) persons who have testified as witnesses against gangs, or (2) informants who provide information to government officials about gang activity.

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[168] *Id.*
[169] *Id.*
[170] CGRS Case #8831.
[171] CGRS Case #8793 (emphasis added).

In *Zelaya v. Holder*, the Fourth Circuit held that *Crespin*'s "particular social group" did "not include the family member who agreed to be the prosecutorial witness; rather, it only included the family members of such witness."[172] However, *Zelaya*'s concurrence offers some hope for future cases involving witnesses, suggesting that *Crespin* could logically be read to include the witnesses themselves.[173] In arguing for a broader reading of *Crespin*, Judge Floyd's concurrence reasoned that "if the family members of witnesses are deemed socially visible and particular, the witnesses themselves – a more particular and socially visible and smaller class of people – must, a fortiori, meet those requirements as well."[174] According to Judge Floyd, the group in *Zelaya* lacked the required particularity not because it lacked kinship ties, but because its characteristics were "broader and more amorphous than a group consisting of individuals who have testified for the government in formal prosecutions of gangs."[175]

However, the *Zelaya* concurrence also noted that "prosecution witnesses against gangs [might] not constitute a particular social group for some reason other than particularity or social visibility,"[176] implying that such a group could fail the immutability requirement. In other words, a court could find that an applicant's identity as an anti-gang witness was malleable and/or not fundamental to the applicant's identity or conscience.[177]

While other circuits have adopted varying approaches to the question of whether witnesses or informants against gangs comprise a particular social group,[178] the BIA has ruled similarly to the Fourth Circuit. In *Matter of C-A-*, the Board held that "former noncriminal drug informants working against the Cali drug cartel" in Colombia did not meet the requirements for a particular social group because it was too broad and could potentially include many others who work against the cartels.[179] The BIA also found that, although the past act of having informed on the cartel was immutable, not all past acts can define social group membership.[180] In addition, the BIA applied a literal test for social visibility, finding that the group lacked visibility because

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[172] *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("[T]he Crespins' proposed group excludes persons who merely testify against MS-13; the Crespins' group instead encompasses only the relatives of such witnesses . . . who suffer persecution on account of their family ties.").

[173] *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).

[174] *Id.* (quoting *Henriquez-Rivas v. Holder*, 449 F. App'x 626, 632 n.5 (9th Cir. 2011) (Bea and Ripple, JJ., concurring)).

[175] *Id.*

[176] *Id.*

[177] *See Matter of Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (finding that an applicant could avoid persecution by guerrillas by either "chang[ing] his means of earning a living or cooperat[ing] with the guerrillas in order to avoid their threats").

[178] *Compare Garcia v. U.S. Att'y Gen.*, 665 F.3d 496 (3d Cir. 2011) (applying *Acosta* criteria in holding that witness who testified against gang members is part of a particular social group that shares a "'common immutable characteristic' with other civilian witnesses who have the 'shared past experience' of assisting law enforcement officials against violence gangs that threaten communities in Guatemala"), *with Henriquez-Rivas v. Holder*, 449 F. App'x 626, 627 (9th Cir. 2011) ("individuals who testified against gang members in court" did not constitute a particular social group) (citing *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978-79 (9th Cir. 2010) ("material witnesses for the government" was insufficiently particular group) and *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009) (government informants did not comprise particular social group)), *vacated pending en banc review by Henriquez-Rivas v. Holder*, 670 F.3d 1033 (9th Cir. 2012).

[179] *Matter of C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006).

[180] *Id.* at 958.

the informants were acting outside the public view.[181] The BIA further observed that the Cali and other drug cartels directed harm against any individual perceived to be interfering with their operations, and in this sense the informants in this case were no different from many others.[182]

IV. Former Gang Membership

Some applicants have sought asylum based on a particular social group defined by former gang membership (for example, where they fear retribution for leaving the gang). Former gang membership as a basis for a particular social group can be linked to *Matter of Acosta*, in which the BIA suggested that a social group could be defined by "a shared past experience such as former military leadership or land ownership."[183] The Fourth Circuit Court of Appeals recently found in *Martinez v. Holder* that former gang membership meets the immutability requirement for establishing membership in a particular social group.[184] Several other Circuit Courts of Appeal have also considered this question:

- In *Gatimi v. Holder*, the Seventh Circuit held that a former member of a violent criminal Kenyan faction, the Mungiki, was a member of a "particular social group," reasoning a gang is a group, and being a former member of such a group is immutable.[185] In *Benitez-Ramos v. Holder*, the court similarly held that former gang membership – in this case an identifiable former member of the MS-13 – could constitute a "particular social group." The Court held that MS-13 is a "specific, well-recognized, indeed notorious gang," and Ramos could not change the fact that he was a former member of that gang.[186]

- In *Urbina-Mejia v. Holder*, the Sixth Circuit followed suit, denying the claim on other grounds but holding that former gang membership may qualify as a basis for particular social group membership.[187] Significantly, however, the court held that *current* membership in a gang is not an immutable or fundamental characteristic.[188]

- In *Cantarero v. Holder*, the First Circuit granted deference to the BIA's finding that the phrase "particular social group" excludes former members of violent gangs because their inclusion would run contrary to the "manifest humanitarian purpose of the INA."[189]

Following the *Benitez-Ramos* decision, USCIS issued guidance to all asylum offices regarding the decision and advising that in cases arising "outside of the Seventh Circuit . . . the shared characteristic of terrorist, criminal or persecutory activity or association, past or present,

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[181] *Id.* at 960.
[182] *Id.*
[183] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see also* UNHCR *Guidance Note on Gangs*, *supra* note 24, at 13 ("Past association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited.").
[184] *Martinez v. Holder*, No. 12-2424, at 21 (4th Cir. Jan. 23, 2014).
[185] *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).
[186] *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (noting that Congress had not specifically barred former gang members from qualifying for asylum).
[187] *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010).
[188] *Id.* at 366.
[189] *Cantarero v. Holder*, 2013 WL 5832652 (1st Cir. 2013).

cannot form the basis of a particular social group."[190] In *Martinez*, the Fourth Circuit explicitly rejected this argument, finding that previous participation in "antisocial or criminal conduct" does not bar eligibility for fear-based relief unless it falls within one of the bars to relief separately defined by the INA, such as commission of a particularly serious crime or engaging in past persecution.[191] Outside the Seventh Circuit and the Fourth Circuit, the government will likely continue to argue that past gang membership is not grounds for finding membership in a particular social group.

One important issue to consider in making a case based on former gang membership is the voluntariness of that membership. Voluntary participation in gang-related activity may trigger one or more mandatory bars to asylum.[192] According to UNHCR, holding that voluntary membership in an organized gang constitutes membership in a particular social group would be "inconsistent with human rights and other underlying humanitarian principles."[193] For former gang members, therefore, it is important to assess the circumstances under which the applicant joined the gang and the extent to which it could be considered "voluntary."[194] Young children, for instance, might lack the mental capacity or maturity required to "voluntarily" choose to join a gang.[195] In addition, many youth may be coerced into joining when gangs stalk and harass them, physically or sexually assault them, or threaten to harm their family members if they do not join.

V. Gang-Related Claims Based on Race

Members of certain racial groups – particularly indigenous groups – may be targeted by gangs because of their membership in those groups. Although few courts have addressed the issue, gang-related claims based on race have generally met with little success.[196] Establishing an applicant's membership in a racial group is often straightforward, but the primary challenge in such cases is demonstrating a clear nexus between that membership and the persecution suffered. While the Fourth Circuit does not appear to have issued any relevant decisions on this topic, other circuits have denied such claims for failure to satisfy the nexus requirement or failure to demonstrate an objectively reasonable fear of persecution:

- In *Caal-Tiul v. Holder*, the First Circuit held that an indigenous woman from Guatemala failed to show that a gang had targeted her because of that status.[197] In

[190] Joseph E. Langlois, DHS Memorandum to Asylum Officers, *Notification of* Ramos v. Holder*: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit, available at* 2010 WL 2292974 (Mar. 2, 2010).
[191] *Martinez v. Holder*, No. 12-2424, at 18 (4th Cir. Jan. 23, 2014).
[192] INA § 208(b)(2)(A)(i) (persecution of others on the basis of a protected ground), 8 U.S.C. § 1158(b)(2)(A)(i); INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (particularly serious crime); INA § 208(b)(2)(B)(i), 8 U.S.C. 1158(b)(2)(B)(i) (serious nonpolitical crime outside the U.S.).
[193] UNHCR *Guidance Note on Gangs*, *supra* note 24, at 15.
[194] *See, e.g., Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (B.I.A. 1988) ("Mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief."); *Hernandez v. Reno*, 258 F.3d 806, 813-14 (8th Cir. 2001) (BIA erred in failing to consider involuntariness of applicant's participation in killing suspected government informants).
[195] UNHCR *Guidance Note on Gangs*, *supra* note 24, at 15.
[196] For more information on race-based claims generally, *see* Daniel J. Smith, *Political Asylum—Well-Founded Fear of Persecution*, 13 AM. JUR. 3D *Proof of Facts* 665 § 6 (2012).
[197] *Caal-Tiul v. Holder*, 582 F.3d 92, 94 (1st Cir. 2009).

this case, the IJ had granted asylum based in part on country reports suggesting that indigenous women were disproportionately affected by gang violence. Reversing the IJ's decision, both the BIA and the First Circuit found that the applicant was not targeted because of her membership in that group, having merely demonstrated "fear of harm resulting from general conditions of violence and civil unrest in a home country."[198] The BIA noted that the indigenous status of the applicant was not even raised until the IJ asked about it at the end of the hearing and did not appear to play a role in the gang's focus on the applicant.[199]

- In an unpublished opinion, the Third Circuit held that an applicant did not qualify for asylum for various reasons but specifically examined whether the presence of pervasive discrimination against indigenous people constituted persecution for the purposes of asylum law.[200] The court found that although this situation could lead the applicant to have a subjectively reasonable fear of persecution, it is not necessarily an objectively reasonable one. In doing so, the court cited to various cases holding that harassment and discrimination fall short of "persecution."[201]

- In another unpublished opinion, the Eleventh Circuit found that a Guatemalan applicant, a Mayan Indian, failed to show he was targeted by the gang on account of his race.[202] Although the applicant testified that the Maras told him they hated him because he was "not like them," he also admitted that they may have disliked him because he did not dress as they did or tattoo his body. He further admitted that one of the Maras had been his friend for three years before the attacks and was himself Mayan. Lastly, the applicant stated that the gang attacked him only because they wanted him to join the gang, which was why they did not harm his mother.[203]

Note that the asylum office in Arlington has granted asylum for at least one gang-related claim based on indigenous group membership. In January 2012, CAIR Coalition successfully helped a child gain asylum, arguing that gangs were targeting him for being an indigenous Guatemalan. On numerous occasions, white Hispanic Mara-18 members stalked and physically assaulted the boy, who looked indigenous and spoke Spanish with an accent. CAIR Coalition distinguished this case from those that failed by providing specific evidence that persecution would not have occurred but for the applicant's indigenous group membership. During each threat and attack, the gang made derogatory remarks about the boy's race, saying that he did not deserve to live because he was indigenous. CAIR Coalition also provided evidence that gangs like Mara-18 have adopted racist or nationalist ideologies prevalent in Guatemala. Although no formal decision is available, attorneys seeking to bring race-based or indigenous group claims should contact CAIR Coalition for sample materials from this case.[204]

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[198] *Id.*
[199] *Id.*
[200] *Sapon-Ordonez v. U.S. Att'y Gen.*, 474 F. App'x 70, 73 (3d Cir. 2012).
[201] *Id.*
[202] *Miguel-Francisco v. U.S. Att'y Gen.,* 429 F. App'x 837, 839 (11th Cir. 2011).
[203] *Id.*
[204] *See* CAIR materials: Sample I-589 Application for Asylum, Withholding of Removal, and CAT for Unaccompanied Alien Child Juan Miguel Anaya A# 123-456-789.

VI. Gang-Related Claims Based on Religion

Child asylum-seekers might also be targeted by gangs because of their religious beliefs. As with race, this is a protected ground that has had little success in the courts. In *Quinteros-Mendoza v. Holder*, the Fourth Circuit held that the respondent's religious beliefs were not "one central reason" for his persecution.[205] In that case, gang members attacked the respondent at his church and threatened to hurt him if he continued to attend, but they also harassed him elsewhere and continued to threaten him even after he stopped going to church.[206] The court also pointed out that the gang members demanded money each time and targeted no other members of the church.[207] Ultimately, the court concluded that the persecutors were motivated primarily by "money and personal animosity" towards the applicant, who failed to show his religious beliefs were more than "incidental or tangential" to the persecution.[208]

A recent Seventh Circuit case further highlights the challenge of bringing gang-related claims based on religious beliefs. In *Bueso-Avila v. Holder*, the petitioner was a member of an evangelical youth group that recruited young people in the community "away from gang life."[209] He testified that the gang considered this recruitment an encroachment on their territory and that he experienced several threats and attacks from the gang, two of which took place after church youth group meetings. Other members of his youth group were also threatened, and the group was eventually disbanded because of the danger. Even with this evidence, the court concluded that the gang's violent actions were based on their desire to recruit the petitioner, and that he had not established that the gang members either knew of, or were motivated by, his religion or church group membership.[210]

Although such claims have been unsuccessful in federal court, some claims based on religious belief have been granted in immigration court. In one case, a gang took the respondent to her church, where they gang raped her, stabbed her, and carved gang marks into her body. The respondent was a devout Christian and outspoken critic of gangs, and the IJ found that the facts provided a clear nexus between the respondent's persecution and her religious beliefs.[211] In another recent decision, a Salvadoran evangelical Christian was granted asylum based on a showing that he was targeted by gangs because he spoke out against them as a religious believer. The IJ in that case was also persuaded by expert testimony explaining that gangs routinely persecute religious individuals who speak out against them.[212] Thus, child applicants may succeed in immigration court or before an asylum officer if they can show strong, compelling facts linking gang persecution to their religious beliefs.

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[205] *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164-65 (4th Cir. 2009).
[206] *Id.*
[207] *Id.* at 165.
[208] *Id.* at 164.
[209] *Bueso-Avila v. Holder*, 663 F.3d 934, 935 (7th Cir. 2011).
[210] *Id.* at 939.
[211] CGRS Case #6991.
[212] CGRS Case #8989.

GENDER-BASED CLAIMS

I. Overview

A. Gender-Based Persecution

Gender-based asylum claims generally take one or both of the following forms:

1) Claims in which the form of persecution is unique to women or disproportionately inflicted on women, regardless of the reason for the infliction (*e.g.*, sexual abuse or female genital mutilation); or

2) Claims in which the persecution is imposed because of a woman's gender, whether or not the harm itself is gendered (*e.g.*, punishment for breaching laws or social norms that apply only to women).

In 1995, legacy INS issued a memorandum to all asylum officers formally recognizing gender-based persecution as a valid ground for relief under U.S. asylum law and setting forth guidelines for evaluating women's asylum claims based "wholly or in part on their gender."[213] The guidelines provide that "rape . . . sexual abuse . . . domestic violence . . . and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds."[214]

B. Protected Grounds

While these and other forms of gender-based harm may qualify as persecution, an asylum applicant must also demonstrate that the persecution is suffered on account of a protected ground.[215] In some cases, the gendered harm may be inflicted for reasons unrelated to the victim's gender, such as her political opinion.[216] Here, courts have required applicants to demonstrate that the persecution was motivated by something other than a purely "personal interest" in the applicant, particularly in cases involving sexual harm.[217]

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[213] P. Coven, INS Memorandum, *Considerations for Asylum Officers Adjudicating Claims From Women* (May 25, 1995), *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html.
[214] *Id.* at 4.
[215] *See id.* at 9 ("The determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim to asylum.").
[216] *See, e.g.*, *Ali v. Ashcroft*, 394 F.3d 780, 784-87 (9th Cir. 2005) (finding that United Somali Congress militia's gang rape of applicant was motivated in part by her political opinion and ties to previous ruling administration).
[217] *See, e.g.*, *Thuri v. Ashcroft*, 380 F.3d 788, 792-73 (5th Cir. 2004) (denying petition for review where applicant was raped by "rogue police officers" who were "motivated by purely personal reasons," not as retaliation for her father's opposition to institutional government corruption); *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (finding that sexual assault by Polish secret police was motivated by "personal interest" in the applicant, even

Where persecution is inflicted because of a woman's gender, claims are generally analyzed under the "particular social group" rubric. The BIA has suggested that the characteristics of sex or gender alone may be sufficient to define a particular social group under the INA,[218] and several Circuit Courts have adopted a similarly broad interpretation.[219] Despite this, the question of whether females may constitute a particular social group, without any other defining characteristic, remains largely unresolved.[220] In *Gomez v. INS*, for example, the Second Circuit found that even "Salvadoran women who have been previously raped and beaten by Salvadoran guerrillas" did not constitute a particular social group because the group's members lacked a "recognizable and discrete" attribute that would enable persecutors to distinguish them from other women.[221]

In gender-related cases, courts have also emphasized that a particular social group must "share a narrowing characteristic other than the risk of being persecuted."[222] In *Kante v. Holder*, the Sixth Circuit held that "women subjected to rape as a method of government control" did not constitute a particular social group, because "a social group may not be circularly defined by the fact that it suffers persecution."[223]

Recently, the Seventh Circuit issued a helpful decision exploring gender-based persecution. In *Cece v. Holder*, the court recognized Cece as a member of a particular social group because she was a "young woman from a minority religion *who has lived by herself* most of the time in Albania, and thus is vulnerable, particularly vulnerable to traffickers for this reason."[224] According to the court, Cece's claim was successful because her social group was defined by "gender plus one or more narrowing characteristic."[225] The court further recognized that while a social group cannot be circularly defined solely by the fact or fear of persecution, the shared vulnerability or fear of harm does not disqualify an otherwise valid social group.[226] In overturning the BIA, the court noted: "[A]lthough it is true that these women are linked by the

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though applicant's initial contact with the officer arose from her political act of refusing to join the Communist Party).

[218] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("The shared characteristic [of a particular social group] might be an innate one such as sex, color, or kinship ties …").

[219] *See Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005) ("the focus with respect to [gender-related] claims should not be on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say they are persecuted 'on account of' their membership."); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) ("to the extent that the petitioner . . . would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements").

[220] *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010); *see also Sharif v. INS*, 87 F.3d 932, 936 n.3 (7th Cir. 1996) (citing *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) ("Persecution on account of sex is not a category allowing relief under [the INA].")); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("[T]he attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.").

[221] *Gomez*, 947 F.2d at 663-64.

[222] *Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011).

[223] *Id.*

[224] *Cece v. Holder*, No. 11-1989, slip op. at 12 (7th Cir. Aug. 9, 2013) (emphasis added).

[225] *Id.* at 23.

[226] *Id*. at 13.

persecution they suffer – being targeted for prostitution – they are also united by a common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone."[227]

Other issues that arise in defining particular social groups are discussed in the sections below, which focus on the following specific forms of gender-based harm: (1) female genital mutilation; (2) gender-specific laws or social codes; and (3) domestic violence.

II. Female Genital Mutilation

A. FGM Generally

Female genital mutilation ("FGM") refers to "a class of surgical procedures involving the removal of some or all of the external genitalia, performed primarily on girls and young women in Africa and Asia."[228] Relying in part on legacy INS's 1995 memorandum, the BIA has held that "[t]he practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution."[229] As in other circuits,[230] it is "well-settled" in the Fourth Circuit that FGM qualifies as persecution within the meaning of the INA.[231] The Fourth Circuit has found this to be true regardless of the method of FGM used, stating:

> It is clear under our past precedent that any of the methods used to conduct female genital mutilation, including clitoridectomy, excision or infibulation, would satisfy the requirements for past persecution. This Circuit has found that female genital mutilation constitutes past persecution, not because of any particular method of conducting it, but rather because of the serious mental and physical harm it inflicts on the women who endure it.[232]

In assessing whether an applicant has established a well-founded fear of FGM, the Fourth Circuit has looked to factors such as the incidence of FGM in the applicant's country of origin, whether the country imposes restrictions on FGM, and whether those restrictions are enforced.[233] Courts have treated FGM as persecution on account of social group membership, defining the

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[227] *Id.* at 14.
[228] *Haoua v. Gonzales*, 472 F.3d 227, 230 n.5 (4th Cir. 2007).
[229] *Matter of Kasinga*, 21 I. & N. Dec. 357, 366-67 (B.I.A. 1996) ("FGM is practiced, at least in some significant part, to overcome the sexual characteristics of young women" and "to control women's sexuality").
[230] *See, e.g., Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007) ("[T]here is no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law." (internal quotation marks and citations omitted)); *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005) ("[T]he extremely painful, physically invasive, psychologically damaging and permanently disfiguring process of genial mutilation undoubtedly rises to the level of persecution."); *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th. Cir 2004) ("Forced female genital mutilation involves the infliction of grave harm constituting persecution on account of membership in a particular social group that can form the basis of a successful claim for asylum.").
[231] *Kourouma v. Holder*, 588 F.3d 234, 244 (4th Cir. 2009); *see also Haoua*, 472 F. 3d 227; *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006).
[232] *Kourouma*, 588 F.3d at 244 (rejecting IJ determination that partial circumcision is insufficient to constitute persecution); *see also Benyamin v. Holder*, 579 F.3d 970, 975-77 (9th Cir. 2009) (reversing BIA determination that minimal physical harm in some forms of FGM does not qualify as persecution).
[233] *See Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009).

particular social group by reference to the applicant's "gender – combined with [her] ethnicity, nationality, or tribal membership."[234]

In so-called "parent-protector" cases, some courts have also found that FGM performed on a daughter can amount to persecution of the parent.[235] However, both the BIA[236] and Fourth Circuit[237] have declined to follow this reasoning and do not permit a parent to seek relief, in his or her own right, based solely on the psychological suffering s/he will endure if a daughter is subjected to FGM upon return.

B. Past Persecution

Courts have examined the effect of past FGM on an applicant's well-founded fear of future persecution. Generally, a showing of past persecution creates a rebuttable presumption that an applicant has a well-founded fear of persecution.[238] In *Matter of A-T-*, however, the BIA found that because the applicant had already been subjected to FGM, she had no basis to fear future persecution if returned to her home country.[239] In an unpublished opinion the following year, the Fourth Circuit suggested it would follow the BIA's approach, stating that "any application of the ['continuing persecution'] theory would likely be foreclosed by the BIA's decision in [*Matter of A-T-*]."[240] In denying a claim for asylum based on past FGM, the Fourth Circuit in that case found that the presumption created by the past infliction of FGM had been rebutted by a fundamental change in circumstances, as evidenced by the fact that the applicant had returned to her country of origin for an extended period since being subjected to FGM and had demonstrated no credible evidence that she was persecuted during that time.[241]

Shortly thereafter, Attorney General Mukasey vacated and remanded the BIA's decision in *A-T-*. The AG's decision made clear that the rebuttable presumption created by past persecution is "mandatory" and rejected the Board's characterization of FGM as a "'one-time act' that cannot be repeated on the same woman."[242] Accordingly, the immigration judge on remand found that A-T- had suffered past persecution, creating a rebuttable presumption of future persecution – in the form of forced marriage – on the same grounds, namely, membership in the particular social group of "Bambara women in families that practice the Wahabi

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[234] *Bah v. Mukasey*, 529 F.3d 99, 112-13 (2d Cir. 2008); *see also Kone v. Holder*, 596 F.3d 141, 147 (2d Cir. 2010) ("It is well-settled that a woman . . . who has undergone genital mutilation may have been persecuted through this experience on account of her membership in a particular social group."); *Hassan*, 484 F.3d at 518 (applicant "was persecuted on account of her membership in a particular social group, Somali females"); *Mohammed*, 400 F.3d at 797 ("[T]here is little question that genital mutilation occurs to a particular individual because she is a female. That is, possession of the immutable trait of being a female is a motivating factor – if not a but-for cause – of the persecution.").

[235] *See, e.g., Abay*, 368 F.3d at 641-42.

[236] *Matter of A-K-*, 24 I. & N. Dec. 275 (B.I.A. 2007).

[237] *Niang v. Gonzales*, 492 F.3d 505, 512-13 (4th Cir. 2007) ("[A parent's] psychological harm, without any accompanying physical harm, does not constitute 'persecution.' . . . *Abay* is unpersuasive because its holding is an unwarranted expansion of the statutory definition of persecution.").

[238] *See supra* p. 17.

[239] *Matter of A-T-*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007).

[240] *Dieng v. Mukasey*, 284 F. App'x 2 at *11 n.4 (4th Cir. 2008), *reh'g denied*, No. 10-3497, 2013 U.S. App. LEXIS 1411 (6th Cir. Jan. 16, 2013).

[241] *Id.*

[242] *Matter of A-T-*, 24 I. & N. Dec. 617, 618-22 (A.G. 2008).

religion."[243] Although it has not since directly opined on this question, the Fourth Circuit is likely to follow the AG's approach in *A-T-*, as other courts have generally done.[244]

Some courts have gone further than this, finding that past FGM is a continuing form of harm that alone supports a well-founded fear of persecution.[245] In *Mohammed v. Gonzales*, the Ninth Circuit reasoned that FGM results in permanent, lasting effects that "render[] a petitioner eligible for asylum, without more."[246] Under this framework, "it would be impossible for the government to rebut the presumption of past persecution."[247]

C. Future Persecution

Both the Fourth Circuit[248] and BIA[249] have recognized that women may be eligible for asylum solely on the basis of possible future FGM. *Matter of Kasinga*, the Board's seminal case on FGM, found that the applicant was a member of a particular social group composed of young women in the Tchamba-Kunsuntu tribe who opposed FGM but had not yet undergone the procedure.[250] Some courts have clarified that an applicant's opposition to the practice of FGM is not required in order to establish that the persecution was on account of the applicant's membership in a particular social group, as long as the group is otherwise defined by gender along with tribal/clan membership and/or nationality.[251]

III. Gender-Specific Laws or Social Codes

The 1995 legacy INS memorandum recognizes that the laws and customs of some countries:

> contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil,

[243] *Matter of A-T-* (Apr. 18, 2011) (Baltimore, MD) (Gossart, IJ).
[244] *See, e.g., Kone v. Holder*, 596 F.3d 141, 148-49 (2d Cir. 2010); *Bah v. Mukasey*, 529 F.3d 99, 114-15 (2d Cir. 2008); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007); *Mohammed v. Gonzales*, 400 F.3d 785, 799 (9th Cir. 2005).
[245] *See, e.g., Niang v. Gonzales*, 422 F.3d 1187, 1189 (10th Cir. 2005).
[246] *Mohammed*, 400 F.3d at 799.
[247] *Dieng v. Mukasey*, 284 F. App'x 2 at *11 n.4 (4th Cir. 2008), *reh'g denied*, No. 10-3497, 2013 U.S. App. LEXIS 1411 (6th Cir. Jan. 16, 2013) (citing *Mohammed*, 400 F.3d at 801).
[248] *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009); *Haoua v. Gonzales*, 472 F. 3d 227 (4th Cir. 2007).
[249] *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).
[250] *Id.* at 365.
[251] *Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005); *see also Mohammed v. Gonzales*, 400 F.3d 785, 797 n.16 (9th Cir. 2005) ("The persecution at issue in [FGM] cases . . . is not a result of a woman's opposition to the practice but rather a result of her sex and clan membership and/or nationality. That is, the shared characteristic is not opposition, but the fact that the victims are female in a culture that mutilates the genitalia of its females.").

> political, social and economic rights of women are often diminished in these countries.[252]

Accordingly, the BIA and federal courts have recognized that punishment for an applicant's opposition to the laws or social norms of her country of origin may qualify as persecution on account of membership in a particular social group. In analyzing such claims, courts have generally looked to:

- Whether the punishment for violating the laws or social code constitutes persecution: The BIA has held that criminal prosecution by itself does not constitute persecution.[253] The Fourth Circuit, however, has found that "where the motive underlying a purported prosecution is illegitimate, such prosecution is more aptly called persecution."[254] Other circuits have similarly recognized that prosecution can amount to persecution where the government selectively enforces regulations against an individual, institutes "disproportionately severe punishment," or where the laws are "especially unconscionable" or "merely a pretext to persecute" an individual.[255]

- The likelihood of the applicant suffering the punishment: Courts have denied asylum where an applicant fails to prove that she intends to violate the law or social code. In *Fatin v. INS*, the Third Circuit denied asylum where an applicant could not demonstrate that her opposition to gender-specific laws and repressive social norms was "so profound that she would choose to suffer the severe consequences for noncompliance"; rather, the record merely showed the applicant would "seek to avoid compliance if possible."[256] Similarly, in *Sharif v. INS*, the Seventh Circuit denied asylum to an applicant who had no history of objecting to Iran's social code and provided "no evidence to suggest that [she was] either unable or unwilling to comply with Iranian law" or would "voice her opposition to Iranian law" upon her return.[257]

- Whether expecting the applicant to comply with the laws or social code would amount to persecution: Claims often turn on whether the laws or norms are "so deeply abhorrent" to an applicant that requiring her to comply with them would be "tantamount to persecution."[258] In *Yadegar-Sargis v. INS*, for example, the Seventh Circuit held that the dress code requiring women to wear Islamic garb did not amount

[252] P. Coven, INS Memorandum, *Considerations for Asylum Officers Adjudicating Claims From Women* at 4 (May 25, 1995), *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html.
[253] *In re Nagy*, 11 I. & N. Dec. 888 (B.I.A. 1966).
[254] *Menghesha v. Gonzales*, 450 F.3d 142, 148 n.2 (4th Cir. 2006).
[255] *Fisher v. INS*, 79 F.3d 955, 962-964 (9th Cir. 1996) (rejecting claim where applicant merely "received routine punishment for violating generally applicable laws").
[256] *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).
[257] *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996).
[258] *Fatin*, 12 F.3d at 1241; *see also Ahmed v. Holder*, 611 F.3d 90, 97 (1st Cir. 2010) (requiring "evidence of an individual's profound opposition and refusal to conform in order to demonstrate that the cultural expectations are abhorrent to the individual's beliefs").

to persecution, because the code did not violate the tenets of the applicant's Christian religion or prevent her from attending her own church and practicing her own faith.[259]

IV. Domestic Violence

In its 1995 memorandum to all asylum officers, legacy INS specifically identified domestic violence among the forms of gender-based harm that could serve as evidence of past persecution in asylum cases.[260] Until recently, however, victims of foreign domestic violence had little guidance on how courts would analyze such claims.[261] In *Matter of R-A-*, the BIA for the first time addressed the issue of whether asylum could be granted to women on the basis of spousal abuse in their home countries.[262] Three Attorneys General intervened over the course of the *R-A-* litigation, which spanned the period from 1996 to 2009.

Although not precedential, the case was significant in part because DHS formally took the position that domestic violence could be a basis for a "particular social group" claim. DHS's briefs in *Matter of R-A-* and another case, *Matter of L-R-*, suggest that social groups in such cases should be defined according to:

- Gender,
- Nationality, and
- Inability to leave a domestic relationship, or status in a domestic relationship.

[259] *Yadegar-Sargis v. INS*, 297 F.3d 596, 604-05 (7th Cir. 2002); *see also Fatin*, 12 F.3d at 1241-42 (Iranian women who refuse to conform to gender-specific laws and social norms "may well satisfy the BIA's definition of [particular social group], for if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as so fundamental to [her] identity or conscience that [they] ought not be required to be changed.").

[260] P. Coven, INS Memorandum, *Considerations for Asylum Officers Adjudicating Claims From Women* at 4 (May 25, 1995), *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html.

[261] In 1994, an IJ in Arlington issued what was believed be the first immigration court decision granting asylum on the basis of spousal abuse. In that case, the IJ found that a Jordanian woman had suffered "continuous abuse" on account of both her political opinion and her membership in the social group of "women who espouse Western values and who are unwilling or unable to live their lives at the mercy of their husbands." *Matter of A- and Z-*, A72 190 893, A72 793 219 (Dec. 20, 1994) (Arlington, VA) (Nejelski, IJ), *reported in* 72 INTERPRETER RELEASES 521 (Apr. 17, 1995).

[262] Note that in *Matter of S-A-*, the BIA granted asylum to a victim of family abuse. 22 I. & N. Dec. 1328 (B.I.A. 2000).

A. *Matter of R-A-*

In *Matter of R-A-*, the BIA initially denied asylum on a finding that "Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination" did not constitute a particular social group under the INA.[263] The Board noted that nothing in the record indicated the husband bore animosity towards women who were intimate with abusive partners or targeted the respondent because he perceived her to be a member of this group; rather, he only targeted the respondent.[264]

In 2001, Attorney General Reno vacated the Board's decision and directed the Board to stay reconsideration of the case pending the publication of a final rule amending the asylum and withholding definitions.[265] When Attorney General Ashcroft accepted new briefs by the parties in 2004, DHS took the position that the applicant should be granted asylum, defining the particular social group as "[m]arried women in Guatemala who are unable to leave the relationship."[266]

In 2008, the Attorney General Mukasey lifted the stay previously imposed on the BIA and remanded the case for reconsideration of the issues presented with respect to asylum claims based on domestic violence.[267] On remand, DHS issued a response to the respondent's supplemental filing, granting asylum as a matter of discretion.[268] Although the IJ acknowledged that the result provided "no binding authority on the legal issues in this case,"[269] the case provided the first meaningful insight into DHS's view of asylum claims based on domestic violence.

B. *Matter of L-R-*

In April 2009, DHS filed a supplemental brief in *Matter of L-R-* arguing that the respondent, a Mexican woman who had suffered almost two decades of domestic abuse from her common-law husband, had failed to articulate a cognizable particular social group.[270] DHS pointed out that social groups should be defined so as to "accurately identify the reason why [the persecutor] chose the female respondent as his victim and continued to mistreat her."[271] The brief also noted that the BIA's "social visibility" requirement for particular social groups could

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[263] *Matter of R-A-*, 22 I. & N. Dec. 906, 911 (B.I.A. 1999). The Board also rejected the respondent's argument that she was persecuted on account of her political belief that "women should not be controlled and dominated by men," finding it "difficult to conclude . . . that there [was] any 'opinion' the respondent could have held, or convinced her husband she held, that would have prevented the abuse she experienced." *Id.* at 916.
[264] *Id*. at 918.
[265] *Matter of R-A-*, 22 I. & N. Dec. 906 (A.G. 2001). Note that the proposed rule was never finalized. 65 Fed. Reg. 76,588 (Dec. 7, 2000).
[266] Department of Homeland Security's Position on Respondent's Eligibility for Relief, *Matter of R-A-*, 22 I. & N. Dec. 906 (Feb. 19, 2004) (File No. A73 753 922), *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.
[267] *Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).
[268] Department of Homeland Security Response to the Respondent's Supplemental Filing of August 18, 2009, *Matter of R-A-*, 24 I. & N. Dec. 629 (Oct. 28, 2009) (File No. A73 753 922).
[269] *Matter of R-A-*, A73 753 922 (Dec. 10, 2009) (San Francisco, CA) (DiCostanzo, IJ).
[270] Department of Homeland Security's Supplemental Brief, *Matter of L-R-* at 29 (Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf [hereinafter DHS *L-R-* Brief].
[271] *Id.* at 15.

be satisfied by demonstrating that the society and legal norms of an applicant's country of origin tolerate and accept violence against women.[272]

DHS thus suggested two alternative social group formulations: (1) "Mexican women in domestic relationships who are unable to leave," and (2) "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[273] On remand, the respondent submitted additional evidence using the legal framework articulated by DHS, and asylum was granted by an IJ in 2010.

In addition to the requirements for demonstrating membership in a particular social group, the DHS brief addressed several other elements of an asylum claim as applied to domestic violence. Specifically, DHS stated that:

- A victim of domestic violence will not be considered to have been persecuted on account of her political opinion (for example, feminism) where an abuser "continued to abuse her regardless of what she said or did" and "[t]here is no record evidence that the female respondent was politically active or made feminist / anti-male domination political statements."[274]

- An applicant is still required to show that she was unable to avoid the persecution by reasonable relocation to another part of her home country.[275]

- An applicant must also show that the government is unwilling or unable to protect her by demonstrating that reporting the abuse "was or would have been futile, or would have subjected her to further abuse."[276] Note that this does not necessarily require an applicant to show that she reported the abuse to government officials. As explained by the Ninth Circuit in *Rahimzadeh v. Holder*:

> [No case law] creates a freestanding reporting requirement to apply for asylum. The absence of a report to police does not reveal anything about a government's ability or willingness to control private attackers; instead, it leaves a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods. These methods . . . might include showing that others have made reports of similar incidents to no avail.[277]

Despite DHS's recognition of domestic violence as a basis for asylum in both *R-A-* and *L-R-*, neither decision serves as precedential authority on the issue. Nonetheless, applicants will generally be able to succeed on such claims by citing the DHS briefs from those cases. In particular, attorneys representing such asylum-seekers should formulate particular social group

[272] *Id.* at 17-18.
[273] *Id.* at 14.
[274] *Id.* at 22.
[275] *Id.* at 27.
[276] DHS *L-R-* Brief, *supra* note 270, at 26.
[277] *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010).

claims by closely mirroring DHS's framework in *L-R-*, which "represents the Department's current position" on domestic violence as a basis for asylum.[278]

FILING FOR ASYLUM: PRACTICE TIPS

I. Filing for Asylum Generally

Filing for asylum requires that an applicant file a Form I-589, *Application for Asylum or Withholding of Removal*, along with any supporting exhibits, with the proper adjudicating office.[279] Filing procedures and adjudication of an asylum application will depend on whether the applicant is or was an unaccompanied alien child ("UAC"), as defined under the Homeland Security Act of 2002.[280] If a child is an unaccompanied minor *at the time of filing*, the asylum office within USCIS has initial jurisdiction.[281] Note that a child in ORR custody is considered to meet the definition of a UAC and is therefore subject to USCIS jurisdiction. A child who meets the UAC standard will file an affirmative asylum application with the asylum office. Otherwise, if the applicant is in removal proceedings, the Executive Office for Immigration Review ("EOIR") has initial jurisdiction, and a defensive application must be filed with the immigration court having jurisdiction over the case.[282]

In June 2013, USCIS issued several guidance memoranda clarifying and broadening the circumstances under which asylum offices will accept applications. These guidance memoranda provide that if CBP or ICE has already made a determination that the applicant is a UAC, and that status determination was still in place on the date the asylum application was filed, asylum offices will adopt that determination without a separate factual inquiry as to whether the applicant meets the definition of UAC.[283] The memoranda also state that asylum offices will accept applications from individuals who are over the age of 18 but were at one point designated as a UAC by DHS or DHHS, so long as certain supporting documents are submitted along with the application.[284] In these instances, the applicant will file an affirmative asylum application with the asylum office and will be afforded all the procedural and adjudicative benefits of a UAC.

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[278] DHS *L-R-* Brief, *supra* note 270, at 4.
[279] Form and instructions available at http://www.uscis.gov.
[280] 6 U.S.C. § 279(g)(2).
[281] TVPRA, Pub. L. No. 110-457, 122 Stat. 5044. *See also* USCIS Memorandum, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (Mar. 25, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/uac_filings_5f25mar09.pdf.
[282] 8 C.F.R. § 1208.4(b)(3)(i). The U.S. immigration court system is administered by the Executive Office for Immigration Review (EOIR) within the U.S. Department of Justice.
[283] USCIS, *Question and Answer: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (June 10, 2013) *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/proc-determ-init-juris-asylum-app-filed-unaccompanied-alien-children.pdf.
[284] Ted Kim, Acting Chief, Asylum Division, USCIS, *Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien Children* (June 4, 2013) *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/service-ctr-ops-proced-accepting-form-i589-unaccompanied-alien-children.pdf.

Under the Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008,[285] applications for asylum filed by an unaccompanied minor are given special protections, and they are governed by regulations which take into account the specialized needs of UACs.[286] In addition, asylum officers adjudicating an unaccompanied minor's application are trained to work with unaccompanied children[287] to create a non-adversarial setting for a child to articulate his or her fear to an adjudicator who possesses a heightened sensitivity to the child's particularly vulnerable status.[288] In light of the distinction between children's asylum claims and those of adult asylum-seekers, USCIS has also issued guidelines for asylum officers assessing the substantive aspects of the case.[289]

All filings to the immigration court must comply with procedures laid out in the Immigration Court Practice Manual.[290] Specifically, the Form I-589 must be filed during a master calendar hearing, which is a procedural hearing at which time the applicant can request an individual hearing, also known as a merits hearing. The legal brief and supporting exhibits may be filed at a later date prior to the individual hearing, in compliance with filing court deadlines and proper service procedures.[291] In addition, the applicant will have the opportunity to present his or her case at the merits hearing.[292]

	Filing with the Asylum Office (USCIS)	**Filing with the Immigration Court (EOIR)**
Mandatory Filings	• Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, available at http://www.uscis.gov/files/form/g-28.pdf • Form I-589, *Application for Asylum or Withholding of Removal*, available at http://www.uscis.gov/files/form/i-589.pdf	• eRegistry through http://www.justice.gov/eoir (online and in-person; mandatory as of Dec. 10, 2013) • Form EOIR-28, *Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*, available at http://www.justice.gov/eoir/eoirforms/eoir28.pdf • Form I-589, *Application for Asylum or Withholding of Removal*, available at http://www.uscis.gov/files/form/i-589.pdf • Proof of service to opposing counsel (ICE Office of Chief Counsel, DHS)

[285] TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, § 235(d)(7).
[286] *Id*. at § 235(d)(8).
[287] *Id*. at § 235(e).
[288] 8 C.F.R. §§ 208.9(b), 1208.9(b).
[289] USCIS Asylum Officer Basic Training Course, *Guidelines for Children's Asylum Claims* at 36-37 (Sept. 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf; Jeff Weiss, INS Memorandum, *Guidelines for Children's Asylum Claims* at 18-19 (Dec. 10, 1998), *available at* http://cgrs.uchastings.edu/documents/legal/gender_guidelines/DHS_INS_children_guidelines.pdf.
[290] Office of the Chief Immigration Judge, *Immigration Court Practice Manual* (Feb. 2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm [hereinafter *Immigration Court Practice Manual*].
[291] *Id*. at Appendix D (as amended June 30, 2008).
[292] For more details about presenting asylum cases before an immigration judge, *see infra* p. 61 and consult CAIR Coalition's *Representing Detainees in Immigration Court: Memo to Pro Bono Attorneys*.

	Filing with the Asylum Office (USCIS)	Filing with the Immigration Court (EOIR)
		• Submissions to USCIS for biometrics that comply with DHS instructions, available at http://www.uscis.gov/files/article/PreOrderInstr.pdf
Supporting Exhibits	• Cover letter • Proof of Unaccompanied Alien Child status • Corroborating evidence • Country conditions reports	• Legal brief • Corroborating evidence • Country conditions reports
Where to File	• File the original Form I-589 **plus a copy**, with passport pictures attached, to the USCIS Nebraska Service Center.[293] • Prior to the asylum interview, supporting exhibits can subsequently be filed with the asylum office having jurisdiction over the case.	• File the original Form I-589, with passport picture attached, with the immigration court during a master calendar hearing. Serve a copy to the ICE Office of Chief Counsel, DHS. • Supporting exhibits can subsequently be filed with the immigration court prior to the individual hearing, pursuant to filing deadlines outlined in the Immigration Court Practice Manual or as set forth by the immigration judge.

II. Affirmative Asylum Applications with the Asylum Office: Working with Child Asylum Applicants and the Role of Supporting Documents

Attorneys representing child asylum applicants face unique and significant challenges. The child's age, development, and the traumatic circumstances often underlying the asylum claim can affect the child's ability to communicate with his or her attorney and effectively convey his or her story to the asylum office or immigration court. Because credibility is a critical component of the asylum process, the attorney should pursue a wide range of strategies to bolster the child's credibility and corroborate the child's story.

A. Cover Letter to the Asylum Application

One of the most important forms of advocacy is the attorney's cover letter to the asylum office. For child asylum applicants with relatively straightforward claims, the cover letter can be short and provide a succinct overview of the factual and legal arguments supporting the claim. However, for child applicants who have more complicated circumstances that warrant further

[293] In CAIR Coalition's experience, the Arlington asylum office will accept the filing of an asylum application for an unaccompanied minor only under exceptional circumstances.

explanation (such as negative facts or circumstances that call into question the child's UAC status), an effective written submission by the attorney can be a vital component of the application, creating a framework for the adjudicator to preview and consider such issues.

In general, the cover letter should include the following information:

- A list of all documents included in the filing;
- A brief factual summary;
- A brief overview of the legal argument;
- A discussion of any issues that warrant further explanation; and
- A conclusion that portrays the child in the best possible light.

Nearly all asylum applicants have suffered some form of mental health consequences as a result of the circumstances in their home country. For children who are still developing emotionally, these mental health consequences may manifest themselves in various forms, including memory loss, difficulties in retelling traumatic stories, and inconsistent or vague testimony – all of which may affect how the asylum office or immigration judge assesses the child's credibility. Thus, attorneys representing child applicants who have concerns about the child's ability to provide consistent, detailed testimony should use the cover letter as an opportunity to remind the asylum officer of the standard that should be used to assess the child's credibility.

For an asylum applicant under the age of 18, the 1998 legacy INS Guidelines for Children's Asylum Claims apply.[294] In assessing credibility while reviewing a child's testimony, the guidelines state that "Asylum Officers should consider the child's age and development at the time of the event and the time of retelling, the impact of the lapse of time between the event and the retelling . . ."[295] They further state that "[b]ecause vagueness and inconsistencies are likely to occur during the interview of the child, asylum officers must remember the possible development or cultural reasons for a child's vagueness or inconsistency, and not assume that it is an indicator of unreliability."[296] Recent USCIS guidelines reflect the same need for sensitivity and special consideration when interviewing child asylum applicants, particularly those who have suffered trauma.[297] In discussing the credibility of a child's testimony, the guidelines state:

> Trauma may . . . cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order to not relive their horror by telling what happened . . . These symptoms may be mistaken as indicators of fabrication or insincerity, so it is

[294] Jeff Weiss, INS Memorandum, *Guidelines for Children's Asylum Claims* (Dec. 10, 1998), *available at* http://cgrs.uchastings.edu/documents/legal/gender_guidelines/DHS_INS_children_guidelines.pdf.
[295] *Id*. at 14.
[296] *Id*. at 15.
[297] USCIS Asylum Officer Basic Training Course, *Guidelines for Children's Asylum Claims* (Sept. 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf.

> important for asylum officers to be aware of how trauma can affect an applicant's behavior.[298]

If the child has specific needs that the attorney would like the asylum office to be aware of, the attorney may submit a Special Request to the local asylum office. For example, the attorney may request a female asylum officer if the child is a female victim of sexual violence, or the attorney could state a preference for an asylum officer who has experience working with mentally disabled minors. To make a Special Request, the attorney should prepare a letter stating the reasons for the request. Because the Special Request becomes a part of the applicant's file, which may be reviewed by the asylum officer conducting the applicant's interview, the request should be as short as possible. The attorney should then contact the local asylum office and ask where the Special Request should be sent and to whom it should be directed.

B. Documentation of UAC Status at Time of Filing

An attorney submitting an asylum application to the USCIS Nebraska Service Center must include evidence that the child applicant qualifies as a UAC under 6 U.S.C. § 279(g)(2). If the child is in the custody of the Office of Refugee Resettlement ("ORR"), the attorney may submit various documents to demonstrate that the child meets the UAC requirements, such as the DHS Notice of Custody Determination, ORR Notice of Placement in Secure or Staff Secure Facility, and/or a letter from the child's case manager at the ORR detention facility, affirming that the child is currently in custody at the facility.

For a child who is no longer in ORR custody, the asylum office has initial jurisdiction of the application if, at the time of filing the I-589 application, the child met the UAC requirements.[299] USCIS has issued new guidance stating that as of June 10, 2013, if CBP or ICE has already made a determination that the applicant is a UAC, and that status determination was still in place on the date the asylum application was filed, asylum offices will adopt that determination without a separate factual inquiry as to whether the applicant meets the definition of UAC.[300] Thus, the attorney may submit any relevant documents demonstrating the child was a UAC at the time of filing, including ORR Discharge/Transfer paperwork, the ORR Discharge Notification Form, any Motions to Change Venue or Change of Address Forms, the child's birth certificate showing that the child is still under 18 years old, and/or affidavits or statements showing that the child was not living with a parent or legal guardian.

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[298] *Id.* at 32.

[299] USCIS, Memorandum, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (Mar. 25, 2009), *available at* http://www.uscis.gov//Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/jurisdiction-provision-tvpra-alien-children2.pdf.

[300] USCIS, *Question and Answer: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (June 10, 2013) available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/proc-determ-init-juris-asylum-app-filed-unaccompanied-alien-children.pdf

C. Corroborating Evidence, Expert Witnesses, and Country Conditions Reports

Country conditions reports and corroborating documents are other essential parts of the asylum application. Part B of the I-589 asylum application states: "You must attach documents evidencing the general conditions in the country from which you are seeking asylum or other protection and the specific facts on which you are relying to support your claim." This provision invites the attorney to submit reports about the conditions in the child's home country, and it also permits the attorney to submit a wide range of documentation to support the facts of the child's case.

i. *Corroborating Evidence*

Attorneys should submit as much corroborating evidence as possible to reaffirm and fill in factual details of the child's story, as specific dates, places, and events only strengthen the asylum application. One of the most powerful tools in the asylum application is the child's declaration, which is a written retelling of his or her past persecution and/or the reasons to fear future persecution if returned to his or her country of origin. In certain cases, a child's testimony alone may be sufficient to sustain the burden without corroboration, but only if the child is credible, persuasive, and refers to specific facts to demonstrate that the applicant is a refugee.[301]

Many children who have suffered harm and trauma may find it difficult to articulate past events, and therefore, may need to have many conversations with the attorney, and possibly a mental health expert, to extract the child's story in a coherent way. Further, many children may not be able to recall specific dates or places or may provide conflicting details. As the asylum officer guidelines show,[302] these inconsistencies can be attributed to a child's past or ongoing trauma, the current age of the child and the child's age at the time of the harm, education level, cultural background, or lack of a stable home life.

In order to avoid conflicting statements in the record, attorneys may choose to focus a declaration on the details of the harm and may refrain from including specific dates, times, and locations. Instead, a declaration may include statements such as, "When I was around nine (9) or ten (10) years old, MS-13 left a written note on my door saying they would come for me," or "Several months ago, members of the 18th Street gang stabbed me and left me bleeding in the streets."

If a child is having problems articulating past persecution, consider having the child draw pictures to supplement the declaration. Many children may use drawings to indicate on their bodies where they have suffered physical harm or to illustrate events that transpired.

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[301] INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

[302] USCIS Asylum Officer Basic Training Course, *Guidelines for Children's Asylum Claims* (Sept. 2009), *available at* http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/for-Childrens-Asylum-Claims-31aug10.pdf.

SAMPLE SECTION OF A CHILD'S DECLARATION

- While in Shenandoah I have been feeling better because I feel safe and free from the constant MS-13 violence I suffered before. I still suffer from nightmares, anxiety, flashbacks, and stress from what I have been through. My clinician has given me pills to help me sleep, and I have been meeting with her on a weekly basis to deal with my past and start moving forward in a positive way.

- Even though I do not enjoy being detained, I feel much safer now because I know that no one can harm me. I know that if I return to my home country, I will be killed just like my parents. I want to begin a new way of life in the U.S. that has nothing to do with gangs and violence.

- I want to stay in the U.S. because I feel protected and I want to make something of my life. I am smart and get really good grades in school. I believe that I am curious, I have a lot of energy, and I want to study hard to have a good career. I have been making a good effort in my classes and have been behaving very well at Shenandoah. I also learn things quickly, like languages. I want to go to the army, marines, or air force and fight for this country and just forget about my past. I would also like to be a professional soccer player or Spanish rapper.

- While in detention, I wrote a song called "El mundo por mis ojos" which means "the world through my eyes." I made music for it and rapped it in front of everybody. The song described the life that I have lived and talks about how much I have seen. The message is that someone has the opportunity to have a better life and change. The lyrics also include that I am inspired because I am different.

In addition to the child's declaration, attorneys should consider including as much additional corroborating evidence as possible. Specifically, the REAL ID Act of 2005 arguably altered the standards and evidentiary burdens governing asylum applications, allowing immigration adjudicators to require credible asylum applicants to obtain corroborating evidence "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[303]

Attorneys should ensure that all corroborating evidence is internally consistent, particularly with the client's declaration and the I-589. Any non-English corroborating documents must be translated into English with a completed Certificate of Translation attached.[304] Examples of other corroborating evidence include:

[303] REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-23.
[304] For Sample Certificate of Translation, *see Immigration Court Practice Manual*, *supra* note 290, at Appendix H.

- Written affidavits or declarations from family members or others who have specific knowledge of the facts in the application
- Written affidavits or declarations from community members, family members, school teachers, or anyone who can corroborate the child's fear of returning to his or her home country and/or give positive feedback about the child's progress in the United States
- Client's birth certificate
- Other relevant birth and death certificates
- Photographs
- School records
- Medical records
- ORR records, where relevant (including any relevant assessments by a mental health professional)
- Maps
- Newspaper articles
- Receipts

ii. *Expert Witnesses*

Using expert witnesses is another strategy to corroborate the child's story and assist the asylum office or the immigration judge in better understanding the circumstances in the child's home country, including circumstances specific to the child. Expert witnesses provide written, sworn declarations that are submitted with the asylum application and may be called to testify if the case is before the immigration court. Expert witnesses typically charge fees for their services, which should be negotiated at the beginning of the representation. They may, however, provide free or discounted rates to *pro bono* attorneys upon request. Attorneys should discuss the scope of the expert's work at the outset and are encouraged to formalize the scope of the relationship through a retainer agreement. Finally, attorneys who are requesting assistance from experts who have never provided services for an immigration matter should be prepared with sample declarations and a list of specific issues they would like the expert to address, and they should offer assistance in drafting and editing declarations.

a) Subject-Matter and Region-Specific Experts

Attorneys frequently hire witnesses with expertise in a specific subject-matter and/or region. For example, many child asylum applicants fear returning to their home country on account of some form of gang-related threat in Central America. In such a case, an attorney may hire a Central American gang expert, who is knowledgeable about the history, politics, and social structure of Latin American gangs and can testify as to the plausibility of the child's claim. Attorneys may also seek assistance from professors or authors of literature relating to the region and/or subject-matter.

b) Mental Health Experts

Other experts to consider hiring are mental health experts who can corroborate the child's story or trauma, diagnose any mental health conditions that have arisen from the trauma, and/or help explain any potential credibility issues that may arise from the trauma. Two organizations that *pro bono* attorneys frequently use, and who conduct psychiatric evaluations for free, are the Physicians for Human Rights and HealthRight International. Attorneys should be aware that these organizations require anywhere from 1-3 months advance notice for an evaluation and often require that the client's draft declaration be enclosed with the initial application. Additionally, volunteers with these programs may not have experience working with traumatized children, and children may not immediately trust the person conducting the evaluation. Thus, to the extent possible, the attorney should offer any materials in advance of the evaluation that may be helpful to the expert and may also intervene during the evaluation if there are miscommunications between the child and the mental health specialist.

In addition to having a mental health expert perform an evaluation, attorneys with child clients that are suffering from severe trauma should consider hiring a therapist or other mental health expert who can provide ongoing treatment and support as the child prepares for the asylum interview or hearing. The expert can also submit a written declaration or letter describing his or her qualifications and experience, the child's account of the persecution or threat of persecution, the initial diagnosis of the child's mental health condition, and the recommended treatment plan.

iii. *Country Conditions Reports*

Country conditions reports are helpful to both the attorney and immigration because they: (1) help the attorney understand the country's economic, social, and political climate and tailor the client's asylum application accordingly; (2) provide secondary corroborative evidence of the country circumstances and how they relate to the applicant; and (3) cite to articles and studies conducted independently by reputable organizations, which can carry significant weight with immigration. Because country conditions reports can be quite lengthy, it is helpful to highlight relevant portions of the reports and create a chart that lists:

- The tab where a particular article can be found;
- The page numbers of the article that are relevant; and
- A description or summary of the relevant parts of the article, including the article's Bluebook citation.

Attorneys may append a range of reports, newspaper articles, law review articles, and studies to the country conditions report, with the relevant passages highlighted. Country conditions reports should include materials from as many of the following credible and well-known organizations as are relevant:

- The UN Refugee Agency (http://www.unhcr.org)
- UN Refworld (http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain)

- U.S. Department of State Country Fact Sheets (http://www.state.gov/r//ei/bgn)
- UN Human Rights Committee Report of the Special Rapporteur
- Council on Foreign Relations Reports (http://www.cfr.org/publication)
- Human Rights Watch (http://www.hrw.org)
- U.S. Committee for Refugees and Immigrants (http://refugees.org)
- New York Times, CNN, BBC, and other reliable news sources

D. Preparing for the Asylum Interview

Attorneys should plan to have multiple meetings with the client to prepare for the asylum interview. First, attorneys should ensure that the client can answer all questions on the I-589 application, including the logistical and biographical questions, and that those answers are consistent with what was stated on the application. Next, attorneys should question the client about his or her own declaration, as well as information in the supplemental materials, again ensuring the client is comfortable answering detailed questions and is able to answer questions consistently with the application.

Finally, attorneys should plan at least one mock interview where someone other than the attorney plays the role of the asylum officer. The mock interview will allow the client to practice answering questions in a formal setting by someone s/he does not know. This is also an excellent opportunity for the attorney to become familiar with the proceedings by practicing opening and closing statements, test his or her knowledge of the asylum application and exhibits, and see how the child reacts to certain questions under pressure. If the client plans to use an interpreter during the asylum interview, the mock interview is an excellent time for the client to practice working with that interpreter. Unlike immigration court, the asylum office will not provide an interpreter for the interview, and therefore, it is the client's responsibility to bring an interpreter. Note that the attorney is not permitted to act as the interpreter. Ideally, the interpreter would be someone who works at the attorney's firm, such as a legal assistant or paralegal.

The asylum interview is typically a two to three hour interview conducted in the asylum officer's office. Before the interview formally begins, attorneys are encouraged to raise any special considerations with the asylum officer, such as a child's lack of mental development, heightened trauma, or willingness to conduct the interview in English despite English not being his or her first language. In addition, the attorney should make any amendments to the application at the outset and submit any additional exhibits that were not previously included. The child will typically be placed under oath.[305] If using an interpreter, the asylum officer will place the in-person interpreter under oath. Before the interview begins, the asylum officer will call-in to have an interpreter listen to the child's statements telephonically and correct the record if the child's interpreter misinterprets anything.[306]

[305] 8 C.F.R. § 1208.9.
[306] *Id.*

The asylum officer will typically begin by reviewing the biographical information on Page 1 of Form I-589. Common questions include:

- Can you please state your full name?
- Can you please state your full address?
- Are you married?
- Can you please state your birthday and place of birth?
- When did you last enter the U.S.?
- Please list the dates of all entries to the U.S. as well as the place of entry.

The asylum officer will then typically continue by asking questions relating to the claim of persecution. Common questions include:

- Have you or your family members ever experienced harm in your home country?
- Can you please describe the harm either you or your family members have suffered?
- Are you fearful of returning to your home country? Why are you fearful?
- Do you think you could safely relocate in your home country?
- Do you fear being tortured if you are returned to your home country?
- Have you ever been arrested, cited, detained or charged for a crime, either in the U.S. or abroad?
- Have you ever participated or assisted in causing harm to someone, based on their race, religion, nationality, political opinion, or membership in a particular social group?

At the outset, the asylum officer's line of questioning can be compared to that of a direct examination, giving the asylum officer an opportunity to establish the overall details of the case. However, also be prepared for questioning similar to that of cross-examination, where the asylum officer is probing for more information and clarity, and is assessing any inconsistencies in testimony as well as credibility. Throughout the interview process, some asylum officers encourage attorneys to assist in communication between the officer and the child, such as re-wording a question in a way that the child may understand or encouraging the child to expand further on facts. In addition, attorneys should reference particular exhibits that may expand upon a topic when it is not clear based on the child's testimony.

Before the interview concludes, the attorney or the applicant will have an opportunity to make a statement or comment on the evidence presented.[307] This is an opportunity for the attorney to ask some final questions that go to the heart of the claim, focus the asylum officer on the most important facts, and make a brief closing statement. Should the asylum office require additional information, the officer may issue a Request for Evidence ("RFE"), which gives the attorney a brief extension to submit additional documentation to the asylum office.[308]

[307] *Id.*
[308] *Id.*

E. Decision from USCIS

As of January 2014, USCIS has updated its policies regarding the adjudication of asylum applications filed by "juveniles," meaning an applicant under 18 years of age or a UAC.[309] According to the new policies, the asylum office may now grant asylum to a juvenile without first referring the case to USCIS Headquarters for review.[310] As such, a child can expect normal processing times of approximately two weeks for a positive decision. However, USCIS Headquarters will continue to review referrals, Notices of Intent to Deny ("NOIDS"), and denials pertaining to juvenile asylum applicants.[311] Further, USCIS Headquarters will continue to review cases that fall under any other category that requires its review, such as certain cases involving persecutor-related issues or national security concerns.[312] If USCIS Headquarters review is required, the asylum office may take several months to render a decision.

If the asylum office finds that the applicant has satisfied all of the requirements under INA § 208(a), the applicant will receive an approval notice along with a Form I-94, *Arrival-Departure Record*, indicating that the child has been granted asylum. Upon receiving asylum, a child is eligible to receive an employment authorization document and may move to terminate proceedings with the immigration court. If the asylum office does not find that the applicant has met the definition of a refugee, and the child is removable, then the case will be referred to the immigration court for adjudication before the immigration judge.[313]

If a child has accrued 150 days on the "asylum clock," meaning the child's I-589 has been pending for 150 days since the date of filing (not including any delays in processing the applicant may have requested or caused), the child becomes eligible to apply for an employment authorization document (work permit).[314]

III. Defensive Asylum Applications with the Immigration Court

A. Immigration Court Overview

There are two comprehensive resources that provide excellent guidance on immigration court practice and should be consulted frequently by *pro bono* attorneys – particularly those new to immigration court. First, the Department of Justice ("DOJ") has published an Immigration Court Practice Manual that is available online.[315] The second resource is a book published by the American Immigration Lawyers Association ("AILA") that includes helpful analyses of

[309] *See* John Lafferty, Chief, Asylum Division, USCIS, *Changes to Case Categories Requiring Asylum Headquarters Review* (Jan. 27, 2014).
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] 8 C.F.R. § 1208.14.
[314] 8 C.F.R. § 274a.12(c)(8)(i).
[315] *See Immigration Court Practice Manual*, *supra* note 290.

asylum law in addition to practical guidance for attorneys.[316] Periodic updates to both the Immigration Court Practice Manual and AILA Asylum Primer are available online.

The two main types of immigration court hearings are master calendar and individual hearings. The hearings are typically in person, although in limited circumstances they may be conducted by phone or video conference. A client may have one or more master calendar hearings in which s/he appears before the judge for several minutes to resolve preliminary issues such as various motions and scheduling. For a client whose asylum case is before the immigration judge, an individual hearing will be scheduled at the client's last master calendar hearing. An individual hearing is an opportunity to present evidence in support of the client's case and is similar in format to a criminal trial. Both before and during individual and master calendar hearings, attorneys may submit written filings to the court, which must also conform with the court's requirements discussed below.

B. Immigration Court Hearing Dates and Times

Clients are typically informed of the date, time, and location of their first master calendar hearing when they are served with their initial Form I-862, *Notice to Appear* ("NTA") by immigration. If the NTA does not contain this information, the client will receive a Notice of Hearing in the mail.[317] Attorneys may also obtain the date, time, location, and judge's name for any scheduled court hearings, as well as obtain decision information, by calling the EOIR Case Information System at **1-800-898-7180** and using your client's nine-digit Alien Registration Number (also referred to as an "A Number") to navigate the automated system. The attorney should call this number as soon as possible to determine the date of the client's upcoming hearing. Note that hearing information for UACs is not always available on this EOIR hotline, in which case the attorney should call the court directly. Information will only be released to an attorney over the phone if you have entered your appearance as the representative with the immigration court, by filing Form EOIR-28, *Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court*.

C. The Master Calendar Hearing

The purpose of master calendar hearings is to plead to the charges in the NTA, update the judge on the client's case, bring anything necessary to the judge's attention, and schedule future hearings before the court. Attorneys should be prepared to appear at each of his or her clients' scheduled appearances, including the master calendar hearings. Any delay in the appearance of a respondent's attorney may result in the hearing being held in the attorney's absence.[318]

In order to appear before EOIR, attorneys must comply with the Department of Justice's new eRegistry requirements, which were optional as of June 10, 2013 but became mandatory as of December 10, 2013. eRegistry is a two-step process:

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[316] *See* REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE (5th ed. 2007) [hereinafter AILA PRIMER].
[317] *See Immigration Court Practice Manual*, *supra* note 290, at 65.
[318] *Id.* at 59.

1) Electronic registration: Complete the online registration, available at http://www.justice.gov/eoir, by creating a UserID and password and following the instructions; and

2) Identity validation: Print and bring a copy of the eRegistration received via email from EOIR to an immigration court location or the BIA. Attorneys must present photo identification (government issued photo ID such as a driver's license or passport) so that EOIR can verify their identity.

Attorneys may complete eRegistry at the Arlington and Baltimore immigration courts during normal business hours. However, because the Baltimore immigration court will complete eRegistry by appointment only, attorneys validating their identity at the location must call ahead. Once identity validation is complete, EOIR will email the registrant notifying him or her that the account has been activated and providing an EOIR ID number. The registrant is then required to include the EOIR ID number when filing a Form EOIR-28. In the future, EOIR may send correspondence about immigration cases to the email address provided on the registry system. For more on eRegistry, visit http://www.justice.gov/eoir/engage/eRegistration.htm.

After completing eRegistry, the attorney must then enter his or appearance by preparing a Form EOIR-28, *Notice of Entry of Appearance as Attorney or Representative before the Immigration Court*, on a double-sided green piece of paper.[319] As with all filings and motions, the attorney must serve a copy of the EOIR-28 on the DHS trial attorney. Attorneys may also file a G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, with DHS, traditionally filed on blue paper.[320] While not a prerequisite to appearing in court, DHS may require a G-28 to be filed before corresponding with the attorney as a representative of the client.

Attorneys should arrive at the specified immigration court at least 15 minutes before the time set for the master calendar hearing, bearing in mind that they may need to wait in the courthouse's security line.[321] Some courts require attorneys to sign-in upon arrival in the courtroom, while others advise attorneys to check-in with courtroom staff upon arrival.[322] It is not unusual for 30 or more respondents to have master calendar hearings scheduled at the same date and time, which means the judge spends only a short time with each respondent in order to complete the docket in two to three hours. When the judge or clerk calls the last three digits of the client's A Number, the attorney should proceed quickly to the counsel's table with the client and state only the most important points of the argument.

Each judge has a unique manner of proceeding through the master calendar hearing, many of which are described more fully in the Immigration Court Practice Manual.[323] If time permits, attorneys should observe the judge during a master calendar hearing in advance of the client's hearing in order to become familiar with the judge's format and style. On the day of the

[319] AILA PRIMER, *supra* note 316, at 159.
[320] *Id.*
[321] *See Immigration Court Practice Manual*, *supra* note 290, at 65.
[322] *See id.* The practice of the Arlington immigration court is for the court clerk to provide a sign-in sheet that attorneys can sign upon arrival to reserve a place in line, while signing in at the Baltimore immigration court varies from judge to judge.
[323] *See id.* at 65-66.

master calendar hearing, the attorney should be prepared to do any of the following on behalf of the client (the Immigration Court Practice Manual provides an exhaustive list on pp. 67-68):

- Concede or deny service of the NTA;
- Admit or deny the allegations in the NTA;
- State the form(s) of relief your client is applying for;
- Ask for a specific amount of time to present your client's case in chief;
- State whether your client or any witnesses require an interpreter;
- Designate, or – in the case of a client seeking asylum or other fear-based relief or in whose case it would not be in the client's best interest to return, decline to designate, a country of removal; and/or
- Request a date on which to file the application for relief with the court.

The judge may also entertain one or more motions during the master calendar hearing, such as motions to change venue, terminate proceedings, or suppress evidence.[324] Arguments on the motion are made orally, and the DHS attorney will have an opportunity to respond. The motions themselves should also be submitted in writing and must state the grounds for the motion, the relief sought, and the jurisdiction of the court.[325] The judge will typically make a ruling immediately after hearing brief arguments from both sides. At the conclusion of the hearing, the judge will either schedule another master calendar hearing to resolve any outstanding issues or schedule an individual hearing.

If an applicant or witnesses is not fluent in English and needs an interpreter during an individual hearing, the immigration court will arrange for an interpreter at the government's expense.[326] To secure an interpreter for a merits hearing, the attorney should advise the court on the record at a master calendar hearing that an interpreter is required. Alternatively, the attorney could file a Motion to Request an Interpreter at a later time that complies with court filing deadlines.[327] Similarly, interpreters may be provided during master calendar hearings upon request. If a Spanish-speaking interpreter is needed for a master calendar hearing, filing a Motion to Request An Interpreter is most likely not necessary, as the court typically provides Spanish-speaking interpreters for most master calendar hearings.[328]

D. Written Filings with the Immigration Court

Attorneys should consult the Immigration Court Practice Manual when preparing written motions, applications, and other documents that will be filed with the immigration court, as documents improperly filed – even with minor errors – may be rejected by the court.[329] Attorneys should also be mindful of deadlines, as the court may similarly reject untimely

[324] AILA PRIMER, *supra* note 316, at 161.
[325] *Id.*
[326] *Immigration Court Practice Manual*, *supra* note 290, at 61-2 (Chapter 4.11); *see also* 8 C.F.R. § 1003.22.
[327] *Immigration Court Practice Manual*, *supra* note 290, at 73 (Chapter 4.15(o)).
[328] *See id.* at 66 (Chapter 4.15(f)).
[329] *Id.* at 37.

filings.[330] Because a document is not considered "filed" until it is received by the court, the failure of any delivery service to deliver a filing on time does not excuse an untimely filing.[331] Applications for relief filed in immigration court have special DHS instructions pertaining to filing fees, submissions, and fingerprints. If you do not have a copy of the DHS instructions, please contact CAIR Coalition, and we will send you a copy.[332]

With the exception of the I-589 Asylum Application, which must be submitted in court at a master calendar hearing, any written submissions (including motions) may be submitted to the immigration judge during a hearing or with the court outside of the hearing context.[333] Although written submissions with the court may be mailed, attorneys should, where possible, hand deliver the submissions either personally or through a courier service. Filings that are hand-delivered should be brought to the immigration court's public window during that court's filing hours, which may be available on EOIR's website or by calling the court.[334] Mailed filings should be sent to the immigration court's street address.[335]

All documents filed with the immigration court must also be served on DHS.[336] The individual immigration court may publish the appropriate DHS address to receive service on its website, or the attorney may need to contact the court directly. In many cases, the DHS office is located in the same building as the court. With the exception of filings served during a hearing or jointly-filed motions, the attorney must also provide a written declaration, called a "Proof of Service" or "Certificate of Service," to the court stating that the attorney has served the appropriate DHS office and identifying the item being filed. The Proof of Service on the second page of Form EOIR-28 does **not** serve as proof of service for additional documents that are submitted with the EOIR-28.[337]

Attorneys are encouraged to keep a "conformed" or identical copy of the filing that is stamped by the immigration court with the time and date of filing. Hand-delivered filings may have the conformed copy stamped by the clerk at the filing window. Mailed filings should include a conformed copy that is prominently labeled "CONFORMED COPY; RETURN TO SENDER," along with a self-addressed stamped envelope.[338]

E. The Brief

Attorneys may supplement the client's asylum application with a legal brief and supporting exhibits discussed above.[339] A legal brief is not required by the court, but it is generally recommended. The brief summarizes the relevant part of your client's story, describes conditions in the client's home country (particularly as they provide direct support for the specific details of the client's claim), and explains any of the relevant law applicable to the

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[330] *See id.*
[331] *Id.* at 32, 37.
[332] These filing instructions are also available at http://www.uscis.gov/files/article/PreOrderInstr.pdf.
[333] *See Immigration Court Practice Manual*, *supra* note 290, at 31, 34.
[334] *See id.* at 32.
[335] *Id.*
[336] *Id.* at 39.
[337] *Id.* at 39-41 (listing the contents of the Proof of Service) and Appendix G (sample Proof of Service).
[338] *Id.*
[339] *See supra* p. 55.

client's case. If the client does not have any significant legal issues in his or her case, the legal section of the brief might be quite short. In general, brevity is appreciated by the court.

Although attorneys should consult the Immigration Court Practice Manual for an exhaustive list of filing requirements, the following are the documents and requirements most commonly filed, in order:

- Form EOIR-28, *Notice of Entry of Appearance as Attorney or Representative before the Immigration Court*
- Cover page *(sample at Immigration Court Practice Manual, Appendix F)*
- Motion or legal brief
    - Two-hole punched ("binding" by staple is preferred to binder clips)
    - Black ink
    - Times New Roman 12-point font preferred
    - Original signatures
- Copies of the Proposed Order *(sample at Immigration Court Practice Manual, Appendix Q)*
- Proof of Service *(sample at Immigration Court Practice Manual, Appendix G)*
- Table of contents with page numbers identified (if filing includes attachments) *(sample at Immigration Court Practice Manual, Appendix P)*
- Supporting documents tabbed by number, consecutively paginated, and with relevant portions highlighted and tabbed by number
- A conformed copy of the filing
- Self-addressed, prepaid return packaging

F. The Individual Hearing

Individual hearings typically last between two and four hours and are similar in format to a criminal trial. During the hearing, the attorney should be prepared to do all of the following:

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

Immigration courts do not adhere to the Federal Rules of Evidence. Thus, evidence that would not ordinarily be admissible in criminal court, such as hearsay evidence, may be admissible in immigration court, with the caveat that the court can exclude evidence that violates

the test of "fundamental fairness."[340] Judges are typically active during the individual hearing and may ask the client and witnesses questions at any time during the hearing.[341]

Unlike in criminal court, clients are expected to testify in support of their application in immigration court. Witnesses, including expert witnesses, are typically expected to testify in person. Notably, the immigration judge may ask questions of the respondent and all witnesses at any time during the individual hearing. For a witness concerned about his or her own immigration status or otherwise unable to attend in person, the attorney may file a Motion to Permit Telephonic Appearance. Alternatively, the witness may submit a notarized affidavit stating his or her testimony.

At the close of the hearing, the judge often immediately renders a written or oral decision granting or denying asylum or withholding of removal.[342] Attorneys should listen closely and be prepared to take notes in preparation for appeal, as there may not be a written record containing the basis of the judge's decision. Either party may appeal the judge's decision to the BIA, or the judge may certify a decision to the BIA for its review.[343] If the judge finds the applicant removable and orders him or her removed, the judge must provide the applicant with a Form EOIR-26, *Notice of Appeal from a Decision of an Immigration Judge*, and advise him or her of the right to appeal to the BIA within 30 days.[344] If the applicant waives his or her right to appeal, the judge's decision becomes final.[345]

G. Preparing for an Individual Hearing

Both the Immigration Court Practice Manual and the AILA Primer describe how to prepare for an individual hearing and should be consulted by the attorney in advance of the hearing. Any applications, exhibits, motions, briefs, witness lists, or criminal history charts, if applicable, should be filed with the court prior to the individual hearing in accordance with the court's deadlines and requirements for filing.[346]

Clients will require extensive preparation for individual hearings. As discussed above in the context of preparing for an asylum interview, *see supra* p. 58, the attorney should have someone other than him or herself conduct mock questioning of the client. The client should be prepared to address biographical information and substantive information about the asylum claim contained in both the I-589 application and the client's declaration. However, unlike an asylum interview, the setting for an immigration court hearing will be adversarial, and DHS will look for inconsistencies in the client's testimony. Attorneys should prepare the client for this type of setting and should conduct mock direct and cross-examination of the client. Attorneys should also practice their own opening and closing arguments.

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[340] AILA PRIMER, *supra* note 316, at 183.
[341] *Immigration Court Practice Manual*, *supra* note 290, at 77.
[342] AILA PRIMER, *supra* note 316, at 165.
[343] *Id.* at 228.
[344] *Id.*
[345] *Id.*
[346] *See Immigration Court Practice Manual*, *supra* note 290, at Chapter 3.1(b) (Timing of submissions). Some motions have special deadlines: Chapter 5.7 (Motions to Reopen); 5.8 (Motions to reconsider); Chapter 5.9 (Motions to Reopen in Absentia Orders).

BENEFITS AND ADJUSTMENT OF STATUS

An immigrant who has been granted asylum, also known as an "asylee," is eligible for cash and medical assistance for up to 8 months following the grant of asylum, and for other ORR funded benefits for up to 5 years.[347] Further, an asylee may adjust status to lawful permanent resident if s/he: (1) applies for adjustment; (2) has been physically present in the U.S. for at least one year after being granted asylum; (3) continues to be a refugee within the meaning of section 101(a)(42) of the INA; (4) has not firmly resettled in another country; and (5) is admissible to the U.S. as an immigrant under section 212(a).[348] There is no longer a cap on adjustment of status for asylees and refugees.[349]

Asylees who are subject to any inadmissibility grounds must seek a waiver under section 209(c) of the INA in order to adjust status. With the exception of controlled substance trafficking[350] and several grounds related to security,[351] the Attorney General may waive any grounds of inadmissibility for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

In order to apply for adjustment of status, an asylee must prepare and submit Form I-485, *Application to Register Permanent Residence or Adjust Status*, with USCIS.[352] Along with Form I-485, the applicant must include supporting documents showing s/he has been granted asylum and meets the adjustment of status requirements for asylees.[353] Evidence of physical presence can be shown through college transcripts, employment records, or installment payments (*e.g.*, monthly rent receipts, utility bills) during the requisite time period.[354] The applicant will be required to undergo an interview before the adjudicating office prior to being granted lawful permanent residence, unless the applicant is a child under the age of 14.[355]

If, during the pendency of the adjustment of status application, country conditions change such that the applicant no longer fears persecution, adjustment of status may be denied. Although a denial of adjustment of status is not appealable, the application may be renewed in removal proceedings.[356]

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[347] Office of Refugee Resettlement, Administration for Children and Families, *Asylee Information and Hotline* (July 12, 2012), *available at* http://www.acf.hhs.gov/programs/orr/resource/asylee-information-and-hotline.
[348] INA § 209(b), 8 U.S.C. § 1159; 8 C.F.R. §§ 209.2(b), 1209.2(b).
[349] REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, § 101(g).
[350] INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C).
[351] INA § 212(a)(3)(A)-(C), (E), 8 U.S.C. § 1182(a)(3)(A)-(C), (E).
[352] Unless the applicant is in removal proceedings, in which case the immigration judge would have exclusive jurisdiction to adjudicate any application for adjustment of status filed by the applicant. 8 C.F.R. § 1245.2.
[353] *Id.* § 209.2(c).
[354] U.S. Citizenship and Immigration Services, *Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specialized Criminal Activity* (Dec. 12, 2008), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3fc14b60aaa0e110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.
[355] 8 C.F.R. § 209.2(e).
[356] *Id.* §§ 209.2(c), 1209.2(c).

U VISA

"While the defendants were kicking and punching him, he was stabbed in the abdomen and on his left side. His left cheek was also slashed. He was removed to a local hospital where he was admitted and remained for approximately one week. The defendants' actions caused a laceration to his face, a punctured lung, and injuries to his diaphragm and colon."

– Deposition testimony of a detective based on information provided by an unaccompanied immigrant minor to indict gang members for, among other things, felony gang assault. The defendants were ultimately convicted.

INTRODUCTION TO U VISAS

Julia's parents brought her from Mexico to the United States when she was seven years old. Julia started school, where she quickly made friends and learned English. When she was 14, Julia went with some friends to a house party at an older high school student's home. She began talking with an older boy named David who she recognized from the neighborhood. When David offered her a drink, she refused at first because she had never drunk alcohol before. However, David convinced her to have just one and led her to one of the bedrooms while the two continued talking. As she was sitting on the bed, Julia began to feel weak and dizzy. She noticed that she was unable to move her body. Julia saw David approaching her and felt him taking off her pants, but she could not talk. She remembered feeling him climb on top of her and begin to have sex with her, but she soon blacked out. When Julia awoke, she was alone. She grabbed her clothes and ran out. She reported the rape to the police a few days later, and David was arrested and charged. Julia cooperated with the prosecutor on several occasions and testified in court against David. David was convicted for sexual assault of a minor.

Although fictional, stories like Julia's happen every day to immigrants and non-immigrants alike and demonstrate the importance of a victim's cooperation with authorities after suffering physical or mental abuse from criminal activity. Recognizing the need to protect victims and encourage them to come forward with valuable information, Congress created the U visa as part of the Victims of Trafficking and Violence Prevention Act ("VTVPA") of 2000.[357] The U visa, so named because it falls under subsection (U) of section 101(a)(15) of the Immigration and Nationality Act ("INA"), is an immigration benefit for victims of certain crimes who have been, or will likely be, helpful in the investigation and prosecution of those crimes.

While the U visa is available to both adult and child victims, unaccompanied children can be particularly vulnerable to crimes such as human trafficking, domestic violence, and sexual assault. In creating the U visa, Congress recognized that certain victims, especially children, may be reluctant to come forward and cooperate with authorities out of fear of being detained and/or deported for not having lawful status. Cultural differences and a lack of understanding of U.S. laws often exacerbate these fears. Perpetrators commonly use immigration status to threaten child victims, telling them that reporting the violence will result in their own deportation rather than any consequences to the perpetrator. The U visa was thus created to allow authorities to fully investigate and/or prosecute a case, while offering crime victims temporary relief from deportation. Recognizing that some children may have difficulty trusting authorities and disclosing the details of their victimization (which was likely traumatic), the U visa also allows a parent who possesses information about the underlying crime to assist a child under the age of 16 in cooperating with authorities.

In order to apply for a U visa, a victim must prepare and submit Form I-918, *Petition for U Nonimmigrant Status*, to U.S. Citizenship and Immigration Services ("USCIS"). In addition, the applicant must have a certifying agency fill out Form I-918B ("Supplement B") verifying that the victim has been, or will be, helpful in the investigation of the crime. Although the Supplement B does not guarantee that USCIS will approve the U visa, an applicant will not be

[357] Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000). The VTVPA is also known as the Trafficking Victims Protection Act (TVPA) of 2000.

eligible for a U visa without one. The certification may be completed by any agency with the authority to investigate or prosecute the qualifying criminal activity, including, but not limited to: local or federal police, prosecutors, judges, child protective services, or Immigration and Customs Enforcement ("ICE"). For the purposes of U visa eligibility, the perpetrator does not have to be convicted, charged, or even arrested. Rather, the certifying agency's focus should be the helpfulness or potential helpfulness of the victim in investigating and/or prosecuting the crime.

Even where a victim fully cooperates with authorities, some jurisdictions may be reluctant to certify the Supplement B because they are unfamiliar with the U visa. Additionally, some authorities may decline to provide a certification because they mistakenly assume that certifying the Supplement B grants immigration status to the applicant, or because the criminal investigation is ongoing and they want to avoid compromising the credibility of the witness by giving the appearance of promising immigration benefits in exchange for the witness's testimony. Before reaching out to authorities, a *pro bono* attorney should consult with local practitioners to better understand the practices of the local certifying agency. In some cases, the *pro bono* attorney may need to educate the authorities about this particular form of relief while respectfully asking for a certification.

Although Congress has capped the number of U visas granted at 10,000 per fiscal year, this quota is not always met. If it is met, USCIS will create a waiting list that carries over to the next fiscal year.

Once USCIS approves a U visa application, the applicant receives "U nonimmigrant status" allowing him or her to remain in the U.S. for up to four years while assisting law enforcement. After three years of continuous physical presence in the U.S., the U visa holder can apply to adjust his or her status to that of a lawful permanent resident (also known as a "green card holder") if certain criteria are met.

The U visa is particularly beneficial to immigrant children because certain "derivatives" − specifically, the U visa recipient's parents, children, and unmarried siblings under the age of 18 − may be included in the application and thereby granted U nonimmigrant status. Thus, the U visa confers immediate immigration benefits to both the victim and his or her family.

U VISA REQUIREMENTS

To be eligible for a U visa, an applicant must show that s/he: (1) was a victim of a qualifying crime in the United States; (2) suffered substantial physical or mental abuse as a result of the criminal activity; (3) possesses credible and reliable information concerning the criminal activity; and (4) has been helpful or is likely to be helpful to law enforcement in the investigation or prosecution of the crime.[358]

[358] INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i).

I. Victim of a Qualifying Crime in the U.S.

In order to qualify for a U visa, an applicant must have been the victim of a qualifying crime that either violated the laws of the United States or occurred in the United States. The following are qualifying crimes under section 101(a)(15)(U) of the INA:[359]

- Abduction
- Abusive sexual contact
- Blackmail
- Domestic violence
- Extortion
- False imprisonment
- Felonious assault
- Female genital mutilation ("FGM")
- Being held hostage
- Incest
- Involuntary servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual assault
- Sexual exploitation
- Slave trade
- Torture
- Trafficking
- Witness tampering
- Unlawful criminal restraint
- Stalking[360]

Sample Part 3 of the Supplement B Form:

Part 3. Criminal acts.

1. The applicant is a victim of criminal activity involving or similar to violations of one of the following Federal, State or local criminal offenses. *(Check all that apply.)*

☐ Abduction	☐ Female Genital Mutilation	☐ Obstruction of Justice	☐ Slave Trade
☐ Abusive Sexual Contact	☐ Hostage	☐ Peonage	☐ Torture
☐ Blackmail	☐ Incest	☐ Perjury	☐ Trafficking
☐ Domestic Violence	☐ Involuntary Servitude	☐ Prostitution	☐ Unlawful Criminal Restraint
☐ Extortion	☐ Kidnapping	☐ Rape	☐ Witness Tampering
☐ False Imprisonment	☐ Manslaughter	☐ Sexual Assault	☐ Related Crime(s)
☒ Felonious Assault	☐ Murder	☐ Sexual Exploitation	☒ Other: *(If more space needed, attach seperate sheet of paper.)*
☐ Attempt to commit any of the named crimes	☐ Conspiracy to commit any of the named crimes	☐ Solicitation to commit any of the named crimes	**gang assault in 1st**

Form I-918 Supplement B (08/31/07)

An applicant may also be eligible for a U visa if s/he was the victim of "any similar activity in violation of Federal, State, or local criminal law,"[361] which includes crimes with elements substantially similar to the above-listed enumerated crimes. For example, a charge of video voyeurism may fall under the qualifying crime of sexual exploitation if the elements of voyeurism under state or local law are similar to those of sexual exploitation. Furthermore, a petitioner may be eligible for a U visa if s/he has been the victim of any attempt, conspiracy, or

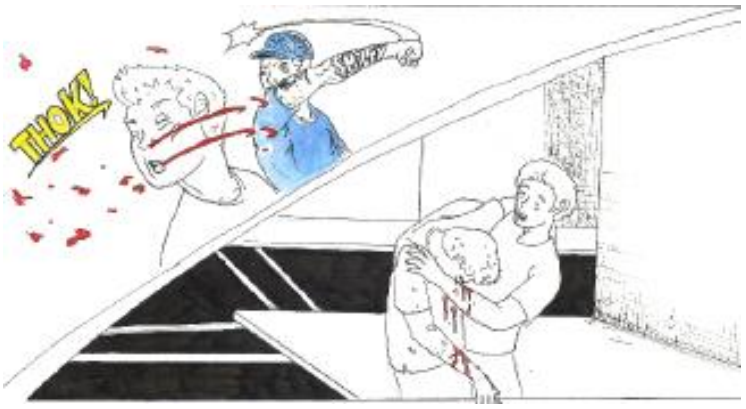
[359] INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii).
[360] *Id*., as amended by the Violence Against Women Act Reauthorization (VAWA) of 2013, Pub. L. No. 113-4.
[361] *Id*.

solicitation to commit a qualifying or related offense.[362] In order to be eligible for a U visa on this basis, the petitioner is required to show the relationship between the underlying crime and one of the crimes listed above.

II. Substantial Physical or Mental Abuse

When adjudicating U visa petitions, USCIS determines whether a victim has suffered "substantial physical or mental abuse" as a result of the criminal activity. This determination is made on a case-by-case basis. Among other things, USCIS considers the following factors:

- The nature of the injury inflicted;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of the harm; and
- The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.



"As the boys were running, Smiley let the dogs loose and they started chasing the boys. One of the dogs caught up to Jaime and started biting his legs and back. Jaime fell to the ground as the dog continued to attack him. The gang quickly surrounded Jaime on the ground. Then, they began kicking and punching him all over his body."

– The Basics of Immigration: U Visa, graphic novel by CAIR Coalition staff

A. Corroborating Evidence

On Form I-918 Supplement B (*see infra* p. 76), a certifying law enforcement agency may provide information about any injuries or abuse suffered by the victim. Although USCIS will consider this evidence in determining U visa eligibility, the burden of proving substantial physical or mental abuse ultimately lies with the petitioner. Part C of the Form I-918 U visa application encourages the petitioner to "provide and document all credible evidence, particularly when documenting a pattern of abuse." This permits the attorney to submit a wide range of corroborating evidence, including:

[362] *Id.*

- A personal statement of the applicant describing the crimes and harm suffered;
- Supporting affidavits from family members, friends, teachers, counselors, and/or others in the community with personal knowledge of the facts relating to the criminal activity;
- Medical, hospital, and/or mental health records that document the child's physical or mental condition, including records of any psychological or psychiatric examination(s);
- Photographs of the child's visible injuries, supported by affidavits;
- School records;
- Newspaper articles;
- Relevant birth or death certificates; and/or
- Records from non-certifying agencies. For example, even where a prosecutor's office has already certified the Supplement B, an applicant can also include police reports, orders of protection, court records, and records from child protective services to substantiate the harm.

Attorneys should submit as much corroborating evidence as possible to reaffirm and fill in factual details of the child's story, as specific dates, places, and events strengthen the U visa application. One of the most powerful tools in the application is the child's declaration, which is a written retelling of the child's suffering of substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity.

Many children who have suffered harm and trauma find it difficult to articulate past events, and as a result, may provide conflicting details or have difficulty recalling specific dates or places. An attorney and/or mental health expert may need to have numerous conversations with the child in order to extract his or her story in a coherent way. To avoid conflicting statements in the evidentiary record, the attorney might choose to focus a declaration on the details of the harm and its ongoing effects on the victim, rather than focusing on specific dates, times, and locations.

Attorneys should ensure that all corroborating evidence is internally consistent, particularly with the client's declaration and the Form I-918. Any non-English corroborating documents should be translated into English with a completed Certificate of Translation attached.[363]

> "*USCIS will make the determination as to whether the victim has met the "substantial physical or mental" standard on a case-by-case basis during its adjudication of the U visa petition*."
>
> − DHS's U Visa Law Enforcement Certification Resource Guide

[363] For a Sample Certificate of Translation, *see Immigration Court Practice Manual*, *supra* note 290, at Appendix H.

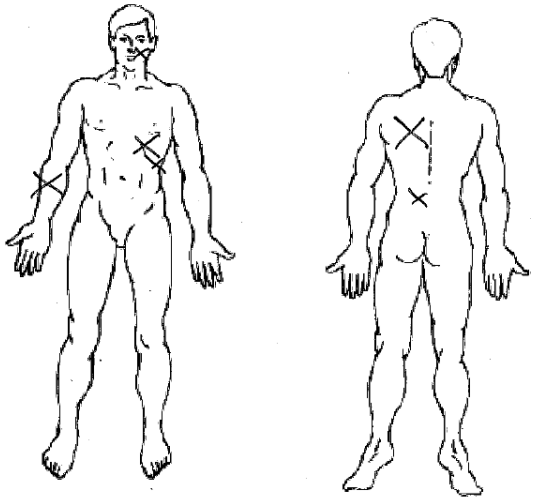
B. Expert Witnesses and Mental Health Experts

Nearly all child U visa applicants have suffered some form of mental or physical health consequences as a result of the circumstances giving rise to their application. For children who are still developing emotionally, these mental health consequences can manifest themselves in various forms, including memory loss, difficulty retelling traumatic stories, and inconsistent or vague testimony − all of which can affect the attorney's ability to provide detailed information in support of the application. Attorneys representing child applicants who have concerns about the child's mental or physical health should consider using a therapist or counselor during the course of the representation to help the child through any emotional difficulties arising from preparation of the application.

Using expert witnesses such as doctors or other health professionals can also be an effective strategy to corroborate the child's story and assist USCIS in better understanding the child's particular circumstances. Attorneys should consider retaining mental health experts who can corroborate the child's story or trauma, diagnose any mental health conditions stemming from the trauma, and/or help explain potential credibility issues that may arise from the trauma. If the victim suffered physical injuries, experts may also be able to provide photographs, x-rays, or diagrams indicating where on the body the victim was injured and any physical damage, whether permanent or healed.

MEDICAL INTAKE FORM

Date: 01-23-12 Time: 9:00 Am
Patient's name: LUIS ABEL GONZALEZ
Reporter: DR. JOHN FRIEDMAN



Description: Minor has extensive bruising on left shoulder blade + lower back. Missing left canine tooth. Two broken ribs + swelling on left side of body. Laceration on right anterior forearm.

Expert witnesses provide written, sworn declarations that are submitted with the U visa application. They typically charge fees for their services, which should be negotiated at the beginning of the representation. Some experts provide free or discounted rates to *pro bono* attorneys upon request. Attorneys should discuss the scope of the expert's work at the outset and are encouraged to formalize the scope of the relationship through a retainer agreement. Attorneys requesting assistance from experts who have never provided services for an immigration matter should be prepared to provide sample declarations and a list of specific issues they would like the expert to address. Attorneys may also offer assistance in drafting and editing declarations.

Health professionals serve very different roles when conducting evaluations for the purpose of providing expert testimony and when providing ongoing therapy or counseling. Attorneys should be aware of this distinction and consider whether a health professional would be helpful in either or both roles given the child's needs.

III. Victim Possesses Information about the Criminal Activity

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

Child crime victims may be unable to provide law enforcement with adequate information because of their age and/or the trauma they have suffered. In many cases, a child might first confide in his or her parents about the criminal activity. Parents of child victims therefore play a critical role in reporting crimes and assisting law enforcement in the investigation or prosecution of crimes committed against their children. Furthermore, a parent's "helpfulness," such as making phone calls to the police, assisting during police questioning, and offering direct testimony in court, will be attributed to the child's "helpfulness" when the child is under the age of 16.

A non-citizen parent may also apply for recognition as an "indirect victim" of a crime committed against a child if: (1) the principal victim is a child under the age of 21 and is unable to provide assistance to law enforcement in the investigation or prosecution of the crime because of incompetence or incapacity; or (2) the child is deceased due to murder or manslaughter.[364] The parent must meet the remaining requirements for U visa eligibility in order to qualify as an indirect victim.

A "next friend" is an individual who assists in a lawsuit on behalf of an applicant who is under the age of 16 or who cannot appear on his or her own behalf because of inaccessibility, mental incompetence, or other disability. A "next friend" is dedicated to the best interests of the petitioner. In cases involving domestic violence, child victims may be placed in the care and custody of the state, either temporarily or permanently. A social worker or guardian *ad litem* may then be assigned to the case as a "next friend" for purposes of the child's custody hearing.

[364] 8 C.F.R. § 214.14(a)(14)(i).

In these cases, the social worker or guardian *ad litem* can provide valuable information on behalf of the child to the police, the state, or the juvenile court judge charged with determining the child's best interests. For U visa purposes, the "helpfulness" of the "next friend" in providing information will similarly be attributed to the child when s/he is under the age of 16.

IV. Helpfulness in Investigation or Prosecution

A. "Helpfulness" in Investigation or Prosecution

A U visa petition must include Form I-918 Supplement B, *U Nonimmigrant Status Certification*, a signed certification from a law enforcement agency attesting that the applicant assisted, or is likely to assist, law enforcement in the investigation or prosecution of the qualifying criminal activity of which s/he is a victim. A petitioner who unreasonably refuses to assist law enforcement after reporting a crime will not be eligible for a U visa. While there is no requirement for a victim to testify at trial in order to be eligible for a U visa, the victim cannot unreasonably refuse to cooperate with law enforcement if s/he is expected to testify.

Petitioners also have an ongoing responsibility to remain helpful to law enforcement even after a U visa is granted. The certifying agency has the discretion to withdraw or disavow a Supplement B at any time if the victim fails to provide continuing assistance when reasonably requested to do so. In addition, USCIS may revoke the U visa if the victim unreasonably refuses to provide assistance after the visa has been granted.

The U visa certification process can be initiated by either the crime victim or the law enforcement agency itself. The petitioner is required to send the original signed certification form to USCIS along with his or her completed U visa petition. For more information about filing a Supplement B, *see infra* p. 84.

The law enforcement certification attests, to the best of the certifying official's knowledge, that the petitioner: (1) was a victim of a qualifying crime; (2) has specific knowledge and details of the crime; and (3) has been, or is likely to be, helpful to law enforcement in the detection, investigation, or prosecution of the qualifying crime. Part 4, Question 5 of the certification form invites the certifying official to provide specific details about the helpfulness of the victim, including any refusal by the victim to be helpful at any time during the investigation or prosecution. In addition, law enforcement may report information about any harm sustained by the victim of which law enforcement has knowledge.

Note that there is no statute of limitations for the qualifying crime. A certification can be submitted even for a victim in a closed case.[365] Moreover, a law enforcement certification can be completed even where no charges have been filed, there is no ongoing investigation, and/or the perpetrator has not been prosecuted or convicted. Certifications for these types of cases are permitted because, in some cases, an arrest or prosecution cannot take place because of evidentiary hurdles or because the perpetrator has fled, cannot be identified, or was deported.

[365] U.S. Department of Homeland Security, *U Visa Law Enforcement Certification Resource Guide*, *available at* http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf [hereinafter *U Visa Resource Guide*].

Sample Part 4 of the Supplement B Form:

Part 4. Helpfulness of the victim.

The victim (or parent, guardian or next friend, if the victim is under the age of 16, incompetent or incapacitated.):

1.	Possesses information concerning the criminal activity listed in **Part 3**.	☒ Yes	☐ No
2.	Has been, is being or is likely to be helpful in the investigation and/or prosecution of the criminal activity detailed above. *(Attach an explanation briefly detailing the assistance the victim has provided.)*	☒ Yes	☐ No
3.	Has not been requested to provide further assistance in the investigation and/or prosecution. *(Example: prosecution is barred by the statute of limitation.) (Attach an explanation.)*	☐ Yes	☒ No
4.	Has unreasonably refused to provide assistance in a criminal investigation and/or prosecution of the crime detailed above. *(Attach an explanation.)*	☐ Yes	☒ No

Form I-918 Supplement B (11/23/10) Y Page 2

B. Certifying Law Enforcement Agencies and Officials

Law enforcement agencies have the discretion, but are under no legal obligation, to complete U visa certifications. A certifying agency may be any agency with responsibility for the investigation, prosecution, conviction, or sentencing of the qualifying criminal activity, including, but not limited to:

- Federal, state, and local law enforcement agencies;
- Federal, state, and local prosecutors' offices;
- Federal, state, and local judges;
- Federal, state, and local family protective services;
- Equal Employment Opportunity Commission;
- Federal and state Departments of Labor; or
- Other investigative agencies.[366]

A U visa certification may be signed by "[t]he head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency."[367] Although not required with each certification, it may be helpful to include in the U visa application package a letter showing the designation of the signing official. The letter should be signed by the agency head and include the name and rank or title of the designated signing official. Helpful resources

[366] *Id*.; *see also* U.S. Citizenship and Immigration Services, *Questions & Answers: Victims of Criminal Activity, U Nonimmigrant Status* (Nov. 22, 2010), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f31534210VgnVCM100000082ca60aRCRD&=e3e4d77d73210VgnVCM100000082ca60aRCRD [hereinafter USCIS Questions & Answers].

[367] 8 C.F.R. § 214.14(a)(3).

for certifying authorities include USCIS's instructions for completing the Supplement B,[368] DHS's *U Visa Law Enforcement Certification Resource Guide*,[369] and the *U Visa Toolkit for Law Enforcement Agencies and Prosecutors*.[370]

Obtaining a law enforcement certification is often one of the most significant challenges for attorneys representing child U visa applicants. Because many law enforcement agencies are unfamiliar with the U visa process, the attorney may need to familiarize the agency with the process and emphasize the importance of submitting a certification on the child's behalf.

Jurisdictions vary in their procedures for certifying the Supplement B, and many law enforcement agencies have established their own policies and procedures for providing U visa certifications. In the case of a 17-year-old boy who was stabbed and beaten by a gang because of mistaken identity, CAIR Coalition was able to obtain a U visa certification from a District Attorney's ("DA") Office in New York City within a matter of days. Notably, that DA's office appoints one or two lawyers to review each U visa case and make a decision in as little as a day. In contrast, U visa certifications by the New York City Police Department ("NYPD") are reportedly subject to a more burdensome review process before reaching the Police Commissioner's desk for approval.

In general, attorneys should conduct initial research before reaching out to local authorities, including speaking with local practitioners to ascertain which agencies are familiar with the U visa, which have victims' units, and which are more likely to certify the Supplement B. Before contacting authorities regarding a U certification, *pro bono* attorneys representing children in the D.C. metropolitan area should consult with CAIR Coalition staff about their experiences in working with local law enforcement.

Sample Part 6 of Supplement B Form:

Part 6. Certification

I am the head of the agency listed in **Part 2** or I am the person in the agency who has been specifically designated by the head of the agency to issue U nonimmigrant status certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual noted in **Part 1** is or has been a victim of one or more of the crimes listed in **Part 3**. 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. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he/she is a victim, I will notify USCIS.

Signature of Certifying Official Identified in Part 2. | **Date** *(mm/dd/yyyy)*

01-15-2014

Form I-918 Supplement B (01/15/13) Y Page 3

[368] U.S. Citizenship and Immigration Services, *Instructions for Form I-918 Supplement B, U Nonimmigrant Status Certification* (Jan. 15, 2013), *available at* http://www.uscis.gov/files/form/i-918supbinstr.pdf.
[369] U.S. Department of Homeland Security, *U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement* (Dec. 2011), *available at* http://www.dhs.gov/U visa-law-enforcement-certification-resource-guide.
[370] Leslye E. Orloff et al., National Immigrant Women's Advocacy Project at American University Washington College of Law, *U Visa Toolkit for Law Enforcement Agencies and Prosecutors* (Nov. 2012), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/february-15-2013-collaborating-with-le/U visa_toolkit_Jan2013.pdf.

Sample Request to Authorities to Certify Form I-918, Supplement B

Ms. Smith:

Thank you for taking the time to speak with me this morning regarding Julio Ramirez's case. I would appreciate any help from you and your office. As you are aware, I have come to know Julio through my work at the Capital Area Immigrants' Rights (CAIR) Coalition, a non-profit organization located in Washington, D.C. that provides free legal services to unaccompanied immigrant children detained by immigration in Virginia.

I have had the opportunity to meet with Julio on several occasions to assess his eligibility for relief from deportation. In my meetings with Julio, he shared with me that he was a victim of a violent attack by several gang members in 2012. I understand that your office has an excellent Crime Victim's Coordinator's Office that offers assistance and services as part of your mission to seek justice for victims. The U visa is a temporary form of humanitarian relief for victims of certain crimes who are undocumented and facing deportation, and who have been helpful or who will likely be helpful to law enforcement authorities in the future. As the victim of attempted homicide who subsequently cooperated with your office, Julio may be eligible for a U visa.

Our office is currently assisting Julio with his U visa application to be submitted to U.S. Citizenship and Immigration Services (USCIS). As part of this process, we would like to request that you fill out and certify the Supplement B portion of Form I-918. The certifying person must be a law enforcement official or other federal or state authority that detected, investigated, or prosecuted any of the criminal activities. By completing this form, you would be assessing Julio's helpfulness in the investigation of the crime committed against him. The criminal activity in Julio's case occurred on November 31, 2012, when he was attacked and beaten in the street by gang members who erroneously suspected him of being a rival gang member. They slashed his face and stabbed him in the chest and side. As a result, Julio spent five days in the hospital and several months recovering. Afterwards, he worked with investigators, including your office, to provide information about the crime. Julio later testified before a grand jury, and several of the aggressors were ultimately arrested and convicted (Case # 1234567).

For the Supplement B to be completed, it is not necessary that the aggressor be charged or found guilty of the crime. The form merely certifies that the crime took place and that Julio helped with the investigation of the crime. It is also important to remember that by signing this, your office is not conferring any sort of immigration status upon Julio. It is simply a necessary step of his application. Without it, he will not be able to proceed with his case.

I have attached the entire Form I-918B, as well as the instructions to assist you in completing the form. I have also attached a "U visa Law Enforcement Toolkit," which may offer some guidance.

I would appreciate any help with this and am willing to offer any assistance you may need. Thank you again, and I look forward to speaking with you soon.

Sincerely,

Ashley Ham Pong
Supervising Attorney, Detained Children's Program
CAIR Coalition

WAIVERS AVAILABLE

Immigrants seeking to lawfully enter the United States or adjust their status from within the United States must be "admissible" under the INA. If the applicant is inadmissible to the U.S. based on one of the grounds enumerated in section 212(a) of the INA, s/he must obtain a waiver of inadmissibility in order to receive U nonimmigrant status. Some of these inadmissibility grounds include:

- Unlawful presence in the U.S.;[371]
- Conviction and/or commission of certain crimes;[372]
- Entering the U.S. without permission;[373]
- Having lied to immigration officials;[374]
- Falsely claiming to be a U.S. citizen for any benefit;[375] and
- Security grounds (related to terrorism).[376]

Note that the above list is not exhaustive. Part 3 of the U visa application should identify and explain all potential grounds of inadmissibility that may apply to the petitioner. The U visa applicant can apply for a waiver of most grounds of inadmissibility by submitting Form I-192, *Application for Advance Permission to Enter as Nonimmigrant*. The Form I-192 should provide context for any prior criminal acts, particularly if they are linked to the client's victimization (for example, if the client was forced to engage in prostitution or steal to provide for his or her basic needs).

The approval or denial of a waiver application is discretionary. USCIS evaluates each U visa petition on a case-by-case basis and has broad authority to waive most inadmissibility issues, except where the applicant committed certain enumerated offenses.[377] In evaluating an application, USCIS will consider the number and severity of the offenses involved. In cases involving violent or dangerous crimes or security-related grounds of inadmissibility, the waiver will only be approved in extraordinary circumstances.[378] USCIS will also deny a U visa petition

[371] INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B).
[372] INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).
[373] INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).
[374] INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).
[375] INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii).
[376] INA § 212(a)(3), 8 U.S.C. § 1182(a)(3). Note that Congress recently amended the TVPRA and the William Wilberforce Violence Against Women Act ("VAWA") to eliminate the public charge ground of inadmissibility for U visa applicants. As a result, U visa applicants need no longer apply for waivers of inadmissibility under INA § 212(a)(4), which provides that "[a]ny alien who . . . is likely at any time to become a public charge is inadmissible." Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4.
[377] Under section 212(d)(14) of the INA, the Secretary of Homeland Security cannot waive inadmissibility under section 212(d)(3)(E) (participation in Nazi persecution, genocide, torture or extrajudicial killing). 8 U.S.C. § 1182(d)(14).
[378] 8 C.F.R. § 214.1(b)(2).

if the victim was complicit or culpable in the qualifying criminal activity of which s/he claims victimization.

Although juvenile delinquency findings are not considered "convictions" under section 101(a)(48)(A) of the INA,[379] they may nevertheless trigger certain conduct-based inadmissibility grounds that do not require convictions. Other inadmissibility bars are triggered when an applicant admits to having engaged in certain conduct, even without a delinquency finding. Practitioners should be aware, however, that inadmissibility grounds triggered simply by the admission of facts sufficient to constitute a crime may not apply to juveniles in certain cases.

For guidance regarding the consequences of a child's juvenile delinquency or criminal history on his or her admissibility, please ask CAIR Coalition staff for a copy of the Immigrant Legal Resource Center's *Practice Advisory: Legal and Ethical Considerations in Disclosure of Delinquent Conduct* and Legal Services for Children's *Practice Advisory: Preparing for an I-485 Adjustment of Status Interview and/or Hearing Before Immigration Court for UACs with Delinquency Issues*.

In many cases, an applicant's criminal history is the result of, or related to, the victimization that forms the basis for the U visa petition. A child who has been the victim of domestic violence or sexual assault, for example, might have a history of delinquent conduct, such as vandalism, running away, prostitution, or underage drinking in public – all of which can be chargeable offenses. These actions may be the child's way of expressing feelings of anxiety, depression, loneliness, and vulnerability. In other cases, police may have been called to the home to investigate a domestic disturbance only to charge the child, rather than the parent, for assault and battery.

Because USCIS's decision to waive a ground of inadmissibility is discretionary, the child's personal statement and/or Form I-192 should explain the reasons for the behavior that triggered the inadmissibility grounds or wrongful conduct. The applicant should also include evidence of positive factors that weigh in favor of an exercise of discretion – even those

[379] *Matter of Devison*, 22 I. & N. Dec. 1362 (B.I.A. 2000).

unrelated to the victimization – as an adjudicator evaluates the applicant based on the totality of the applicant's circumstances.[380] Positive factors may include:

- The applicant's ties to U.S. citizens and/or relatives with lawful immigration status;
- The applicant's contributions to the community;
- The applicant's education or employment history;
- Circumstances under which the applicant came to the U.S. and his or her length of time in the U.S., particularly if s/he came to the U.S. as a young child or is/was unaccompanied; or
- Facts demonstrating hardship the applicant will face upon removal to his or her home country, such as unstable family life, likelihood of homelessness if returned, or undesirable country conditions (*e.g.*, prevalence of transnational gangs or violence, government or police corruption, inadequate social/medical services for crime victims, lack of educational opportunity).

The Administrative Appeals Office ("AAO"), which reviews appeals of many USCIS decisions, has taken the position that it lacks jurisdiction to review the Vermont Service Center's denial of waivers in connection with U visa applications.[381] However, in the case of a denial by USCIS, a new waiver application may be filed.[382]

Generally, USCIS does not initiate removal proceedings following a U visa denial. USCIS may, however, find the victim inadmissible and initiate removal proceedings where an application raises serious inadmissibility issues, such as security concerns, multiple or violent criminal arrests, or multiple immigration violations.

THE U VISA APPLICATION PROCESS

I. Filing Requirements

Attorneys representing child U visa applicants face unique and significant challenges. The child's age, development, and the traumatic circumstances often underlying the U visa claim can affect the child's ability to communicate with his or her attorney effectively. USCIS does not conduct interviews of U visa applicants, so the petitioner will not be given the chance to explain anything in the application package. Therefore, preparing a detailed application package

[380] For a list of "positive factors" weighing in favor of ICE's exercise of prosecutorial discretion, *see* John Morton, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf; *see also* John Morton, U.S. Immigration and Customs Enforcement, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf.

[381] 8 C.F.R. § 212.17(b)(3).

[382] INA § 212(d)(14), 8 U.S.C. § 1182(d)(14); 8 C.F.R. § 212.17(b)(3).

is critical, and attorneys may need to pursue a broad range of strategies to obtain corroborating information in support of the child's application.

The application package for a U visa should include the following:[383]

- Cover letter that details the petitioner's eligibility and outlines and references the supporting documentation and evidence;
- Form I-918, *Petition for U Nonimmigrant Status*;
- Form I-918 Supplement B, *U Nonimmigrant Status Certification*; [384]
- Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*;
- Form I-192, *Application for Advance Permission to Enter as a Nonimmigrant*, for a waiver of any grounds of inadmissibility identified on Form I-918;[385]
- Form I-765, *Application for Employment Authorization*;
- Form I-912, *Request for Fee Waiver* (among other things, USCIS may waive the $80 biometrics fee and filing fees for Forms I-192 and I-765);[386]
- 3 passport-sized photos;
- Personal statement or declaration of petitioner; and
- Evidence demonstrating eligibility and discretionary factors, such as State Department reports, human rights reports, or declarations of support from case managers, social workers, therapists, or other advocates who have worked with the applicant.

II. Cover Letter to the U Visa Application

The attorney's cover letter to USCIS is one of the most important forms of advocacy in support of the U visa application. For U visa applicants with relatively straightforward claims, the cover letter can be short and provide a succinct overview of the factual and legal arguments supporting the claim. However, for child applicants who have more complicated circumstances that warrant further explanation (such as negative facts), an effective written submission by the

[383] Forms and instructions are available at http://www.uscis.gov.
[384] Any additional documents provided by the law enforcement official, such as photographs or a copy of the police report, should be indicated on Form I-918B with a note to "see attachment" or "see addendum."
[385] This form must still be submitted along with Form I-918 regardless of whether an applicant is seeking a waiver, because it allows USCIS to issue Form I-94, *Arrival/Departure Record*, to a U nonimmigrant.
[386] TVPRA 2008 amended the INA to provide for fee waivers for forms filed by victims of crime. USCIS interprets this broadly and may waive any fees associated with the filing of a U visa application, including all fees arising through the final adjudication of adjustment of status applications filed by U visa recipients. U.S. Citizenship and Immigration Services, Policy Memorandum, *William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator's Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38)* (July 21, 2010) [hereinafter TVPRA Policy Memorandum].

attorney can be a vital component of the application, creating a framework for USCIS to analyze the application and its contents.

The cover letter should include the following information:

- A list of all documents included in the filing;
- A brief factual summary;
- A brief overview of the legal argument;
- A discussion of any issues that warrant further explanation; and
- A conclusion that portrays the child in the best possible light.

III. Law Enforcement Certification

USCIS may reject a U visa petition solely on the basis of an improperly completed law enforcement certification. The Form I-918 Supplement B must include an original signature of the certifying official and should be signed in an ink color other than black. USCIS will not accept photocopies, faxes, or scanned copies of the certification form.

In addition, the certification must have been signed within the six months immediately preceding the submission of the petition package. If the applicant does not file the U visa application within six months of the date the Supplement B is signed by authorities, the applicant can request that authorities prepare a more current Supplement B. However, because authorities are under no obligation to prepare the Supplement B, an applicant who fails to submit his or her application in a timely manner risks being ineligible to receive a U visa if a new Supplement B cannot be obtained.

IV. Background Investigation (Biometrics)

In addition to documentation submitted by the U visa petitioner, USCIS may also consider information and evidence from law enforcement and immigration when determining U visa eligibility, including the petitioner's criminal history, immigration records, and other background information. USCIS conducts a thorough background investigation of all U visa applicants, including a name check and a Federal Bureau of Investigation ("FBI") fingerprint check, known as "biometrics."

Once the U visa application is filed, USCIS will send a written notice scheduling the child for a "biometrics" appointment, during which the child must provide the agency with original fingerprints and photographs. A biometrics notice will include the date, time, and location of the appointment. The child must bring the notice to the appointment along with a government-issued form of identification. Without biometrics, USCIS will not adjudicate the I-918. USCIS will also review the petitioner's immigration records for any potential grounds of inadmissibility, such as any criminal history, immigration violations, and/or security concerns.

USCIS may contact the certifying law enforcement agency with any questions about information provided in the law enforcement certification.[387]

V. U Visa Adjudication

The USCIS Vermont Service Center adjudicates U visa applications on a case-by-case basis and does not issue written decisions on U visa petitions. USCIS may issue a request for evidence ("RFE") when an application lacks required documentation (initial evidence) or when the officer needs additional information or clarification (additional evidence) to determine an applicant's U visa eligibility. USCIS may send the applicant an RFE at any stage of its review.

The RFE will indicate what evidence or information is needed for USCIS to fully evaluate the application, where to send the evidence, and the deadline for response. Review of the U visa petition will be suspended during the response period. After a timely response to the RFE is received, USCIS will review the additional information and will adjudicate the petition in light of the new evidence.

Because a U visa can take anywhere from several months to a year to adjudicate even without delays (for example, due to an RFE), the attorney should ensure that the initial application contains all the required information and as much supporting evidence as possible.

U VISA DERIVATIVES

A "derivative" is an individual other than the applicant (usually a family member) who may be eligible to receive lawful status based on his or her relationship to the principal U visa recipient.[388] In order to include a derivative, the principal applicant must submit Form I-918 Supplement A, *Petition for Qualifying Family Member of U-1 Recipient*, either concurrently with the Form I-918 or anytime thereafter.

I miss you father
I wish to be with you
Laughing together
Father

– Excerpt from *Father*, a poem written by 17-year-old boy from Honduras while at Youth for Tomorrow

[387] *U Visa Resource Guide*, *supra* note 365.
[388] USCIS Glossary, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243ad1a/?vgnextoid=b328194d3e88d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD.

The following individuals may qualify for derivative U status:[389]

If principal recipient is 21 or older:	If principal recipient is under the age of 21:
• Spouse (U-2) • Unmarried children under the age of 21 (U-3)	• Spouse (U-2) • Unmarried children under the age of 21 (U-3)[390] • Parents (U-4) • Unmarried siblings under the age of 18 (U-5)

The principal applicant must demonstrate that the family member applying for derivative status: (1) meets one of the family relationship requirements above; and (2) is either not inadmissible under section 212(a) or qualifies for a waiver of inadmissibility. Note that derivative applicants need not meet the other eligibility criteria required of the principal U visa applicant.[391] Although the number of U visas approved each year is capped at 10,000, this numerical limitation applies only to principal applicants and not derivatives.[392]

BENEFITS AND ADJUSTMENT OF STATUS

Once the U visa petition is approved, the U visa recipient receives U nonimmigrant status to live and work in the U.S. for up to four years. A qualifying family member may be granted U-2, U-3, U-4, or U-5 derivative nonimmigrant status for an initial period that does not exceed the expiration date of the initial period approved for the principal U visa recipient.

USCIS will extend U nonimmigrant status beyond the initial period for individuals who have pending applications for adjustment of status under section 245(m).[393] U nonimmigrant status may also be extended if the certifying official attests that the immigrant's presence in the U.S. continues to be necessary to assist in the investigation or prosecution of the qualifying criminal activity. In order to obtain an extension of U nonimmigrant status based on such an attestation, the U nonimmigrant must file Form I-539, *Application to Extend/Change*

[389] 8 C.F.R. § 214.14(f)(4).
[390] Previously, unmarried children of U visa applicants did not remain eligible for U status after they turned 21, even if they met the age requirement at the time the derivative application was filed. By reauthorizing the Violence Against Women Act (VAWA) in March of 2013, Congress amended TVPRA and VAWA to provide U visa derivatives with age-out protections similar to those available for T visa derivatives. Specifically, unmarried children who are under the age of 21 at the time the derivative application is filed will now remain eligible for derivative status even after they turn 21. If the principal applicant is under the age of 21, his or her derivatives (*i.e.*, parents or unmarried siblings under the age of 18) will receive similar age-out protection once the principal applicant turns 21. Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4.
[391] 8 C.F.R. § 214.14(f)(1). However, if the family member committed the qualifying crime against the applicant, s/he will not be eligible to obtain U visa status as a derivative.
[392] INA § 214(p)(2)(B), 8 U.S.C. § 1184(p)(2)(B).
[393] INA § 214(p)(6), 8 U.S.C. § 1184(p)(6).

Nonimmigrant Status, and a newly executed Supplement B.[394] In addition, USCIS has discretion to extend U nonimmigrant status where an applicant demonstrates exceptional circumstances. The U visa holder may submit an affirmative statement and any other credible evidence in support of his or her request for an extension.[395]

Following the duration of the U visa period, the U visa recipient may apply for adjustment of status to become a lawful permanent resident (*i.e.*, green card holder) if s/he: (1) has been physically present in the U.S. for a continuous period of at least three years since the date of admission as a U nonimmigrant; and (2) has provided ongoing cooperation with law enforcement in connection with the investigation or prosecution of the qualifying crime.[396] Additionally, the certifying agency must determine that the individual's continued presence in the country is justified on humanitarian grounds to ensure family cohesiveness or is otherwise in the national or public interest.

In order to adjust status, the U visa recipient should file Form I-485, *Application to Register Permanent Residence or Adjust Status*; Form I-797, *Notice of Action*, providing evidence of lawful U nonimmigrant status; and any other supporting documents or forms.[397] S/he may also file Form I-912 requesting a fee waiver for the I-485 and other associated fees. These forms should be filed with USCIS, who has sole jurisdiction to approve or deny a Form I-485 based on U nonimmigrant status.[398]

There is no numerical cap on the number of U nonimmigrant status holders USCIS may adjust in a given fiscal year.[399] However, like the initial U visa application, the grant of adjustment of status to lawful permanent residence is discretionary and may be denied even if an applicant meets the eligibility requirements.[400]

Qualifying family members of the U nonimmigrant visa holder may also apply for permanent residence. Family members who hold a derivative U nonimmigrant visa themselves may be eligible for a green card, provided that the principal U visa holder meets the eligibility requirements for adjustment of status and that his or her adjustment application has been approved, is currently pending, or is concurrently filed.[401] Furthermore, family members who have never held a derivative U nonimmigrant visa may also be eligible for a green card in certain cases.[402]

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[394] 8 C.F.R. § 214.14(g); *see also* TVPRA Policy Memorandum, *supra* note 386.
[395] TVPRA Policy Memorandum, *supra* note 386.
[396] INA § 245(m), 8 U.S.C. § 1255(m); *see also U Visa Resource Guide*, *supra* note 365.
[397] Form and instructions available at http://www.uscis.gov.
[398] *Id.* § 245.24(f).
[399] U.S. Citizenship and Immigration Services, *Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specialized Criminal Activity* (Dec. 12, 2008), *available at* http://www.uscis.gov/portal/site//menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3fc14b60aaa0e110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.
[400] For guidance on how USCIS adjudicates U visa applications and corresponding adjustment of status applications, *see* TVPRA Policy Memorandum, *supra* note 386.
[401] *Id.*
[402] USCIS Questions & Answers, *supra* note 366.

T VISA

"He told me I should come to the U.S. and join him. I asked him what the U.S. was like. He told me the U.S. was great. He said there were a lot of jobs that paid well and many opportunities to get a higher education. He said that I could go to school and have great jobs available to me if I came to the U.S."

–17-year-old female who was forced into prostitution by her cousin and forced to work as a maid in the U.S. from 6:00 a.m. to 10:00 p.m. every day for $35 a week so that her cousin could buy drugs.

INTRODUCTION TO T VISAS

Rachel and Ramiro, teenage twin siblings, grew up in Guatemala. Their parents were very poor and could no longer afford to pay for school once Rachel and Ramiro turned 14 years old. Wanting to help their family, the twins decided to leave their home and travel by foot to the United States, where they hoped to find work. While traveling through Mexico, the twins were kidnapped by members of a Mexican cartel. They were blindfolded with their hands tied and taken to a warehouse, where they were separated.

Rachel's kidnappers took her to a room and raped her until she fell unconscious from the pain. They kept her there for three days, raping her repeatedly. They then forced her into the back of a transport truck along with several other girls who had also been kidnapped. The girls were told to stay quiet or they would be killed. The transport truck passed inspection at the U.S. border, and the captives were taken to a house in Houston, Texas. There, Rachel was forced to have sex with several men while her kidnappers profited. One week later, police raided the house, and Rachel was apprehended. She told authorities about her traffickers and the victimization she had experienced.

When the kidnappers first took Ramiro to the warehouse, they kept him in a room with several other teenage boys. They asked if he had any family members or acquaintances in the U.S. who could pay his ransom. When he said no, the kidnappers proceeded to beat him and burn several parts of his body. They told Ramiro he would have to work to pay off the ransom. After one week of torturing Ramiro and the other boys, the kidnappers loaded them up in a truck and drove them close to the border. The boys were tied together by the waist and strapped with large duffle bags of marijuana weighing 75 lbs each. They were instructed to walk in a line while one cartel member led the way with a gun and another cartel member followed behind. The boys were told they were being watched from a distance at all times by cartel members with binoculars and that they would be shot if they tried to escape. The boys trekked in the desert for three days. Ramiro and another boy managed to escape when they took a brief stop and soon turned themselves in to U.S. immigration authorities.

Although Rachel and Ramiro entered the U.S. by different means, they were both victims of human trafficking at the hands of a Mexican cartel. Rachel was a victim of sex trafficking, while Ramiro was a victim of labor trafficking. The Victims of Trafficking and Violence Prevention Act ("VTVPA") of 2000[403] created the T visa – so named because it falls under subsection (T) of section 101(a)(15) of the Immigration and Nationality Act ("INA"). The T visa is an immigration benefit for noncitizens such as Rachel and Ramiro who have been victims of a severe form of human trafficking, are in the U.S. on account of that trafficking, and who would suffer extreme hardship involving unusual and severe harm upon removal from the U.S. Unless they are under the age of 18, T visa applicants are required to comply with all reasonable requests to assist authorities in the investigation of the trafficking.

[403]Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000). The VTVPA is also known as the Trafficking Victims Protection Act ("TVPA") of 2000.

The U.S. government defines "severe form of trafficking in persons" to include both sex trafficking and labor trafficking (*e.g.*, bonded labor, forced labor, or child labor). While the T visa is available to both adult and child victims, traffickers often prey upon people with a relative lack of power who come from unstable and economically devastated places. Unaccompanied children are therefore particularly vulnerable to human trafficking because they tend to be poor and traveling alone. Child trafficking victims are frequently kept isolated and are guarded by their traffickers to prevent those who may offer assistance to the trafficking victim from discovering or stopping the trafficking.

> *"[B]ased on the information governments have provided, only around 40,000 victims of trafficking have been identified in the last year. In contrast, social scientists estimate that as many as 27 million men, women, and children are trafficking victims at any given time. This shows that a mere fraction of the more than 26 million men, women, and children who are estimated to suffer in modern slavery have been recognized by governments as such and are eligible to receive the protection and support they are owed."*
>
> – U.S. Department of State,
> 2013 Trafficking in Persons Report

In all too many cases, children are trafficked not by strangers (such as cartel members), but by trusted family members who promise them endless opportunities if they come to the United States. Once they arrive, the children quickly realize they have been deceived but are powerless to escape because of blackmail or other threats. In cases where underage girls are lured into prostitution by much older pimps, it is common for the girls to believe that these men are their boyfriends and that prostitution is merely a means of paying their passage to the U.S. or living expenses.

Victims of all forms of trafficking suffer significant emotional and physical abuse and trauma. Recognizing that harm and the need to investigate and prosecute traffickers, U.S. immigration laws and policies provide opportunities for victims of trafficking, once identified, to stabilize their immigration status and obtain assistance in rebuilding their lives in the U.S. through various programs. In order to apply for a T visa, an immigrant must submit Form I-914, *Application for T Nonimmigrant Status*, to U.S. Citizenship and Immigration Services ("USCIS") along with supporting documents.

Although Congress has capped the number of T visas granted at 5,000 per fiscal year,[404] this quota is not always met. If it is met, USCIS creates a waiting list that carries over to the next fiscal year. Once USCIS approves a T visa application, the child will receive "T nonimmigrant status" allowing him or her to remain in the U.S. for up to four years while assisting law enforcement in the investigation and/or prosecution of their traffickers. After three years of continuous physical presence in the U.S., the T visa holder can apply to adjust his or her status to that of a lawful permanent resident (also known as a "green card holder") if certain criteria are met.

[404] INA § 214(o)(2), 8 U.S.C. § 1184(o)(2).

Like the U visa, the T visa is a form of relief that is particularly beneficial to children, because certain "derivatives" – specifically, the child's parents, children, and unmarried siblings under the age of 18 – may be included in the application and thereby granted T nonimmigrant status. The T visa thus confers an immediate immigration benefit to both the victim and his or her family.

T VISA REQUIREMENTS

An individual is eligible for T nonimmigrant status if s/he: (1) is or has been a victim of a severe form of trafficking in persons; (2) is physically present in the U.S. on account of the trafficking; (3) has complied with any reasonable request for assistance with the investigation or prosecution of acts of trafficking; and (4) would suffer extreme hardship involving unusual and severe harm upon removal from the United States.[405] The T visa applicant bears the burden of proof for each of these elements.[406]

I. Victim of Severe Form of Trafficking

"Severe form of trafficking" is defined as: (1) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (2) "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or service, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[407] The T visa applicant must therefore provide evidence regarding both the *purpose* and the *means* by which s/he was trafficked.

A. Purpose of the Trafficking

i. *Sex Trafficking*

INA regulations define sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[408] A commercial sex act is "any sex on account of which anything of value is given to or received by any person."[409]

[405] INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T).
[406] 8 C.F.R. § 214.11(f).
[407] 22 U.S.C. § 7102(9).
[408] 8 C.F.R. § 214.11(a).
[409] *Id.*

ii. *Labor Trafficking*

Individuals who have been trafficked "for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery" may be eligible for T nonimmigrant status. The INA and regulations define these terms as follows:

- Debt bondage: The status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services, as reasonably assessed, is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[410]

- Involuntary servitude: Servitude induced by means of any scheme, plan or pattern intended to cause a person to believe that, if the person did not enter into or continue such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process.[411]

- Peonage: The status or condition of involuntary servitude based on real or alleged debt.[412]

B. Means of Trafficking

Victims of commercial sex trafficking who are under the age of 18 need not show that the trafficking was involuntary.[413] By contrast, both adult victims of sex trafficking and children recruited for labor trafficking or other services are required to show inducement by fraud, force, or coercion.

> *"He told me he would kill himself if I left him."*
>
> – 17-year-old Guatemalan girl who was lured to the U.S. for sex by an older man who she met online

"Coercion" is defined as: (1) threats of serious harm to or physical restraint against any person; (2) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to, or physical restraint against, any person; or (3) the abuse or threatened abuse of the legal process.[414] In cases involving child victims, it is particularly important to include secondary evidence of psychological coercion (for example, through a mental health evaluation). Attorneys should consider the following when making arguments that a child was coerced into trafficking:

- Was the child physically held against his or her will? Did the trafficker use threats, implied threats, or deception to restrict the child's liberty?

[410] 22 U.S.C. § 7102(5).
[411] *Id.* § 7102(6).
[412] 8 C.F.R. § 214.11(a). Note that "slavery" is not defined in the INA or implementing regulations.
[413] 22 U.S.C. § 7102(9).
[414] *Id.* § 7102(3)(A)-(C); 8 C.F.R. § 214.11(a).

- Did the trafficker offer the child anything in return, such as incentives or opportunities? Were these false or unrealistic promises?
- Was the child deprived of basic necessities and contact with family members?
- Was the child forced or convinced to use drugs or alcohol?

In evaluating eligibility for T nonimmigrant status, USCIS will distinguish between smuggling and trafficking. Individuals smuggled into the U.S. with the assistance of "guides" or "coyotes" are not necessarily victims of trafficking, even if they have paid, or owe debts to, their smugglers. Whereas smuggling involves voluntary unlawful entry without force, fraud, or coercion, trafficking involves exploitation of a victim who is forced or deceived into labor or commercial sex, often through an ongoing relationship between the victim and trafficker.

Smuggling can become trafficking in cases where the victim initially consents to being smuggled but is later coerced or fraudulently induced into a debt bondage or peonage situation (for example, where s/he is forced to sell drugs in order to repay a debt to a smuggler).[415] It is common for cartel members to befriend minors who are traveling alone and offer them money in exchange for selling or distributing drugs. Although a child might initially consent to the arrangement, this voluntariness can turn into coercion if the child becomes unable to leave the gang. For example, cartel members might harm or threaten to harm others who try to sever ties with the cartel, thus implying that the same will happen to the child if s/he attempts to leave. For T visa purposes, this type of implied coercion can be enough to satisfy the trafficking requirement under the INA.

For more helpful points in assessing the voluntariness of a child's act and distinguishing between smuggling and trafficking, consult with CAIR Coalition to obtain a copy of the Volunteer Advocates for Immigrant Justice's *Practice Advisory on T Visa Claims for Youth Victims of Narco-Human Trafficking*.[416]

C. Proving Victimization

An endorsement from a law enforcement agency serves as primary evidence that the applicant is the victim of a severe form of trafficking, as does evidence of continued presence arranged by law enforcement,[417] *see infra* p. 101. In the absence of evidence from law enforcement, the applicant may submit credible secondary evidence and affidavits to explain the nonexistence or unavailability of primary evidence and to otherwise establish that the applicant is a victim of a severe form of trafficking in persons.[418]

The secondary evidence must describe the nature and scope of the force, fraud, or coercion against the victim and include a statement by the applicant describing the victimization.[419] Additional secondary evidence may include statements of other witnesses,

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[415] Volunteer Advocates for Immigrant Justice, *Practice Advisory: T Visa Claims for Youth Victims of Narco-Human Trafficking* (July 2011) [hereinafter Narcotrafficking Manual].
[416] *Id.*
[417] 8 C.F.R. § 214.11(f)(2).
[418] *Id.* § 214.11(f)(3).
[419] *Id.*

photographs, a psychological or mental health evaluation, and relevant excerpts from a child applicant's Office of Refugee Resettlement ("ORR") file corroborating the victimization or trauma.

Applicants should include as much supporting evidence as possible to corroborate the trafficking, such as evidence of:

- Any physical abuse that resulted in significant physical harm (*e.g.*, scars, headaches, hearing loss, cardiovascular/respiratory problems, chronic back or joint pain, limb amputation, child malnourishment, burns, broken bones, vaginal/anal tearing, sexually transmitted diseases, menstrual problems);
- Psychological harm, including feelings of helplessness, shame, humiliation, shock, denial, disbelief, distrust, disorientation, and/or confusion, as well as anxiety disorders (*e.g.*, post-traumatic stress disorder ("PTSD"), phobias, panic attacks, depression);
- Development of traumatic bonding or "Stockholm Syndrome," which is a type of survival instinct that helps victims cope with captivity where reciprocal positive feelings develop between captors and their hostages;
- Drug and/or alcohol addiction; or
- Factors relating to the child's social, economic, familial, and educational background that rendered him or her more vulnerable to trafficking.

This last point is critical for providing context and corroborating the child's statements regarding the traffickers' patterns and the inception of the trafficking. Such evidence is particularly compelling when supplemented by relevant country conditions reports. For example, CAIR Coalition encounters many unaccompanied children from Central America who are victimized while traveling through Mexico. The Department of State Trafficking in Persons Report recognizes that women, children, and undocumented migrants are particularly vulnerable to kidnapping and trafficking in Mexico.[420] The report further notes that the vast majority of foreign victims in forced labor and sexual servitude in Mexico come from Central and South America, particularly Guatemala, Honduras, and El Salvador.[421] Newspaper articles and other country reports also show that children with unstable family lives spend more time on the streets and may therefore be at greater risk of victimization, particularly if they are traveling alone to the United States.

For more information on the health impacts of labor and sex trafficking and ways to identify victims of trafficking, please consult the ORR Fact Sheets available online.[422]

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[420] U.S. Department of State, *Trafficking in Persons Report 2013* (June 2013), *available at* http://www.state.gov/j/tip///2013/index.htm.

[421] *Id*.

[422] Office of Refugee Resettlement, Administration for Children and Families, *Fact Sheet: Sex Trafficking (English)* (Aug. 2, 2012) *available at* http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-sex-trafficking-english#Types; Office of Refugee Resettlement, Administration for Children and Families, *Fact Sheet: Labor Trafficking (English)*, (Aug. 6, 2012) *available at* http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-labor-trafficking-english.

Sample Declaration: Narco-Human Trafficking

- At night, there was a commotion on the train, and it began shaking and jerking. Several masked men climbed aboard and began robbing people. The men with large guns approached me and put guns to my head. They grabbed me, blindfolded me, tied my hands, and put me into the trunk of a car with two other children they kidnapped. The men told us to be quiet or they would kill us. Then they drove off.
- Eventually, the car reached a house. Once I was inside the house, the men took off my blindfold. I couldn't see outside because it was dark and the windows had bars on them. There were a lot of women in the house who looked like they were forced to be prostitutes. The men put me and the other captives in a room and locked the door. We could not leave the room.
- The next day, the cartel men came back to the room. They threatened me and told me that I had two options: I could ask for money from my family and they would let me free, or I could traffic drugs for them. They told me that if I didn't comply, they would kill me and my family. To show they were serious, they held me down and burned my ear with a lighter. My family had no money, so I knew I had no choice. One of the other boys said he had family in the U.S. who could pay whatever they asked. When he gave them the phone number, one of the men took out his cell phone to make the call. The family member who answered the phone refused to send money. When the family member hung up, one of the men shot the boy in the head.
- A few days later, the cartel men came back to the room. They tied my hands and blindfolded me. They forced me into the trunk of the car again. After a few hours, we got out. It was dark outside. Other men arrived in a car with the supplies. All of us were forced to carry a big backpack-like sack which contained food for the traffickers and drugs as well as containers of water that we had to carry by hand. As we put the backpacks on, the traffickers tied ropes around each of our waists and then tied all of us together. I think that I had to carry a total of 20 kilos (or almost 50 pounds) on my back. I was in tremendous pain from carrying all this weight. The backpack cut my back and gave me scars.
- We started walking, with one cartel member in front leading the way, and another in the back. Within a few days we crossed into the U.S. The men had told us that members of the cartel would be watching us from far away with binoculars, and that they would shoot us immediately if any one of us tried to escape.
- During the trip, we would only stop to take short breaks. Two days after we crossed into the U.S., we stopped briefly during the night to rest. When the cartel members were distracted, we managed to untie our hands. We dropped our bags and ran into the darkness. I could hear the cartel members yelling, but I did not stop. I ran for a really long time without looking back.

II. Physically Present in the U.S. on Account of Trafficking

Eligibility for a T visa requires that the victim be physically present in the U.S., its territories, or a port of entry on account of the trafficking.[423] In order to satisfy this requirement, a victim need not have been brought into the U.S. as part of the trafficking scheme. Some applicants are not victimized until after they have entered the U.S., either legally or illegally. An applicant's presence will be considered "on account of" the trafficking if s/he:

- Is present because s/he is being subjected to a severe form of trafficking in persons;
- Recently escaped or was recently liberated from the trafficking scheme; or
- Was the victim of a severe form of trafficking in the past, and his or her continued presence in the country is directly related to the original trafficking.[424]

In addition, the Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 amended the INA to provide that persons who are permitted to enter the U.S. in order to participate in the investigation or judicial processes associated with the trafficking are considered to be physically present on account of trafficking.[425]

If the victim escaped the trafficking situation before the law enforcement became involved, s/he must show that s/he did not have a chance to leave the U.S. in the time between fleeing the traffickers and coming into contact with law enforcement.[426] In determining whether the victim had the opportunity to depart the U.S., a number of factors will be considered, including the trauma or injury suffered by the victim, his or her lack of resources, and whether his or her travel documents were seized by the traffickers.[427] For unaccompanied child victims, the T visa application should point to the child's age and development, familial circumstances, and any cultural barriers that may have hindered his or her ability to escape the trafficking situation or depart the United States.[428]

In many narcotrafficking cases, unaccompanied minors who are treated as "drug mules" and forced to carry controlled substances across the border are ultimately unable to escape their traffickers because of coercion or threats. Other victims may be stranded by their traffickers and lost in the U.S. desert for days on end without food or water. Fearing death and desperate for safety, many of these unaccompanied minors will turn themselves in to U.S. Customs and Border Protection ("CBP") at the first available opportunity. Evidence of these types of circumstances is particularly compelling in demonstrating that a child is in the U.S. on account of the trafficking and was unable to leave the country before coming into contact with authorities.

USCIS has interpreted the "on account of" requirement broadly in previous cases. For example, CAIR Coalition staff assisted a child who was granted a T visa despite having escaped

[423] INA § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II).
[424] 8 C.F.R. § 214.11(g).
[425] INA § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II).
[426] 8 C.F.R. § 214.11(g)(2).
[427] *Id*.
[428] Narcotrafficking Manual, *supra* note 415, at Section III.

his drug traffickers prior to entry to the United States. The Mexican cartel kidnapped the child with the intent of using him as a drug mule to traffic drugs into the United States. While still in the desert in Mexico, the child managed to escape his traffickers and discard the drugs. He then crossed into the U.S. by himself and turned himself into authorities. He subsequently cooperated with the Department of Homeland Security ("DHS") to provide information about his traffickers.

CAIR Coalition staff have seen the following common youth trafficking fact patterns:

Narco-Human Trafficking	Sex Trafficking
• Victims are predominantly male.	• Victims are predominantly female.
• Mexican drug cartels kidnap children traveling alone en route to the U.S. and take them to a remote location. In other cases, the cartels befriend the children, offering money in exchange for small-time drug distribution.	• A family member in the U.S. speaks to the child over the phone and promises her a better life, education, work, and housing if she comes live with him in the U.S. The family member also offers to pay for her trip to the U.S.
• The traffickers keep the children isolated and starve and torture them.	• Once the child comes to the U.S., the trafficker begins a sexual relationship with her and holds himself out as her "boyfriend." He treats the child well at the outset, often providing her with gifts.
• The traffickers demand ransom. When the children cannot pay, the traffickers force them to traffic a controlled substance – typically marijuana.	
• The children are strapped with large bags of marijuana weighing 50-100 lbs, which they are forced to carry through the desert. Victims are accompanied by armed cartel members and told they are being watched at all times.	• The trafficker then coerces the victim to have sex with others in order to repay the debt for her trip to the U.S.
• Physical abuse includes forced drugging, whipping, prodding the children as they walk, and withholding food and water.	• Physical abuse includes beating the victim and sexually violating her if she does not comply.
• Verbal threats include telling the child that if he attempts to leave the cartel, he or his family will be harmed or killed or he will be in trouble with U.S. immigration.	• Verbal threats include degrading the child or telling her that she will be in trouble with U.S. immigration if she contacts authorities or tries to leave.
• Immigration typically apprehends the child near the border after he has escaped the traffickers and turned himself in.	• Immigration typically apprehends the child when she calls the police to report the trafficking or during a raid or undercover police investigation.
• The child may face federal drug trafficking or state possession or distribution charges.	• The child may face prostitution charges.

III. Assistance to Law Enforcement

A. Applicants Ages 18 or Older

T visa applicants who are at least 18 years old must cooperate with law enforcement authorities' "reasonable requests" for assistance in investigating or prosecuting the trafficking act.[429] Whether a request is "reasonable" depends on the totality of the circumstances, including:

- General law enforcement and prosecutorial practices;
- The nature of the victimization; and
- The victim's circumstances, including fear, physical and mental trauma, and the age and maturity of young victims.[430]

TVPRA 2008 amended the INA to provide that persons unable to cooperate with law enforcement due to physical or psychological trauma are exempt from this requirement and remain eligible for T nonimmigrant status.[431]

The law enforcement agency ("LEA") [432] can formally certify the applicant's compliance with reasonable requests for assistance by completing Form I-914 Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons*.[433] Among other things, the LEA can provide information about the victimization, the extent of the victim's cooperation, and the victim's fear of retaliation or revenge if removed from the U.S.

Unlike U visas, a formal certification from law enforcement is not a requirement for T visas. However, USCIS will consider the inclusion or absence of a certification in determining whether to exercise its discretion to grant a T visa.[434] Obtaining a formal certification is therefore strongly advised. The LEA endorsement also will most easily satisfy the requirement that the victim cooperated with law enforcement because it provides primary evidence of the applicant's compliance with a request.[435]

When working with LEAs, it may be helpful to remind them that providing a certification will not confer lawful status on the applicant, as the applicant must still request a waiver of grounds of inadmissibility for any prior criminal acts. Furthermore, USCIS encourages LEAs to notify the USCIS Vermont Service Center in writing if a victim unreasonably refuses to assist in the investigation or prosecution of his or her trafficker. If an LEA endorsement is furnished as

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[429] INA § 101(a)(15)(T)(i)(III), 8 U.S.C. § 1101(a)(15)(T)(i)(III).
[430] 8 C.F.R. § 214.11(a).
[431] INA § 101(a)(15)(T)(i)(III)(B), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(B).
[432] A law enforcement agency is defined as a federal law enforcement agency charged with detection, investigation or prosecution of trafficking cases. LEAs include U.S. Attorney's Offices, the Department of Justice's Criminal and Civil Rights Divisions, the Federal Bureau of Investigation ("FBI"), Immigration and Customs Enforcement ("ICE") within DHS, the U.S. Marshals Service, and the Department of State's Diplomatic Security Service. 8 C.F.R. § 214.11(a).
[433] Instructions for completing Form I-914 Supplement B can be found at http://www.uscis.gov.
[434] INA § 214(o)(6), 8 U.S.C. § 1184(o)(6).
[435] 8 C.F.R. § 214.11(h)(1).

part of the T visa application but DHS believes the applicant has not complied with a reasonable request, DHS will contact the LEA to resolve the matter.[436]

In some cases, a victim may be unable to provide an LEA certification with his or her T visa application, for example where:

- The LEA has not responded to the victim's report of a trafficking incident;
- The LEA has not been able to complete interviews needed for them to determine that the victim is a trafficking victim; or
- The LEA has a policy of not providing certifications or a has lengthy timeline for doing so.

If the applicant does not provide an LEA endorsement, s/he may submit credible secondary evidence to show the nonexistence or unavailability of primary evidence and otherwise establish the requirement that the applicant complied with reasonable requests for assistance.[437] The secondary evidence must include a statement by the applicant and may also include affidavits from other witnesses outlining a good faith attempt to obtain an endorsement.[438]

USCIS has sole discretion to make credibility determinations and weigh the evidence. Thus, it is important to document any and all attempts to provide information to law enforcement about the trafficking scheme, even if the LEA has not responded to the victim's report of trafficking, has not had the opportunity to adequately complete the investigation, or refuses to provide a certification. Helpful secondary evidence may include trial transcripts, court documents, police reports, news articles, and/or affidavits from witnesses. If the victim reported the trafficking to immigration, attorneys should also submit a request to DHS under the Freedom of Information Act ("FOIA") for any relevant records that were prepared by immigration authorities.

A victim over the age of 18 who has never had contact with an LEA regarding the acts of trafficking will not be eligible for T nonimmigrant status[439] and should promptly contact DHS's Homeland Security Investigations tip line (1-866-347-2423) or the nearest FBI field office or U.S. Attorney's Office to file a complaint, assist in the investigation or prosecution of the trafficking, and request a certification. The National Human Trafficking Resource Center (1-888-373-7888) can help connect victims and their advocates with the appropriate LEAs.

B. Applicants Under the Age of 18

Unlike adult applicants, victims under the age of 18 are not required to comply with reasonable requests from law enforcement to assist in the investigation or prosecution of the trafficking.[440] An official copy of the child's birth certificate, a passport, or a certified medical

[436] *Id.*
[437] *Id.* § 214.11(h)(2).
[438] *Id.*
[439] *Id.*
[440] INA § 101(a)(15)(T)(i)(III)(aa)-(cc), 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa)-(cc).

opinion may all serve as primary evidence of the applicant's age. Secondary evidence regarding the age of the applicant may also be submitted. An applicant under the age of 18 must still provide evidence demonstrating that s/he satisfies the other necessary requirements for T visa eligibility, including that s/he is the victim of a severe form of trafficking in persons and will face extreme hardship involving unusual and severe harm if removed from the United States.[441]

Although not required, a child's past or ongoing cooperation with authorities will strengthen the T visa application. Part C, Question 5 of the application gives the victim an opportunity to identify the LEA and office where s/he reported the trafficking or explain his or her reason(s) for not doing so. In addition, Part C, Question 7 asks the applicant whether s/he has complied with requests from federal, state, or local law enforcement authorities for assistance in investigating or prosecuting the crime and, if not, to explain the surrounding circumstances.

For example, a child may have been unable to report his victimization upon an initial encounter with authorities because s/he was apprehended and detained along with his or her traffickers. As such, a child's first opportunity to disclose the trafficking may be to a caseworker or clinician while in ORR custody. If this is the case, the child can include this information to show that s/he "reported" the crime to DHHS as soon as s/he could safely do so. Because the grant of T nonimmigrant status is discretionary, affirmative responses to the questions below, supported by credible secondary evidence, can greatly strengthen a child's application.

Sample Part C of the T Visa Application:

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, **on 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

5. I have reported the crime 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," explain the circumstances.)* ☒ Yes ☐ No

Law Enforcement Agency and Office	*Address*	*Phone Number*	*Case Number*
Customs and Border Patrol, DHS	McAllen, Texas	Unknown	Unknown

Circumstances:
I was apprehended in the desert after a Mexican drug cartel kidnapped me and forced me to traffic drugs into the U.S. I escaped and turned myself in to CBP. I told CBP everything that happened to me and gave them important details about my traffickers.

6. I am under *the age of 18 years. (If "Yes," proceed to Question 8.)* ☒ Yes ☐ No

7. I have complied with requests from Federal, State, or local law enforcement authorities for assistance in the investigation or prosecution of acts of trafficking. *(If "No," explain the circumstances.)* ☒ Yes ☐ No

[441] INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T); 8 C.F.R. § 214.11(h)(3).

As discussed above, *supra* p. 98, the LEA endorsement also serves as primary evidence that the applicant is a victim of a severe form of trafficking in persons. Moreover, victims who cooperate with law enforcement may be granted continued presence in the U.S. and a work authorization.

Note, however, that there are a number of potential risks to pursuing an LEA endorsement and/or cooperating with law enforcement, including:

- Lack of control over how the information is used and by whom;
- Possibility that the victim may be compelled to testify if the traffickers are prosecuted;
- Potential re-traumatization of the client;
- Risks to the safety of the client and family members, in both the U.S. and the home country; and
- Risk of referral to immigration court, if the client is not already in removal proceedings, or potential liability for past criminal or delinquent conduct.[442]

Moreover, cooperation will not guarantee an LEA certification, continued presence (described below), or grant of a T visa.

C. Continued Presence

Because many trafficking cases involve lengthy investigations and/or prosecutions, victims who have not yet been granted T nonimmigrant status may request, and federal LEAs have the authority to permit, the victim's continued presence ("CP")[443] in the U.S. while the law enforcement investigation is pending. Federal LEAs may also request CP on the victim's behalf if they believe s/he may be a potential witness in a trafficking investigation.[444] Although only federal law enforcement officers may apply for CP, state and local agencies partnering with federal officers involved in the investigation can request that the federal agency apply for CP for the victim.

If granted, CP is valid for one year and may be extended thereafter. CP allows the victim to receive work authorization and may also allow for administrative closure, termination, or continuance(s) of removal proceedings. Unless the CP has been revoked, proof of CP is also considered primary evidence that the applicant has been "a victim of a severe form of trafficking in persons" for the purposes of a T visa application, *see supra* p. 93.[445]

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[442] Narcotrafficking Manual, *supra* note 415, at Section VI.B.
[443] Continued presence will "permit an alien individual's continued presence in the United States, if, after an assessment, it is determined that such an individual is a victim of a severe form of trafficking and a potential witness to such trafficking in order to effectuate the prosecution of those responsible . . . ." 28 C.F.R. § 1100.35.
[444] *Id.*
[445] *Id.* § 214.11(f)(2).

IV. Extreme Hardship Involving Unusual and Severe Harm upon Removal

A T visa applicant must demonstrate that s/he will experience extreme hardship involving unusual and severe harm upon removal to his or her country of origin.[446] Note that only hardship to the *applicant* will be considered, and economic hardship is not considered sufficient to meet this standard.[447] Factors that may be weighed in considering "extreme hardship" include: [448]

- The age and personal circumstances of the applicant;
- The physical and mental fitness of the applicant;
- Trafficking-related physical and/or psychological consequences;
- The impact of losing access to the U.S. criminal justice system for purposes in relation to the trafficking or other crimes perpetrated against the applicant;
- Whether laws, social practices, or customs in the country of origin would penalize the applicant severely for having been a trafficking victim;
- The likelihood that the trafficker would severely harm the applicant upon return to the home country; and
- The likelihood that the applicant's safety would be seriously threatened by civil unrest or armed conflict in the country of origin. This can be demonstrated, for example, by DHS's designation of the home country for Temporary Protected Status.

Applicants should present evidence showing the likelihood of being re-trafficked or suffering retribution at the hands of the trafficker. For child victims, evidence of extreme hardship should include expert reports and/or detailed country condition reports that demonstrate the extent to which protections, benefits, and services for child victims are not available in the applicant's home country. Attorneys should also consider incorporating supporting documents and/or legal arguments that highlight the best interests of the child and the child's need for permanence and stability.

In addition, applicants should include other compelling facts that may be unrelated to the trafficking but nevertheless demonstrate hardship. These may include instability in the applicant's family life; the likelihood of homelessness if returned; lack of educational opportunity; or the prevalence of transnational gangs, violence, or government or police corruption in the home country. This type of evidence is particularly important for children who have been kidnapped by drug cartels in Mexico but will be returned to other countries where the prevalence of the cartel is significantly diminished, and for victims of sex trafficking whose traffickers reside and will remain in the United States. For additional practice tips on corroborating evidence and expert witnesses, *see supra* pp. 72-74.

[446] *Id*. § 214.11(i)(1).
[447] *Id*. § 214.11(i)(1)-(2).
[448] *Id*. § 214.11(i)(1).

A. Subject-Matter and Region-Specific Experts

Attorneys frequently hire witnesses with expertise in a specific subject-matter and/or region to demonstrate that the applicant would suffer extreme hardship if returned to his or her home country. In particular, attorneys should consider retaining experts such as professors or authors who are knowledgeable about the type of trafficking suffered by the child, as well as the geographical region in which the child was trafficked.

These expert witnesses can testify regarding the extent to which protections, benefits, and services for child victims are not available in the applicant's home country. Experts can also testify as to the unwillingness or inability of local law enforcement in the home community to provide the same protections offered by local U.S. law enforcement.

B. Country Conditions Reports

Country conditions reports are helpful to both the attorney and USCIS because they: (1) help the attorney understand the country's economic, social, and political climate and tailor the client's T visa application accordingly; (2) provide secondary corroborative evidence of the country circumstances and how they relate to the applicant; and (3) cite to articles and studies conducted independently by reputable organizations, which can carry significant weight with immigration authorities. Because country conditions reports can be quite lengthy, it is helpful to highlight relevant portions of the reports and create a chart that lists:

- The tab where a particular article can be found;
- The page numbers of the article that are relevant; and
- A description or summary of the relevant parts of the article, including the article's Bluebook citation.

Attorneys may append a range of reports, newspaper articles, law review articles, and studies to the country conditions report, with the relevant passages highlighted. Country conditions reports should include materials from as many of the following credible and well-known organizations as are relevant:

- The United Nations (UN) Refugee Agency (http://www.unhcr.org)
- UN Refworld (an information database) (http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain)
- U.S. Department of State Country Fact Sheets (http://www.state.gov/r/pa/ei/bgn)
- UN Human Rights Committee Report of the Special Rapporteur
- Council on Foreign Relations Reports (http://www.cfr.org/publication)
- Human Rights Watch (http://www.hrw.org)
- U.S. Committee for Refugees and Immigrants (http://refugees.org)
- New York Times, CNN, BBC, and other reliable news sources.

ANTI-TRAFFICKING IN PERSONS APPLICATION

In order to strengthen the T visa application, a child can show that ORR considers him or her to be a victim of trafficking after the child submitted an Anti-Trafficking in Persons ("ATIP") application. Under section 107(b)(1)(A) of the VTVPA of 2000, any victim of a "severe form of trafficking in persons" will be eligible for federally funded or administered benefits of services through the Office of Refugee Resettlement ("ORR") within the Administration for Children and Families in the U.S. Department of Health and Human Services ("DHHS").[449] These benefits include:

- Refugee cash and medical assistance;
- Temporary Assistance for Needy Families ("TANF");
- Medicaid;
- Food stamps;
- Mental health services;
- Housing assistance; and
- Foster care.[450]

The ATIP application for benefits may be filed either by the applicant's attorney or by ORR, if ORR determines the individual has been trafficked. Note that the granting of an ATIP application does not confer immigration status. Because many benefits are available only for limited time periods that start from the date of the eligibility letter, a victim should seek assistance as soon as possible after receiving the letter. The victim must present the letter when applying for benefits or services and keep ORR notified of his or her current mailing address.

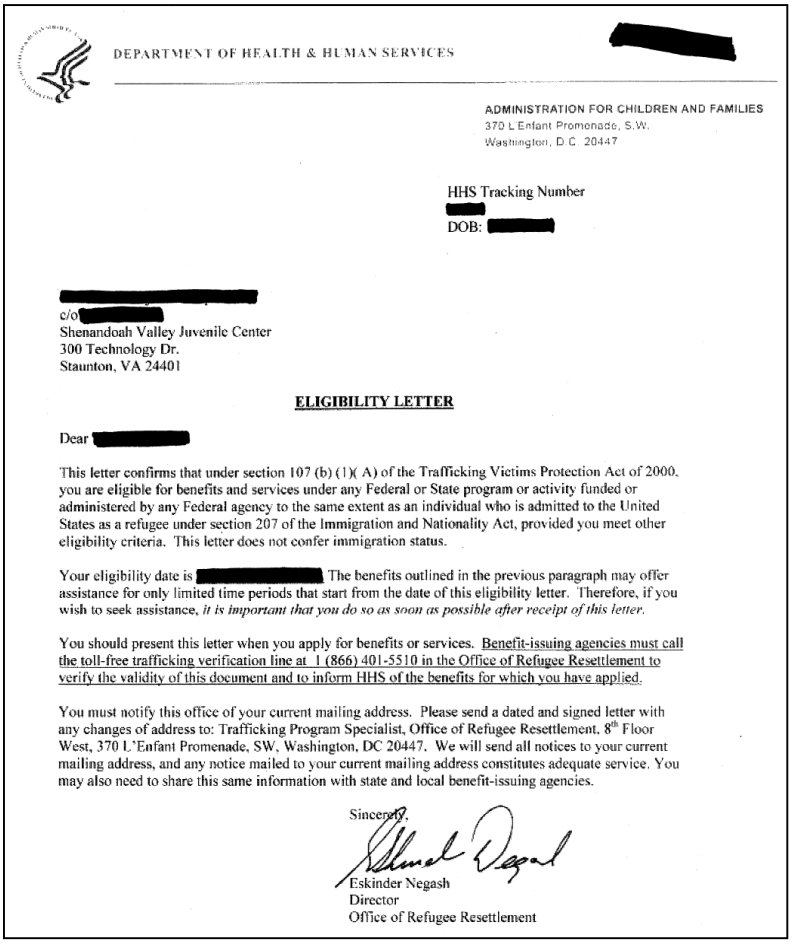
I. Child Victims of Trafficking

In addition to the ATIP benefits listed above, child victims may be eligible for placement in ORR's Unaccompanied Refugee Minor ("URM") Program instead of adult detention.[451] Victims under the age of 18 who file an ATIP application and are found to be victims of a severe form of trafficking in persons need not apply for a T visa or for CP in order to be eligible for federal benefits and services. Minor victims of trafficking also do not need to be officially certified by ORR to be eligible for benefits. Instead, ORR may issue – either on its own or by request – an Eligibility Letter designating the victim as eligible for ATIP benefits. Any person, including the child's attorney, may request an Eligibility Letter on the child's behalf. For unaccompanied minors in the care and custody of ORR, the ORR case workers will often assist in preparing an ATIP application based on the child's statements. A child may also receive an

[449] 22 U.S.C. § 7105. ORR uses the same definition of "severe form of trafficking in persons" that is used to determine T visa eligibility. *Id.* § 7102.
[450] For a complete list of programs offering victim's assistance, *see* U.S. Department of Health and Human Services, *Victim Assistance Fact Sheet* (Aug. 7, 2012), *available at* http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-victim-assistance-english.
[451] TVPA 2000 § 107(b)(1)(A); TVPRA 2008 § 235(c)(2).

Eligibility Letter for "interim benefits" if DHHS has not made a final decision on the ATIP application within 90 days. The form for requesting an Eligibility Letter is available on ORR's website at http://www.acf.hhs.gov/programs/orr.

Sample DHHS Eligibility Letter:



DEPARTMENT OF HEALTH & HUMAN SERVICES

[redacted]

ADMINISTRATION FOR CHILDREN AND FAMILIES
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

HHS Tracking Number
[redacted]
DOB: [redacted]

[redacted]
c/o [redacted]
Shenandoah Valley Juvenile Center
300 Technology Dr.
Staunton, VA 24401

ELIGIBILITY LETTER

Dear [redacted]

This letter confirms that under section 107 (b) (1)(A) of the Trafficking Victims Protection Act of 2000, you are eligible for benefits and services under any Federal or State program or activity funded or administered by any Federal agency to the same extent as an individual who is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act, provided you meet other eligibility criteria. This letter does not confer immigration status.

Your eligibility date is [redacted]. The benefits outlined in the previous paragraph may offer assistance for only limited time periods that start from the date of this eligibility letter. Therefore, if you wish to seek assistance, *it is important that you do so as soon as possible after receipt of this letter.*

You should present this letter when you apply for benefits or services. Benefit-issuing agencies must call the toll-free trafficking verification line at 1 (866) 401-5510 in the Office of Refugee Resettlement to verify the validity of this document and to inform HHS of the benefits for which you have applied.

You must notify this office of your current mailing address. Please send a dated and signed letter with any changes of address to: Trafficking Program Specialist, Office of Refugee Resettlement, 8th Floor West, 370 L'Enfant Promenade, SW, Washington, DC 20447. We will send all notices to your current mailing address, and any notice mailed to your current mailing address constitutes adequate service. You may also need to share this same information with state and local benefit-issuing agencies.

Sincerely,

Eskinder Negash
Director
Office of Refugee Resettlement

II. Adult Victims of Trafficking

Unlike children, victims of trafficking over the age of 18 must be "certified" by DHHS in order to receive federal benefits and services. To receive a certification from ORR, the individual must: (1) be a victim of a severe form of trafficking in persons; (2) be willing to comply with reasonable requests for assistance in the investigation of severe forms of trafficking, or be unable to do so because of physical or psychological trauma; and (3) have made a bona fide application for a T visa that has not been denied or have received CP from DHS in order to assist in the prosecution of trafficking. The certification process typically takes a few days after DHS notifies ORR that a person has made a bona fide application for a T visa or has been granted CP.[452]

[452] *See* Office of Refugee Resettlement, *Fact Sheet: Certification for Adult Victims of Trafficking* (Aug. 8, 2012), *available at* http://www.acf.hhs.gov/trafficking_about_cert_victims.html.

WAIVERS AVAILABLE

As with U visas, T visa applicants who are inadmissible to the U.S. under section 212(a) of the INA must obtain a waiver of inadmissibility in order to receive T nonimmigrant status. The applicant can apply for a waiver by submitting Form I-192, *Application for Advance Permission to Enter as Nonimmigrant*, to USCIS along with the completed T visa application package.

Inadmissibility grounds that commonly arise in trafficking situations include those in which the individual:

- Has committed acts which constitute the essential elements of a crime involving moral turpitude or any offense relating to a controlled substance;[453]
- Has been an illicit trafficker in any controlled substance or a knowing aider, abettor, assister, conspirator, or colluder in the illicit trafficking in any controlled substance;[454]
- Is determined, under DHHS regulations, to be a drug abuser or addict;[455] or
- Has, within 10 years of applying for status, engaged in prostitution or directly or indirectly procured or attempted to procure prostitution.[456]

USCIS has discretion to waive the ground of inadmissibility if it determines that a waiver is in the national interest.[457] In cases that implicate criminal and related grounds under section 212(a)(2), USCIS will exercise its discretion only in exceptional circumstances.[458] Grounds of inadmissibility based on security or terrorism, international child abduction, and renunciation of U.S. citizenship to avoid taxes cannot be waived.[459] Although an applicant may not appeal the denial of a waiver, s/he is permitted to re-file the waiver request.[460]

Because waivers are discretionary, the applicant's personal statement and/or Form I-192 should explain the reasons for the conduct triggering the inadmissibility and highlight any factors weighing in favor of a waiver. Special consideration will be given to the granting of a waiver where the activities triggering inadmissibility were incident to, or caused by, the victimization.[461] The applicant's own declaration detailing the force, fraud, or coercion that contributed to the illicit activities may be sufficient to show that such activities were related to his or her

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[453] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). The INA provides an exception for individuals who have only committed one crime while under the age of 18 more than 5 years before the date of the T visa application and admission to the U.S. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I).
[454] INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i).
[455] INA § 212(a)(1)(A)(iv), 8 U.S.C. § 1182(a)(1)(A)(iv).
[456] INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D). Note that the public charge ground of inadmissibility under INA § 212(a)(4) does not apply to T visa applicants. *Id.* § 212(d)(13)(A), 8 U.S.C. § 1182(d)(13)(A).
[457] INA § 212(d)(13)(B), 8 U.S.C. § 1182(d)(13)(B); 8 C.F.R. § 212.16(b)(1).
[458] 8 C.F.R. § 212.16(b)(2).
[459] INA §§ 212(a)(3), (a)(10)(C), (a)(10)(E), 8 U.S.C. §§ 1182(a)(3), (a)(10)(C), (a)(10)(E).
[460] 8 C.F.R. § 212.16(b)(4).
[461]INA § 212(d)(13)(A)(ii), 8 U.S.C. § 1182(d)(13)(A)(ii); 8 C.F.R. § 212.16(b)(1).

victimization. Secondary evidence such as a mental health or psychological evaluation can also be used to support a waiver application.

In addition to coercing victims, traffickers often threaten their victims with harsh consequences should they come in contact with law enforcement. Because of this, many victims do not volunteer information to authorities when they are apprehended out of fear for their own safety and that of family members. As a consequence, trafficking victims may end up with juvenile delinquency findings or adult convictions without ever disclosing that they are trafficking victims. Children who are victims of sex trafficking may thus face prostitution or solicitation charges, and victims of labor trafficking may face drug trafficking or drug possession charges.

Although juvenile delinquency findings are not considered "convictions" under section 101(a)(48)(A) of the INA,[462] they can nevertheless raise conduct-based inadmissibility grounds that do not require convictions. Other inadmissibility bars are triggered when an applicant admits to having engaged in certain conduct, even without a delinquency finding. Practitioners should be aware, however, that inadmissibility grounds triggered simply by the admission of facts sufficient to constitute a crime may not apply to juveniles in certain cases.

For guidance regarding the consequences of a child's juvenile delinquency or criminal history on his/her admissibility, please ask CAIR Coalition staff for a copy of the Immigrant Legal Resource Center's *Practice Advisory: Legal and Ethical Considerations in Disclosure of Delinquent Conduct* and Legal Services for Children's *Practice Advisory: Preparing for an I-485 Adjustment of Status Interview and/or Hearing Before Immigration Court for UACs with Delinquency Issues*.

THE T VISA APPLICATION PROCESS

I. Filing Requirements

The T visa application package should include the following:

- Cover letter that details petitioner's eligibility, outlining and referencing all supporting documentation and evidence;[463]
- Form I-914, *Application for T Nonimmigrant Status*;
- Form I-914 Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons* **(optional for T visas)**;
- Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*;
- Form I-192, *Application for Advance Permission to Enter as Nonimmigrant*, a waiver of any grounds of inadmissibility identified on Form I-914;[464]

[462] 8 U.S.C. § 1101(a)(48)(A).
[463] *See supra* p. 85.
[464] This form must still be submitted along with Form I-914 regardless of whether an applicant is seeking a waiver, as it allows USCIS to issue Form I-94, *Arrival/Departure Record*, to a T nonimmigrant.

- Form I-765, *Application for Employment Authorization*;
- Form I-912, *Request for Fee Waiver* (among other things, USCIS may waive the $80 biometrics fee and filing fees for Forms I-192 and I-765); [465]
- 3 passport-sized photos;
- Personal statement or declaration from client about his/her victimization; and
- Evidence demonstrating eligibility.

Sample Section of T Visa Application (Form I-914):

Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0099; Expires 05/31/2014

I-914, Application for T Nonimmigrant Status

START HERE - Type or print. ***Use black ink. See Instructions for information about eligibility and how to complete and file this application.***

For USCIS Use Only

Returned	Receipt
Date	
Date	
Resubmitted	
Date	
Date	
Reloc Sent	
Date	
Date	
Reloc Rec'd	
Date	

PART A. Purpose for Filing the Application

Check all that apply:

- [X] I am filing an application for T-1 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 You ***(Person filing this form as a victim)***

Family Name *(Last Name)*	**Given Name** *(First Name)*	**Middle Name** *(if any)*
Ramiro	Mena	Alexis

Other Names Used *(Include maiden name/nickname)*

N/A

II. Background Investigation (Biometrics)

USCIS conducts a thorough background investigation of all T visa applicants, including a name check and a Federal Bureau of Investigation (FBI) fingerprint check, known as "biometrics." Once the T visa application is filed, USCIS will send a written notice scheduling the child for a "biometrics" appointment, during which the child must provide the agency with original fingerprints and photographs. Using this information, USCIS will review the applicant's criminal history, immigration violations, and/or security concerns. Like the U visa, USCIS will not adjudicate the I-914 without biometrics, *see supra* p. 84.

III. T Visa Adjudication

As with U visas, the USCIS Vermont Service Center adjudicates T visa applications on a case-by-case basis without issuing written decisions. Even if an applicant is eligible for a T visa, his or her application may be denied on a discretionary basis. USCIS may issue a Request for

[465] TVPRA Policy Memorandum, *supra* note 386.

Evidence ("RFE") at any stage in its review if additional information is needed to determine an applicant's T visa eligibility, *see supra* p. 85.

DERIVATIVES

Under INA section 214(n), an immigrant who has applied for or been granted a T visa as the principal applicant ("T-1") may apply for derivative status for an immediate family member – either in the U.S. or abroad – who is otherwise admissible to the United States. Although the number of T visas approved each fiscal year is capped at 5,000, this numerical limitation applies only to principal applicants and not to derivatives.[466]

The following family members may qualify for derivative status:

If principal recipient is 21 or older:[467]	**If principal recipient is under the age of 21:**[468]
• Spouse (T-2) • Unmarried child under the age of 21 (T-3) • Parent (T-4) or unmarried sibling under the age of 18 (T-5) who faces a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement[469] • Certain adult or minor children of T visa derivatives who face a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement[470] (T-6)	• Spouse (T-2) • Unmarried child (T-3) • Parent (T-4) • Unmarried sibling who is under the age of 18 at the time the principal application is filed (T-5) • Certain adult or minor children of T visa derivatives who face a present danger of retaliation as a result of the principal's escape from trafficking or cooperation with law enforcement[471] (T-6)

The principal T visa applicant may apply for derivative status for an immediate family member by submitting Form I-914 Supplement A, *Application for Immediate Family Member of T-1 Recipient*, to USCIS. The application for derivative status may be filed along with the

[466] INA § 214(o)(3), 8 U.S.C. § 1184(o)(3).
[467] INA § 101(a)(15)(T)(ii)(II), 8 U.S.C. § 1101(a)(15)(T)(ii)(II).
[468] INA § 101(a)(15)(T)(ii)(I), 8 U.S.C. § 1101(a)(15)(T)(ii)(I).
[469] INA § 101(a)(15)(T)(ii)(III), 8 U.S.C. § 1101(a)(15)(T)(ii)(III).
[470] Recent changes to the TVPRA of 2008 and the William Wilberforce Violence Against Women Act ("VAWA") expanded T visa eligibility to include children of derivatives—i.e., their grandchild(ren), stepchild(ren), nieces, nephews, and siblings of the principal applicant—provided that they face a present danger of retaliation. Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4.
[471] *Id*.

principal T visa application or filed in a separate application at a later time. The applicant must include evidence sufficient to demonstrate that:

- The immigrant for whom derivative status is being sought is an immediate family member of a T-1 nonimmigrant; and
- The immediate family member or the T-1 principal would suffer extreme hardship if the immediate family member were not allowed to remain with or join the principal T-1 nonimmigrant in the United States.

When the immediate family member is outside the U.S., s/he must demonstrate extreme hardship that is substantially different from the hardship generally experienced by other residents of the country of origin who are not trafficking victims. The determination of the extreme hardship claim will be evaluated by USCIS on a case-by-case basis. Factors that may be considered in evaluating extreme hardship to a derivative applicant include:

- The need to provide financial support to the principal immigrant;
- The principal's need for family support; and
- The risk of serious harm, particularly serious bodily harm, to an immediate family member from the perpetrators of the severe forms of trafficking in persons.[472]

BENEFITS AND ADJUSTMENT OF STATUS

T visa recipients are permitted to live and work legally in the U.S. for up to four years.[473] The employment authorization card issued at the time the petition is approved serves as proof of T nonimmigrant status.[474] T nonimmigrant status may be extended if a designated federal or state law enforcement official certifies that the individual's presence in the U.S. is necessary to assist in the investigation or prosecution of human trafficking-related activity.[475]

T visa holders are also eligible for adjustment of status to become lawful permanent residents (*i.e.*, green card holders) by filing Form I-485, *Application to Register Permanent Residence or Adjust Status*; Form I-797, *Notice of Action*; and other supporting documents.[476] These forms should be filed with USCIS, which has sole jurisdiction to approve or deny a Form I-485 based on T nonimmigrant status.[477] Like the initial T visa application, a grant of adjustment of status is discretionary and may be denied even where an applicant meets the eligibility requirements.[478]

An applicant is eligible for adjustment of status to become a lawful permanent resident if s/he: (1) has been physically present in the U.S. for a continuous period of at least three years

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[472] 8 C.F.R. § 214.11(o)(5).
[473] *Id.* § 214.11(p)(1).
[474] *Id.* § 214.11(l)(4).
[475] INA § 214(o)(7)(B), 8 U.S.C. § 1184(o)(7)(B); 8 C.F.R. § 214.11(p)(1).
[476] Forms and instructions are available at http://www.uscis.gov.
[477] 8 C.F.R. § 245.23(d).
[478] For guidance on how USCIS adjudicates T visa applications and corresponding adjustment of status applications, *see* TVPRA Policy Memorandum, *supra* note 386.

since being admitted as a T nonimmigrant or for a continuous period during the investigation or prosecution of acts of trafficking, whichever period of time is less; (2) throughout such period has been a person of good moral character; and (3) during such period, has complied with any reasonable requests for assistance in the investigation or prosecution of acts of trafficking, would suffer extreme hardship involving unusual and severe harm upon removal from the U.S., or was younger than 18 years of age at the time of the victimization.[479]

Evidence of continuous presence can be shown through school transcripts, employment records, or installment payments (*e.g.*, monthly rent receipts, utility bills) during the requisite time period.[480] An applicant for adjustment of status fails to meet the continuous presence requirement if s/he departs the U.S. for a single trip exceeding 90 days or for multiple trips exceeding 180 days in the aggregate. However, TVPRA 2008 allows for exceptions to this general rule if the absence was necessary to assist in the investigation or prosecution of trafficking, or if an official involved in the investigation or prosecution certifies that the absence was otherwise justified.[481] T nonimmigrants who have fewer than three years of continuous physical presence in the U.S. when applying for adjustment of status must submit documentation from the Attorney General attesting that the investigation or prosecution is complete.[482]

As with the initial T visa application, a T nonimmigrant who was under 18 at the time of victimization is not required to demonstrate ongoing compliance with reasonable requests for assistance from law enforcement in order to adjust his or her status.[483] In addition, USCIS may waive any disqualification from good moral character that was caused by, or incident to, the acts of trafficking underlying the original T visa application.[484]

Derivative family members may also apply for adjustment of status, provided that the principal T visa holder meets the eligibility requirements for adjustment of status and that his or her adjustment application has been approved, is currently pending, or is concurrently filed.[485] Although USCIS limits the number of T visa recipients who adjust status to 5,000 each fiscal year, this cap does not apply to eligible family members.[486]

The One

In the dark universe
Look how beautiful is earth
In the dark sky
I see beautiful stars with my eye
What type of power is that
To make all these things with His hand
The power is the greatest
Like Mount Everest
You are everything
Now and Forever

– Poem by a 17-year-old boy from Ethiopia at Youth for Tomorrow

[479] INA § 245(l)(1)(A)-(C), 8 U.S.C. § 1255(l)(1)(A)-(C).
[480] U.S. Citizenship and Immigration Services, *Fact Sheet: USCIS Publishes New Rule for Nonimmigrant Victims of Human Trafficking and Specialized Criminal Activity* (Dec. 12, 2008), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3fc14b60aaa0e110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD [hereinafter USCIS Fact Sheet].
[481] INA § 245(l)(3), 8 U.S.C. § 1255(l)(6).
[482] TVPRA Policy Memorandum, *supra* note 386.
[483] INA § 245(l)(1)(C)(iii), 8 U.S.C. § 1255(l)(1)(C)(iii).
[484] INA § 245(l)(6), 8 U.S.C. § 1255(l)(6).
[485] USCIS Fact Sheet, *supra* note 480.
[486] *Id.*

SPECIAL IMMIGRANT JUVENILE STATUS

"My parents didn't have a heart, but I do. I want to take care of my sister and my brother because no one took care of me. I was only brought to this world to suffer which is why I came to the U.S. I thought I would be able to change my life, but I didn't realize that things would take so long. I feel like a fish but I can't go up for air, so I'm drowning here. My parents only made love to bring me into this world and forget about me. I never had the chance to go to school or study, I took care of myself. But a part of me wants to go back to that life now because I was outside and free, not locked up in a cage."

− Words spoken by a detained 16-year-old illiterate Honduran who qualified for SIJS because his parents had abandoned him. Left in the care of his abusive uncle and grandmother, his caregivers would frequently chain him to a tree in the backyard, beat him, and burn his feet.

INTRODUCTION TO SIJS

Jaime was nine years old when he came to the U.S. with his parents, who began working in a restaurant in Fairfax, Virginia. When Jaime was twelve, his father lost his job and became depressed. His father began drinking on a daily basis and would become agitated very easily. Jaime remembers his father and mother fighting a lot. One day, Jaime's father's temper boiled over, and he began breaking things in the home. When Jaime's mother tried to stop him, Jaime's father hit her and grabbed her by the hair, dragging her on the floor. Jaime tried to intervene, but his father hit him as well. Jaime wound up with bruises all over his back and arms.

As Jaime's father continued drinking over the next few months, the abuse became worse. He physically abused Jaime on a regular basis, telling him he was worthless and a burden on the family. Jaime tried to hide the injuries from others. Eventually, a teacher noticed the steady decline in Jaime's performance at school and asked him if everything was all right. Jaime broke down and shared everything with his teacher. Together, they called child protective services, and Jaime and his mother moved to a safer place.

Sadly, Jaime's story of domestic violence is similar to that of many other unaccompanied immigrant children. Recognizing the particular vulnerability of child victims of mistreatment, Congress enacted the Special Immigrant Juvenile Status ("SIJS") provision of the Immigration and Nationality Act ("INA").[487] The SIJS provision created a form of humanitarian relief for immigrant children like Jaime who have been abandoned, abused, neglected, or similarly mistreated, as defined under state law.

In order to be eligible for SIJS, the immigrant child must first petition a state juvenile court to make certain factual findings before s/he can apply for immigration status from the federal government. Specifically, the state juvenile court must enter an order finding that: (1) the child is either dependent on the court or should be placed in the custody of an individual or entity designated by the court; (2) reunification with one or both parents is not viable due to abuse, abandonment, neglect, or similar basis under state law; and (3) it is not in the child's best interest to return to his or his parents' previous country of nationality.

Of all the forms of relief discussed in this manual, SIJS is the only one that requires the child to first go through state court and have a judge apply state law to the facts. Congress crafted the SIJS provisions to ensure that state juvenile courts retained jurisdiction over findings of fact related to abuse, neglect, abandonment, and the best interests of the child, recognizing that state law adjudicators – having the relevant experience and expertise – are the most qualified and best suited to do so. At the same time, Congress preserved the federal government's sole authority to grant immigration status upon review of a child's SIJS petition. A state court finding, therefore, does not confer any immigration status to a child.

One of the biggest advantages for juveniles with SIJS is that they may immediately apply for lawful permanent resident status (also known as a "green card"). By contrast, juveniles with asylee status must usually wait at least one year to apply, and U or T visa grantees must wait

[487] William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); INA §§ 101(a)(27)(J), 245(h), 8 U.S.C. §§ 1101(a)(27)(J), 1255(h).

three years. Congress has also provided for automatic waivers for certain grounds of inadmissibility for children with SIJS, including those who are stowaways or enter the U.S. without inspection. Unlike other forms of relief, however, the INA prohibits a child from conferring immigration status to his or her biological or adoptive parents by way of SIJS.

A *pro bono* attorney representing a child in an SIJS case will gain significant litigation experience in state court while also being exposed to the federal immigration system through petitioning USCIS for SIJ status and assisting the child in obtaining lawful permanent residence. Although SIJS cases typically demand a lot of time and are best suited for a team of attorneys, the experience is tremendously rewarding. By obtaining SIJS, an attorney is both advocating for the child to be placed in a safe and appropriate environment and seeking lawful status for the child that protects him or her from deportation.

> *"When I arrived to the U.S.-Mexico border, I sat at the edge of the river for half an hour thinking to myself, 'Should I cross, or not?' I was imagining the new life I would lead in the U.S. alone. But I have always been alone my whole life, nothing would change. Next thing I knew I was in the water swimming across the river."*
>
> – 16-year-old boy eligible for SIJS because his father abandoned him to move to another country when he was 4 years old, and because his mother and primary caregiver died when he was 11 years old

SIJS REQUIREMENTS

To be eligible for SIJ status, the petitioner must meet four requirements. First, s/he must be unmarried, under 21 years of age, and present in the United States. Second, the petitioner must obtain one of two kinds of orders from a juvenile or state court. One option is to obtain a dependency order declaring the petitioner dependent on the juvenile court. In the alternative, s/he can obtain an order placing the petitioner under the custody of an agency or department of the state (or an individual or entity appointed by a state or juvenile court). Either a dependency or custody order must declare that the petitioner's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.[488] Third, the petitioner must obtain a judicial or administrative determination that it would not be in the petitioner's best interest to be returned to his or her country of citizenship or last habitual residence.[489] This determination may be part of, or separate from, the dependency or custody order.

Finally, the consent of the Secretary of DHS (and the Secretary of DHHS in the case of children who are detained) is required to allow the state court to exercise discretion over the child's custody status or placement in the custody of DHHS. Consent is necessary to show that the request for SIJS classification is bona fide, meaning the SIJS benefit was not "sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent

[488] INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i). Note that the corresponding regulations at 8 C.F.R. § 204.11 have not been updated to reflect changes from TVPRA 2008.
[489] INA § 101(a)(27)(J)(ii), 8 U.S.C. § 1101(a)(27)(J)(ii).

residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment."[490]

I. Age Requirement

SIJ status requires that the petitioner be under 21 years of age and present in the United States. Although the INA's definition of SIJS does not use the term "child,"[491] USCIS incorporates the definition found at section 101(b)(1) of the INA, which defines a child as being unmarried and under 21 years of age.[492] Practically, however, due to the state court order component of the application and states' varying age requirements for jurisdiction, petitioners may need to obtain the state court order before the child turns 18 years old. The various age requirements for obtaining juvenile or state court jurisdiction in D.C., Maryland, and Virginia are described below.

– Artwork by 17-year-old Honduran boy whose brother was killed by MS-13 and who was constantly harassed as a target for recruitment, and for whom *pro bono* attorneys at Sidley Austin LLP won SIJS/green card

The Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, USCIS must consider the petitioner's age *at the time of filing* in determining whether the petitioner satisfies the age requirement.[493] If an SIJ petitioner was under the age of 21 on the date the SIJ petition was properly filed, USCIS cannot deny SIJ status due to age, regardless of the petitioner's age at the time of adjudication. The age requirement may be satisfied through a birth certificate, passport, an identity document issued by a foreign government, DHHS documentation, or the child's own declaration.[494] In cases where a child does not have any formal government documents, it may be possible for DHS to conduct a bone density test that can serve as a sufficient indicator of the minor's age.

[490] Memorandum from U.S. Citizenship and Immigration Services Office of Policy and Strategy to Field Leadership, HQOPS 70/8.5, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* at 3 (Mar. 24, 2009), *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/_Files_Memoranda/2009/TVPRA_SIJ.pdf [hereinafter USCIS TVPRA Memo of 2009] (citing H.R. Rep. No. 105-405, at 130 (1997)).
[491] INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).
[492] INA § 101(b)(1), 8 U.S.C. § 1101(b)(1); USCIS TVPRA Memo of 2009, *supra* note 490, at 2-3.
[493] 8 U.S.C. § 1232(d)(6).
[494] William R. Yates, Associate Director for Operations at U.S. Citizenship and Immigration Services, Interoffice Memorandum, HQADN 70/23, *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions* at 3 n.6 (May 27, 2004), *available at* http://www.uscis.gov//Laws/Memoranda/Static_Files_/%201998-2008/2004/sij_memo_052704.pdf [hereinafter USCIS TVPRA Memo of 2004].

Further, if USCIS denies a child's SIJS petition or SIJS-based adjustment of status because of age or dependency status, the child may be eligible to file a motion to reopen based on the *Perez-Olano* Settlement Agreement.[495] *Perez-Olano v. Holder* was a class action lawsuit in which class members were defined as juveniles, "including but not limited to, SIJ applicants, who, on or after May 13, 2005, apply or applied for SIJ status or SIJS-based adjustment of status based upon their alleged SIJ eligibility."[496] The settlement agreement, effective from December 14, 2010 to December 13, 2016, allows class members to file a motion to reopen if their SIJ status or SIJS-based adjustment of status was denied or revoked during the defined period.[497] Most importantly, under the *Perez-Olano* Settlement Agreement, USCIS may not deny or revoke any SIJS petition based on age or dependency status if, at the time the class member filed the petition, s/he was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age.[498] This standard applies to any new, pending, or reopened SIJS petitions filed by class members.[499] USCIS will also apply this standard to class members with any new, pending, or reopened SIJS-based adjustment of status applications.[500]

II. Predicate Order from State Court

As described above, in order to be eligible for SIJ status, a petitioner must obtain one of two kinds of predicate state court orders: (1) a dependency order declaring the petitioner dependent on the juvenile court; or (2) an order placing the petitioner under the custody of an agency or department of the state (or an individual or entity appointed by the state or by a juvenile court). Either type of order must also find that the petitioner's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis as determined under state law. Finally, the petitioner must obtain a finding – typically part of the dependency or custody orders – that it is not in the petitioner's best interest to be returned to his or her country of citizenship or last habitual residence.

A. Dependency or Custody Finding

The predicate state court order can be obtained in either a dependency hearing in juvenile court (for an order stating that the petitioner is dependent on the court) or a custody hearing (for an order placing the petitioner under the custody of an agency or department of the state or an individual or entity appointed by the state or by a juvenile court).[501] The dependency order may be in the form of a declaratory judgment. Petitioners may also submit multiple court orders, so long as the INA requirements are satisfied by the orders in the aggregate. State law governs which court (*e.g.*, juvenile court, family court, probate court) will have jurisdiction over a juvenile requesting a dependency or custody order. Note that if the child has an open

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[495] Settlement Agreement, *Perez-Olano v. Holder*, No. 05-3604 (C.D. Cal. Aug. 31, 2010), *available at* http://www.uscis.gov/USCIS/Laws/%%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_.pdf [hereinafter *Perez-Olano* Settlement Agreement].
[496] U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0034, *Implementation of the Special Immigrant Juvenile* Perez-Olano *Settlement Agreement* (Apr. 4, 2011), *available at* http://www.uscis.gov//Laws/Memoranda/2011/April/olano-settlement.pdf [hereinafter *Perez-Olano* Policy Memo].
[497] *Id*.
[498] *Id*.
[499] *Id*.
[500] *Id*.
[501] *Id*.

dependency or delinquency case, then that court may already have jurisdiction to make SIJS findings.

In some cases, a juvenile court may find that a child is dependent on the court even though s/he has been placed in the care of an individual. Although some courts apply the state law definition of "dependent" when such term exists under the state code, courts may also apply the immigration standard established in *Matter of Menjivar*. In that case, the legacy INS Office of Administrative Appeals stated that a child can be "declared dependent on a juvenile court" simply by the court accepting jurisdiction to make care and custody determinations over the child.[502] Thus, when a family court accepts the jurisdiction over the custody of a child whose parents have abandoned him or her, that child can be considered "dependent" on the juvenile court for immigration purposes.[503]

Practitioners should be mindful of other state law provisions, including standing requirements, residency requirements, and state statutory definitions of abuse, abandonment, neglect, or other analogous bases for reunification to be found not viable. Practitioners should also note that a change in state residence or a change in the court's determination may jeopardize the case if the change occurs after obtaining the predicate order but while the SIJ application or adjustment of status is still pending.

B. Reunification Not Viable due to Abuse, Abandonment, or Neglect

As described above, either type of state court order must find that the petitioner's reunification with one or both parents is not viable due to abuse, neglect, abandonment – all determined under state family law or state juvenile law, or a similar basis under state law.[504] Such similar bases have included, for example, the death of both parents (in Oregon) or constructive abandonment (in Virginia).[505]

> *"My relationship with my parents is a 1 on a scale of 10. My dad would get drunk most weekends and beat me. They did not treat me like part of the family. At dinner time, they would serve plates for all my brothers and sisters. They would tell me I could serve food to myself but I could not sit at the table with them. I was forced to sleep on the floor, but all my siblings had beds. Sometimes I questioned whether they were my real parents. I lived with them until my 14th birthday, when I was thrown out. I lived in a cave for a few weeks until a friend invited me to live with him."*
>
> – 18-year-old Salvadoran boy who won SIJS status based on his parents' abuse and neglect because he refused to practice the same religion as them. A *pro bono* attorney in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP represented this young immigrant in his application to adjust status to lawful permanent resident.

[502] *Matter of Menjivar*, File No. A70 117 167, INS Administrative Appeals Unit (Dec. 27, 1994), *available at* http://www.refugees.org/resources/for-lawyers/special-immigrant-juvenile-status/special-immigrant-juvenile-3.html.
[503] *Id.*
[504] INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i).
[505] *See, e.g., In the Matter of* ___ (Multnomah County Circuit Court, Jan. 21, 2011) (citing Or. Rev. Stat. 419B.100).

The INA makes clear that a child does not have to be abandoned, abused or neglected by both parents; a showing of mistreatment by only one parent (often referred to as "single-parent SIJ") is sufficient. Some states – including Virginia, Maryland, and D.C. – also permit single parents to acquire an SIJS predicate order for a child in specific circumstances. However, the availability of SIJ status through a single parent varies by state.

TVPRA 2008 altered the SIJS requirements regarding dependency or custody findings in several respects. First, juveniles who are placed under the custody of an individual or entity appointed by the state or by a juvenile court, are now eligible for SIJ status.[506] Second, in order to qualify for SIJ status, it is no longer necessary (or sufficient) for a juvenile court to determine that the child was eligible for long-term foster care as a result of the abuse, neglect, or abandonment.[507] TVPRA 2008 amended the INA to instead require a finding that the juvenile's "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law."[508]

C. Not in Best Interest to Return to Home Country

In order to be eligible for SIJS, the petitioner must obtain a judicial or administrative determination that it would not be in the child's best interest to be returned to the child's or parents' previous country of citizenship or last habitual residence.[509] USCIS "strongly encourages" petitioners to satisfy this requirement by obtaining such a determination from the state or juvenile court and incorporating it into the court order.[510] However, other judicial or administrative bodies "authorized or recognized by the juvenile court" may also make such a determination.[511]

Attorneys may show that it is not in the petitioner's best interest to return to his or her home country by demonstrating that there is no appropriate or safe place to live in the home country, and that there is no one to take care of the petitioner and provide for his or her well-being. This argument can be strengthened by including evidence of country conditions such as the prevalence of transnational gangs or cartels, police corruption, ineffective government, poverty, or lack of opportunities. Attorneys may also show that the petitioner is obtaining care and support in the U.S. that is not available in the petitioner's home country and that the proposed guardian can provide a safe, loving, and nurturing home.

III. Consent Requirement

Consent from DHS is required and is implicit upon USCIS approving the SIJS petition. In addition, in certain cases, consent from DHHS is required where the petitioner is detained by ORR to show that the petitioner's request for SIJ classification is bona fide. Because the type of

[506] INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i); *see also* USCIS TVPRA Memo of 2009, *supra* note 490, at 2.
[507] If the petitioner is moving to reopen the case under the *Perez-Olano* Settlement Agreement, s/he may still be required to show eligibility for foster care due to abuse, neglect, or abandonment if the petitioner applied before the TVPRA was effective. *See Perez-Olano* Policy Memo, *supra* note 496.
[508] INA § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i).
[509] INA 101(a)(27)(J)(ii), 8 U.S.C. § 1101(a)(27)(J)(ii); USCIS TVPRA Memo of 2009, *supra* note 490, at 2.
[510] USCIS TVPRA Memo of 2004, *supra* note 494, at 3 n.4-5.
[511] *Id.* at 4 (citing 8 C.F.R. § 204.11(c)(6)).

proceedings in which a child may seek an SIJS predicate order vary by state, petitioners in some states may be required to seek specific consent while others will not. If the petitioner is seeking a state court order that does *not* make findings as to the petitioner's custody status or placement, then the petitioner is *not* required to obtain specific consent from DHHS, as the approval of the SIJ petition itself demonstrates the DHS Secretary's consent.[512] For example, an unaccompanied child who has been released from ORR custody, perhaps after having reunified with a sponsor, would not need specific consent from DHHS before instituting state court proceedings, because s/he would no longer be in the custody of DHHS and therefore would not be altering custody with respect to DHHS. Similarly, a child who is in ORR custody but is seeking a declaratory judgment stating the child is dependent is not required to seek consent from DHHS, as such a finding would not alter his or her custody status or placement with DHHS.

However, if the petitioner is still in ORR custody and is seeking a state court order determining or altering his or her custody status or placement, s/he must first obtain "specific consent" from DHHS for the state court's exercise of jurisdiction.[513] For example, a child detained at the Shenandoah Valley Juvenile Center in Staunton, Virginia would need to request and obtain specific consent from ORR before initiating proceedings in the Staunton Juvenile and Domestic Relations District Court requesting that the court place him/her in the care and custody of the state, such as a Virginia state foster care program, instead of the federal ORR program. If the child fails to obtain specific consent, his or her SIJS petition may be denied.

In order to obtain specific consent from DHHS for a child in ORR custody, attorneys must complete the "Request for Specific Consent to Juvenile Court Jurisdiction (ORR C-1) – Specific Consent," available on the ORR website.[514] The request must be submitted electronically to DUCSconsent@acf.hhs.gov, along with a form authorizing the attorney to act on behalf of the unaccompanied child.[515] The attorney will receive a written decision within 30 days of submitting the request, and possibly sooner if the attorney notifies DHHS that the request is urgent. ORR provides instructions on its website to assist attorneys in preparing the requisite forms.[516]

FILING FOR SIJS

The process for obtaining the predicate state court order varies by state, as do the state law requirements for showing abuse, abandonment, or neglect. Regardless of the jurisdiction, an attorney will typically obtain the necessary predicate order by filing a separate motion or addendum for SIJS findings that accompanies the petition invoking the state court's jurisdiction. Thus, the request for SIJS findings is a separate request made in conjunction with the underlying custody or dependency proceedings before the state court. In support of the SIJS motion, attorneys should consider submitting:

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[512] *Id*.
[513] USCIS TVPRA Memo of 2009, *supra* note 490, at 3.
[514] Administration for Children and Families, HHS, Request for Specific Consent to Juvenile Court (ORR C-1), Specific Consent Form (valid through Mar. 31, 2014), *available at* http://www.acf.hhs.gov/programs/orr/resource/childrens-services [hereinafter Request for Specific Consent].
[515] Acceptable documents include a G-28, EOIR-28, or EOIR-29.
[516] Request for Specific Consent, *supra* note 514.

- A declaration by the child outlining the facts to support the SIJ findings;
- A declaration by the parent or third-party seeking custody;
- Federal law guidance on SIJS;
- Relevant immigration documents, country conditions; and
- Records showing the fitness of the party seeking custody.

For sample state court filings and supporting documents, please contact CAIR Coalition's Detained Children's Program. Below are the basic procedural steps that attorneys should follow in the District of Columbia, Maryland, and Virginia.

I. Obtaining the Predicate State Court Order

A. District of Columbia

In the District of Columbia, SIJS findings may be obtained through either: (1) neglect proceedings in the Family Division of D.C. Superior Court ("Family Court");[517] or (2) custody proceedings in Family Court.[518] In either case, the attorney will typically include a motion for SIJS findings as well as a proposed order. A memorandum in support of the motion is also recommended.

Neglect proceedings are initiated via complaints to the Child and Family Services Agency ("CFSA"), which then decides whether to file a petition in Family Court.[519] The Family Division retains jurisdiction until the child is 21 years old and determines whether a child has experienced neglect or abuse in accordance with the definitions at section 16-2301 of the D.C. Code.[520]

In order to initiate custody proceedings, a parent or third party may file a complaint for custody with the Family Court. Sections 11-1101(a)(1) and 16-4602.01 of the D.C. Code govern the jurisdiction of D.C. courts over initial child custody determinations. For example, the District has jurisdiction to make an initial child custody determination if the District is the "home state" of the child on the date the proceedings commence.[521] In the case of single-parent SIJS, a parent bringing an action for custody may petition the court for legal custody and/or physical custody under section 16-914(a)(1)(A) of the D.C. Code. In determining the custody arrangement, the court will apply the "best interests of the child" standard and consider, among other factors, the wishes of the child, the wishes of the parents, the child's relationship with each parent, and the child's adjustment to his or her home, school, and community.[522] Further, where one parent alleges that the other parent committed an intra-family offense, such as domestic

[517] D.C. CODE § 16-2301 *et seq*.
[518] *Id.* §§ 16-831.01 *et seq.*, 11-1101.01 *et seq.*, 16-4601.01 *et seq.*
[519] *Id.* § 16-2305. Note that only the Child and Family Services Agency may bring a guardianship case.
[520] *Id.* § 16-2303.
[521] *Id.* § 16-4602.01.
[522] *Id.* § 16-914(a)(1)(3).

violence, kidnapping, or sexual misconduct, the court may consider such evidence in deciding whether to grant custody or visitation rights to the abusive parent.[523]

Section 16-831.02 of the D.C. Code governs cases in which a third party files a complaint for custody or a motion to intervene in an existing custody proceeding. A third party is defined as someone who is not the child's parent or a *de facto* parent,[524] such as a child's aunt, uncle, adult sibling, or family friend. The court will retain jurisdiction until the child is 18 years old[525] and will determine third party custody based on the best interests of the child, as defined in section 16-831.08 of the D.C. Code.

The D.C. Bar Pro Bono Program is an excellent resource for sample materials for the District of Columbia. The D.C. Bar website provides the public with brief fact sheets of legal information about family law in the District. These facts sheets, geared towards *pro se* individuals, include information in both English and Spanish on custody and how to initiate proceedings in D.C. Superior Court that may be useful for the attorney, the child, and the child's proposed custodian.[526] Included in those materials are a sample Complaint for Custody and/or Visitation, which attorneys may use to initiate SIJ-related proceedings, and a Consent to Answer to Complaint for Custody and/or Access to Children, which a minor's parent(s) can sign in order to consent to the instituted custody proceedings. The D.C. Court's website also provides sample forms, complaints, and orders.[527]

When filing for an SIJS predicate order through custody proceedings in D.C. Superior Court, the attorney should include the following documents:

- Complaint for Custody;
- Proposed Custody Order;
- Consent to Answer Complaint for Custody and/or Access to Children or proof of service[528] or publication[529] as designated by the Judge;
- Motion for SIJS findings;
- Proposed Order for SIJS findings;
- Supporting memorandum for SIJS findings and exhibit list;
- Motion for an emergency hearing (if necessary); and
- Filing fee.

In order to request an interpreter for the proceedings, the attorney may notify the clerk at the time of filing that an interpreter will be needed. For additional information on filing fees,

[523] D.C. CODE § 16-914(a)(1)(A).
[524] *Id.* § 16-831.05.
[525] *Id.* § 16-831.12.
[526] District of Columbia Bar, For the Public: Family (2013), http://www.dcbar.org/for_the_public/legal_information.
[527] District of Columbia Courts, Form Locator, http://www.dccourts.gov/internet/formlocator.jsf.
[528] D.C. CODE § 16-4601.07 (Notice to persons outside the District); § 13-431 (Manner and proof of service).
[529] D.C. CODE §§ 13-336, 339.

pleadings, motions, and proceedings in D.C., practitioners should review the D.C. Superior Court Rules Governing Domestic Relations Proceedings and the General Rules of the Family Court.[530]

Sample Single-Parent D.C. Complaint for Custody Cover Page:

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
Domestic Relations Branch

Edgar Ali
PRINT YOUR NAME

123 Hope St., NE
STREET ADDRESS

Washington, DC 20001
CITY, STATE AND ZIP CODE

☐ SUBSTITUTE ADDRESS: CHECK BOX IF YOU HAVE WRITTEN SOMEONE ELSE'S ADDRESS BECAUSE YOU FEAR HARASSMENT OR HARM.

12 DRB 1234

RELATED CASES:

PLAINTIFF,

v.

Julia Bonilla
PRINT OTHER PARTY'S NAME

100 Calle Hermosa, #3
STREET ADDRESS

La Union, La Union, El Salvador
CITY, STATE AND ZIP CODE

DEFENDANT.

PRINT OTHER PARTY'S NAME

STREET ADDRESS

CITY, STATE AND ZIP CODE

DEFENDANT #2.

COMPLAINT FOR CUSTODY and/or VISITATION
Action Involving Child Support ☐ yes ☑ no

I, Edgar Ali, am the Plaintiff in this case.
PRINT YOUR NAME

1. The child(ren) in this case:

Child's Full Name	Date of Birth	Gender
Juliana Ali	12/12/2000	Female

DC Bar Pro Bono Program (revised 3.2011)

Complaint for Custody and/or Visitation Page 1 of 7

[530] District of Columbia Courts, Superior Court Rules and Promulgation Orders, http://www.dccourts.gov/internet/superior/dcscrules.jsf.

B. Maryland

In Maryland, SIJS findings can be obtained from the Juvenile Department or Family Division of the relevant Maryland county's Circuit Court.[531] The predicate order for an SIJS finding is typically an addendum or motion to another type of Juvenile Department or Family Division proceeding, such as abuse and neglect, foster care, adoption, custody, guardianship, or juvenile delinquency proceedings.[532] In Maryland, "child custody proceedings" include, but are not limited to, proceedings involving legal and/or physical custody or visitation, neglect or abuse, or protection from domestic violence.[533] The Maryland Code distinguishes between sole custody proceedings filed by a parent[534] and custody proceedings initiated by third parties, known as guardianship proceedings.[535] In guardianship proceedings, the third party (*i.e.*, the proposed guardian) is a non-biological parent who files a petition in the minor child's name.

In custody proceedings, the Maryland family court will typically only exercise jurisdiction until the child turns 18 years old. When filing in a Maryland county that is less familiar with SIJS, an attorney should file a supporting memorandum accompanying the motion for SIJS findings. Section 3-8A-08(a) of the Maryland Code governs where family law petitions should be filed.[536] According to the Vera Institute of Justice, practitioners have had the most success obtaining predicate juvenile court orders in Montgomery County, Maryland.[537]

Maryland Code Section 9.5-201(a) governs when a family court has jurisdiction to make an initial child custody determination. For example, a Maryland family court will have jursidiction if Maryland is the "home state" of the child on the date the proceeding commences, meaning the child has resided with a parent or person acting as a parent for at least six consecutive months immediately preceding the commencement of the custody proceedings.[538] If a child has not resided in Maryland for at least six consecutive months preceding the commencement of proceedings, the court may nevertheless exercise jurisdiction if certain criteria are met (for example, if the child has significant connections with the state).[539] In some cases, the court may have jurisdiction even when the child is absent from the state.[540]

In determining whether a child has been the subject of abuse, abandonment, or neglect, Maryland Circuit Court judges consider the best interests of the child.[541] In Maryland, a parent's

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[531] Circuit Court jurisdiction is invoked by filing a petition. MD. CODE ANN., Courts and Judicial Proceedings, § 3-8A-03 (2013); MD. CODE ANN., Family Law, § 9.5-201(a).
[532] MD. CODE ANN., Courts and Judicial Proceedings, § 3-8A-03.
[533] MD. CODE ANN., Family Law, § 9.5-101(e)(1)-(2).
[534] *Id.* § 9.5-101 *et seq.*
[535] MD. CODE ANN., MD Rules, § 9-100 *et seq.*
[536] If the petition alleges that a child is in need of supervision, the petition should be filed in the child's county of residence. If delinquency or a violation of § 3-8A-30 is alleged, or if a citation is issued, the filing should be in the county where the alleged act occurred. A peace order request is filed in the county where the alleged act occurred. MD. CODE ANN., Courts and Judicial Proceedings, § 3-8A-08(a).
[537] Vera Institute of Justice, *Fact Sheet: State-Specific Guidance* at 3 (Mar. 2011).
[538] MD. CODE ANN., Family Law, § 9.5-101(h).
[539] *Id.* § 9.5-201(a)(2).
[540] *Id.* § 9.5-201(a).
[541] *See* MD. CODE ANN., Family Law, § 5-701(c) and § 4-501(b) for definitions of abuse; MD. CODE ANN., Family Law, § 9.5-101(b) for the definition of abandonment; and MD. CODE ANN., Family Law, § 5-701(s) for the definition of neglect.

rights are superior to those of a third party unless the third party has a court order establishing guardianship, custody, or visitation rights that alter the rights of the parents.[542] Similarly, the law generally assumes that the best interests of the child are served by remaining in the custody of the parents unless they are unable or unwilling to exercise their custodial rights and obligations.

When filing for an SIJS predicate order through custody or guardianship proceedings in Maryland, attorneys should include the following documents:

- Petition for Guardianship/Custody;
- Proposed Guardianship/Custody Order;
- Consent from the parent(s) or proof of service or publication[543];
- Motion for SIJS findings;
- Proposed Order for SIJS findings;
- Supporting memorandum for SIJS findings and exhibit list;
- Motion for interpreter (if necessary);
- Motion for an emergency hearing (if necessary); and
- Filing fee.

For information on filing fees, sample motions and petitions, and requests for interpreters, petitioners should visit the Maryland Courts website.[544]

C. Virginia

In Virginia, SIJS findings can be obtained from the Juvenile and Domestic Relations ("J&DR") District Court of the relevant Virginia county.[545] As in Maryland and D.C., the predicate order is typically an addendum or motion to another type of court proceeding. Many Virginia jurisdictions are familiar with SIJS. In counties that are less familiar, the attorney should file a supporting memorandum accompanying the motion for SIJS findings that explains why the state court has jurisdiction to make the proposed SIJ findings. Predicate orders have been granted in guardianship or custody cases filed by a parent or another relative, child welfare proceedings ("Child in Need of Services/Supervision" or "CHINS" proceedings), abuse and neglect proceedings, and delinquency proceedings.[546]

Under the Virginia Code, the Commonwealth of Virginia has initial child custody jurisdiction if Virginia has been the child's "home state," meaning the child has been living with

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[542] *See, e.g., Wagner v. Wagner*, 674 A.2d 1 (Md. App. 1996).
[543] MD. CODE ANN., Civil Procedure – Circuit Court, § 2-121.
[544] Maryland Courts, Fees, Fines Schedules, Brochures, and Forms Index (2013), http://www.courts.state.md.us/district/dctcivforms.html.
[545] Initial jurisdiction by the Juvenile and Domestic Relations District Court is invoked over such proceedings by petition. VA. CODE ANN. § 16.1-260.
[546] *See id.* § 16.1-241 for a list of proceedings in which the domestic and juvenile relations district courts have jurisdiction.

a parent or person acting as a parent for the past six months.[547] The Commonwealth of Virginia may also have initial child custody jurisdiction in cases where the child is absent from the state or where another state's court does not have jurisdiction or has determined that Virginia is the appropriate forum.[548] Regardless, the court will generally only exercise jurisdiction for custody matters until the child's eighteenth birthday. In some cases, the J&DR district court has extended jurisdiction until 21 years of age where the child commenced proceedings prior to his or her 18th birthday.[549]

When determining the city or county in which to initiate proceedings, practitioners should be aware that each J&DR district court has exclusive and original jurisdiction within the limits of the county territory, and concurrent jurisdiction in the neighboring county territory within one mile beyond the limits of the county.[550] Section 16.1-243(A)(1) of the Virginia Code outlines when the city or county J&DR district court has original jurisdiction. For example, venue is proper in the city/county where the child resides or where the child is located when proceedings are commenced.[551] This means that an attorney representing a child who lives in Arlington within one mile of the Arlington/Alexandria county line could initiate custody proceedings in either the Arlington or Alexandria J&DR district court.

In determining whether a child has been the subject of abuse, abandonment, or neglect, the court will first consider whether the conduct alleged satisfies the statutory definition. The child's uncontested testimony may suffice, although courts have sometimes required corroboration.[552] The court will next consider the best interests of the child in determining custody or visitation arrangements.[553]

When filing for an SIJS predicate order through custody proceedings in Virginia, the attorney should include the following documents:

- Forms DC-511, *Petition*,[554] and DC-620, *Affidavit (Uniform Child Custody Jurisdiction and Enforcement Act)*;[555]
- Proposed Custody Order;
- Form DC-435, *Consent to Answer Complaint for Custody and/or Access to Children or Affidavit and Petition for Order of Publication* or proof of service[556];
- Motion for SIJS findings;

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[547] *Id.* § 20-146.12(A)(1).
[548] *Id.* § 20-146.12(A).
[549] *Id.* § 16.1-242.
[550] *Id.* § 16-241.
[551] VA. CODE ANN. § 16.1-243(A)(1)(d).
[552] *See id.* § 16.1-228 for the definitions of abuse or neglect, including abandonment.
[553] *See id.* § 20-124.3 (outlining factors to be considered in determining the best interest of the child).
[554] Form DC-511, Petition, *available at* http://www.vbgov.com/government/departments/courts/juvenile-domestic-relations-court/Documents/court-forms/dc511.pdf.
[555] Form DC-620, Affidavit (Uniform Child Custody Jurisdiction and Enforcement Act), *available at* http://www.state.va.//district/dc620.pdf.
[556] VA. CODE ANN. § 20-146.7.

- Proposed Order for SIJS findings;
- Supporting memorandum for SIJS findings and exhibit list;
- Motion for an interpreter (if necessary);[557]
- Motion for an emergency hearing (if necessary); and
- Filing fee.

For a complete list of filing fees, forms and instructions, petitioners should visit the Virginia Judicial System website and review the District Court Forms Manual.[558]

Sample Section of Virginia Petition for Custody (Form DC-511):

PETITION
Commonwealth of Virginia VA. CODE §§ 16.1-262; 16.1-263

Case No.

DATE OF HEARING

Fairfax Juvenile and Domestic Relations District Court

In re a Child under eighteen years of age

CHILD'S NAME 1. Julia Ali	SSN: N/A	DATE OF BIRTH 2. 12/12/2000	AGE 3. 13	SEX M.F. F	RACE HISP
CHILD'S ADDRESS 4. 123 Hope St., Fairfax, VA, 22031				TELEPHONE NO. 703-555-5555	
FATHER'S NAME 5. Edgar Ali	SSN N/A	DATE OF BIRTH 05/11/1978		TELEPHONE NO. Unknown	
FATHER'S ADDRESS 6. Unknown, Unknown					
MOTHER'S NAME 7. Julia Bonilla	SSN N/A	DATE OF BIRTH 03/17/1979		TELEPHONE NO. 011-53-555-5555	
MOTHER'S ADDRESS 8. 100 Calle Hermosa, #3, La Union, La Union, El Salvador					
GUARDIAN/LEGAL CUSTODIAN OR PERSON IN *LOCO PARENTIS* NAME AND ADDRESS 9.				TELEPHONE NO.	
GUARDIAN'S /LEGAL CUSTODIAN OR PERSON IN *LOCO PARENTIS* RELATIONSHIP TO CHILD 10.					
OTHER(S) NAME AND ADDRESS 11. Lea Martin	123 Hope St., Fairfax, VA 22031			TELEPHONE NO. 703-555-5555	

12. Child held in CUSTODY [X] Yes [ ] No

13. Place of Detention or Shelter Care . N/A

14. Date and Time Taken into Custody ___/___/___ ___:___ m.

13. Date and Time Placed in Detention or Shelter Care ___/___/___ ___:___ m.

15. The above information is not known to the petitioner: No(s).

I, the undersigned petitioner, state under oath to the best of my knowledge, that the above-named child is within the purview of the Juvenile and Domestic Relations District Court Law in that, within this city/county, the child:

She is a child whose custody requires determination between the parties, pursuant to § 16.1-241 of the 1950 Code of Virginia as amended.

[557] Some jurisdictions in Virginia will require a written motion for an interpreter, while other jurisdictions require notifying the clerk at the time of filing of the need for an interpreter. Attorneys should call the clerk to verify local practice before filing.

[558] Supreme Court of Virginia Office of the Executive Secretary, District Court Forms Manual (July 1, 2011), *available at* http://www.courts.state.va.us/courtadmin/aoc/legalresearch/resources/manuals/dcforms/districtcourtformsmanual.pdf.

Sample SIJS Declaration

1. I was born in San Pedro, El Salvador on November 11, 1998. My father traveled a lot because he was a businessman and my mom was a homemaker. When I was younger, I lived with my parents and my two older siblings, Carlos and Juana.

2. My father was an alcoholic. When he lived with us, he would often come home very drunk and fight with my mom. Sometimes, he would hit my mother in front of us, which would make me and my siblings cry. My siblings and I would run to our rooms and hide, but we could still hear them yelling through the walls.

3. When I was around seven (7) years old, my father abandoned me and my family. He never told us why he left, but my mother said that he was not coming back. He left to live with another woman who lived close by.

4. Since my mom did not work, my father's decision to abandon us was very difficult on the family. My mother began working in a grocery store to make money, but it was not enough. We had to rely on my aunt from Falls Church, Virginia to send us money. She would help pay for food, clothing, and school supplies.

5. Although my father lived close to our home, he rarely visited. I do not have too many memories of my father. When I was eleven (11) years old, my father died from liver failure from the drinking. Although he was absent for most of my life, this made me really sad, and it is still very difficult for me to talk about.

6. In my country and hometown, there is a lot of crime and violence committed by gang members. They threaten and beat people, demand money from people, and kill people. The police and authorities in El Salvador do not protect us against this violence because the gangs are so powerful and because, sometimes, the police are corrupt.

7. In June 2012, five members of a gang attacked and shot my older brother, Carlos, in the leg. Carlos was able to tell police who attacked him, leading police to arrest several gang members. Later, my mother and Carlos went to court to testify against the gang. While in court, several members openly threatened to kill the family for having them arrested. When the trial was over, my family and I left the courthouse. Gang members were waiting outside and began shooting at us. My uncle, who had come to observe the proceedings, was shot and killed in front of me. Two of the gang members were eventually released. A family friend told me that this was because the gang had bribed the judge.

8. The gang continues to threaten to harm my family because my brother helped put their members in jail. The gang has made it clear that they will kill everyone in my family. Because of this, I did not feel safe in El Salvador anymore. My mother could only afford to send one of us to the United States, so she sent me. A few months later, my brother and sister also came to the U.S. Several days after they arrived, the gang shot and killed my mother at the grocery store where she worked. I know that if I return to El Salvador, I will be killed because the gang has vowed to take revenge on my family.

9. I would prefer to continue living in Falls Church, Virginia, with my aunt. I love her very much, and she is like a mother to me. I have started school and really like it here. Someday I would like to become a teacher because I really enjoy learning and working with kids.

II. Filing the SIJS Petition with USCIS

A. SIJS Petition Filing Requirements

After obtaining the appropriate predicate state court order, a petitioner can file for SIJ status with USCIS. The SIJ filing requires the following documents:

- Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*;[559]
- State predicate order and/or administrative determination making the necessary SIJS factual findings;
- Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; and
- Proof of the juvenile's age.

Although the filing fee for Form I-360 is typically $405, USCIS exempts SIJS petitioners from having to pay any filing fee; thus, no fee waiver request is required. Attorneys should consult USCIS's Instructions for Form I-360 for information on where to file.[560] In some cases, the attorney may need to check the USCIS website or call the National Customer Service Center hotline (1-800-375-5283) to verify the appropriate filing location.

B. USCIS Adjudications of SIJS Petitions

In order to expedite the SIJ process, TVPRA 2008 amended the INA to require USCIS to adjudicate SIJ petitions within 180 days of filing.[561] Once a child files his or her application, USCIS will send the child a receipt notice by mail. USCIS also will send a written notice scheduling the child for a "biometrics" appointment in which the child must provide the agency with original fingerprints and photographs. A biometrics notice will include the date, time, and location of the appointment. The child must bring the notice to the appointment along with a government-issued form of identification. Without biometrics, USCIS will not adjudicate the I-360.

In certain cases, USCIS may request an interview with a child prior to granting the I-360. However, USCIS has issued clear instructions through an interagency memorandum that interviews may be waived for SIJS petitioners under 14 years of age or when it is determined that an interview is unnecessary.[562] The memorandum further states that officers should avoid questioning a child about the details of the abuse, abandonment, or neglect suffered, as those matters were handled by the state court that applied the relevant state law.[563] If the child is scheduled for an interview, the officer may question the child with respect to biographical

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[559] USCIS, Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant* (Mar. 5, 2013), *available at* http://www.uscis.gov/files/form/i-360.pdf.
[560] USCIS, *Instructions for Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant* (Mar. 5, 2013), *available at* http://www.uscis.gov/files/form/i-360instr.pdf.
[561] TVPRA 2008, § 235(d)(2), 8 U.S.C. § 1232(d)(2).
[562] USCIS TVPRA Memo of 2009, *supra* note 490, at 4 (citing 8 C.F.R. § 245.6).
[563] *Id*.

information and evidence in the record. However, USCIS has instructed officers not to question a child regarding the validity of the dependency order.[564]

In general, USCIS's Baltimore District Office will not approve an I-360 petition if there has been a prior order of removal. If the child received a deportation order but remained in the U.S., s/he will need to file a motion to reopen proceedings. In the case of a child who left the U.S. pursuant to a deportation order and later returned, local Immigration and Customs Enforcement ("ICE") practice is to institute removal proceedings again by filing a new Notice to Appear ("NTA") with the immigration court instead of reinstating the old deportation order and subjecting a child to expedited removal.

In cases where a child is in removal proceedings, the Baltimore immigration court has been willing to grant continuances while awaiting USCIS adjudications, which can take anywhere from six weeks to ten months, and typically terminates proceedings only after the I-360 petition has been approved. The Baltimore District Office, which will adjudicate SIJS petitions for Maryland residents, does not typically require interviews or testimony from the child in SIJ cases, and there is no record of USCIS having challenged a Maryland state court's SIJS findings.[565] Ajudication of the I-360 in this jurisdiction will typically take around two months, but some cases may take closer to six months.

USCIS's Washington District Office, which adjudicates SIJS petitions for residents of D.C. and northern Virginia, will not approve an I-360 if there has been a prior order of removal. As discussed above, a child with a deportation order may need to file a motion to reopen proceedings. In cases where a child is in removal proceedings, the Arlington immigration court is generally willing to grant continuances while awaiting USCIS adjudication. The Washington District Office generally does not investigate underlying state court findings and has not challenged a Virginia state court's SIJS findings.[566] Adjucation of the I-360 in these jurisdictions typically takes between two and six months.

USCIS's Norfolk District Office will adjudicate petitions for residents of southern Virginia and typically does not require an interview. Ajudication of the I-360 in this jurisdiction typically takes around two months, but some cases may take closer to six months.

ADJUSTMENT OF STATUS

A. General Requirements

Once the petitioner's I-360 has been approved and the petitioner has obtained SIJ status, s/he becomes immediately eligible to submit an adjustment of status application in either an affirmative or defensive case.[567] Juveniles who adjust status after obtaining SIJS are eligible for

[564] *Id*.
[565] Vera Institute of Justice, *Fact Sheet: State-Specific Guidance, Maryland: Montgomery and Prince George's Counties* at 5 (Mar. 2011).
[566] Vera Institute of Justice, *Fact Sheet: State-Specific Guidance, Virginia: Alexandria, Arlington, Augusta, Fairfax, Harrisburg/Rockingham, Henrico, Loudon, and Prince William Counties*, at 6 (Mar. 2011).
[567] USCIS TVPRA Memo of 2004, *supra* note 494.

all the benefits of lawful permanent residence, including eligibility to naturalize after five years of continuous residence in the United States.[568]

An applicant for SIJS-based adjustment of status must be under 21 years of age at the time of adjustment.[569] Failure to adjust status before age 21 will result in denial of the adjustment application, unless a child falls within the class of members defined in the settlement agreement following the *Perez-Olano v. Holder* lawsuit.[570] USCIS has issued guidance stating that a class member may move to reopen his or her case under the *Perez-Olano* Settlement Agreement if USCIS denied or revoked his or her SIJS-based adjustment of status application based on age or dependency status.[571] The guidance also states that USCIS may not deny or revoke any new, pending, or reopened SIJS-based adjustment of status if the class member filed the application when s/he was under 21 years of age and was the subject of a valid dependency order.[572]

B. Affirmative Filing (for Applicants Not in Removal Proceedings)

In affirmative cases, where a child is not in removal proceedings before the immigration court, the petitioner should file:

- Form I-485, *Application to Register Permanent Residence or Adjust Status*;
- Copy of the approved I-360 (Form I-797, *Notice of Action*);
- Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*;
- Passport pictures;
- Form I-912, *Request for Fee Waiver* (for Forms I-485 and I-765 and biometrics fees) or immigration judge's decision to waive the associated filing fees; and
- Form I-693, *Report of Medical Examination and Vaccination Record*.

The petitioner may also file supporting documents, including:

- Form G-325A, *Biographic Information Sheet*;
- Form I-601, *Application for Waiver of Grounds of Inadmissibility*;
- Form I-765, *Application for Employment Authorization*; and/or
- Foreign birth certificate (with certified English translation if necessary).

The Baltimore District Office adjudicates I-485 filings by residents of Maryland; the Washington District Office adjudicates I-485 filings for residents of D.C. and northern Virginia; and the Norfolk District Office adjudicates them for residents of southern Virginia.

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[568] *Id.*
[569] 8 C.F.R. § 205.1(a)(3)(iv)(A); *see also* U.S. Citizenship and Immigration Services, Interoffice Memorandum, *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions* at 6 (May 27, 2004).
[570] *Perez-Olano* Settlement Agreement, *supra* note 495 and accompanying text.
[571] *Perez-Olano* Policy Memo, *supra* note 496.
[572] *Id*.

Adjudications of the I-485 may take several months, during which time USCIS will schedule an interview with the child and review the I-485 application to verify biographical information, clarify any inadmissibility issues, and review eligibility. Unlike the SIJS petition stage, where USCIS requests an interview in only a limited number of cases, USCIS requires an adjustment of status interview before making a final decision on the I-485 application. Depending on the case, the USCIS officer will either give his or her decision at the end of the interview or mail a decision within 90 days following the interview. In cases raising inadmissibility issues, USCIS has sometimes requested a second adjustment of status interview. Attorneys should prepare their clients by reviewing the I-485 and supporting documents with the child several times before the interview. Attorneys should also conduct a mock interview to observe how the child answers questions in a formal setting.

C. Defensive Filing (for Applicants in Removal Proceedings)

In defensive cases, where the child's removal proceedings are still open, the immigration court has initial jurisdiction to adjudicate the I-485. Both the Baltimore and Arlington immigration courts have been amenable to terminating proceedings once a child receives SIJS in order to give USCIS initial jurisdiction. In addition, both the Baltimore and Arlington ICE/DHS Offices of Chief Counsel have been willing to terminate proceedings if the I-360 is approved. In only a few instances has the Office of Chief Counsel agreed to administratively close or terminate the case prior to an approved I-360.

If removal proceedings are open, the SIJ petitioner must file the original I-485 and original supporting documents with the immigration court and provide a complete copy to the ICE/DHS Office of Chief Counsel, while also filing certain documents with USCIS in compliance with DHS's instructions for certain court submissions.[573] This allows the petitioner to adjust his or her status through immigration court during an individual hearing, at which time the child will be subject to direct and cross-examination as well as questions by the immigration judge.[574] If approved, USCIS then processes and issues the green card. In some cases, a juvenile may wait many months for an individual hearing, during which time s/he may wish or need to work. Fortunately, once the application for employment authorization is filed along with the I-485, the juvenile may receive employment authorization within 90 days, regardless of whether s/he has adjusted status before the immigration court.

Alternatively, the child may move to terminate the removal proceedings, thus giving initial jurisdiction to USCIS. In this case, the child would file an I-485 with USCIS in the affirmative manner described above. As discussed, once the application for employment authorization is filed along with the I-485, a juvenile may receive employment authorization within 90 days while the application is pending.

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[573] DHS, *Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to USCIS* (Sept. 5, 2013) *available at* http://www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf.

[574] For more information on individual hearings before an immigration judge, *see supra* p. 66.

D. Waivers Available

A child seeking to adjust status must be admissible to the United States and not subject to any bars listed in section 212(a) of the INA. In addition to waivers available for most other grounds of inadmissibility, TVPRA 2008 amended the adjustment of status provisions for individuals with SIJ classifications to include four new exemptions. Approved SIJ petitioners are now automatically exempted from seven inadmissibility grounds of the INA:

- Sections 212(a)(4) (public charge);
- Section 212(a)(5)(A) (labor certification);
- Section 212(a)(6)(A) (aliens present without inspection);
- Section 212(a)(6)(C) (misrepresentation);
- Section 212(a)(6)(D) (stowaways);
- Section 212(a)(7)(A) (documentation requirements); and
- Section 212(a)(9)(B) (aliens unlawfully present).[575]

The only unwaivable grounds of inadmissibility for SIJ petitioners are those listed at INA sections 212(a)(2)(A)-(C) (conviction of certain crimes, multiple criminal convictions, and controlled substance trafficking), as well as those listed at sections 212(a)(3)(A)-(C) and (E) (such as security-related grounds and terrorist activities).[576]

Even if a child is found to be inadmissible under other grounds that are not automatically waived, the Attorney General has the discretion to grant lawful permanent residence and waive inadmissibility grounds for humanitarian purposes, family unity, or when it is otherwise in the public interest.[577] For unaccompanied minors, who often exhibit very compelling facts and would suffer significant hardship upon removal, attorneys should include as many positive factors that weigh in favor of a waiver.

PRACTICE TIPS

Pro bono attorneys assigned to SIJ cases may begin their representation at different phases of the SIJ process. For example, in some instances, a previous legal service provider may have already obtained the appropriate predicate order, particularly if the client has been detained in a jurisdiction that frequently grants SIJ predicate orders. In these cases, the attorney may simply need to begin the SIJ process with USCIS by filing the I-360.

In the vast majority of cases, however, the biggest challenge for attorneys assisting clients seeking SIJS is obtaining the state court predicate order. Attorneys should first determine if the client has an open juvenile or family court case of any kind in any jurisdiction. Even if the

[575] INA § 245(h), 8 U.S.C. § 1255(h); *see also* INA §§ 212(a)(4), (a)(5)(A), (a)(6)(A), (a)(6)(C), (a)(6)(D), (a)(7)(A), (a)(9)(B), 8 U.S.C. §§ 1182(a)(4), (a)(5)(A), (a)(6)(A), (a)(6)(C), (a)(6)(D), (a)(7)(A), (a)(9)(B).
[576] *See* INA §§ 212(a)(2)(A)-(C), (a)(3)(A)-(C), (a)(3)(E), 8 U.S.C. §§ 1182(a)(2)(A)-(C), (a)(3)(A)-(C), (a)(3)(E).
[577] INA § 245(h), 8 U.S.C. § 1255(h).

client believes that the case has been resolved (for example, a disposition has already been entered in juvenile court), the case may still technically be open. Thus, attorneys should try to speak to the child's public defender, social worker, or any other administrative or state court contact with knowledge of the client's juvenile or state court cases to determine if it is possible for a judge to enter SIJ findings.

If the client does not have an open juvenile or family court case, the attorney should seek to obtain the predicate order. Depending on the jurisdiction, judges may already be familiar with the SIJ process, in which case the attorney may simply petition for an SIJS predicate order in the appropriate court to make the SIJ findings. In many jurisdictions, however, judges are not familiar with SIJS. Attorneys should consider seeking the assistance of local counsel who practice in the local courts to educate the court about the SIJ process and to present the SIJ process in a manner that is most helpful to the court (and most likely to result in the court taking jurisdiction). In CAIR Coalition's experience, not all courts are amenable to making SIJ findings. In these difficult situations, attorneys may have to wait until the child is reunified or moved to a more SIJ-friendly jurisdiction before beginning the process of obtaining the predicate order.

My Days in the Center for Refugees in the United States

My life was a world full of tears in the center for refugees.
My first center was in San Antonio, Texas.
I cried, I cried, I cried, I cried and I cried
From the first day that I arrived
I didn't know that there are people that love me.
Then the days went.
Now I know and my life started to change with happiness and love.
Texas is in my mind, soul, and heart.

– Poem by a 17-year-old boy from Honduras at Youth for Tomorrow