Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 1, 2019)[1]

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This fact sheet provides a brief overview of how practitioners can navigate immigration court proceedings for unaccompanied child clients pursuing initial asylum jurisdiction with U.S. Citizenship and Immigration Services (USCIS). It does not address strategies for navigating jurisdictional issues with USCIS. Practitioners who have questions about obtaining USCIS initial jurisdiction over asylum applications filed by unaccompanied children may contact the authors for further guidance.

How is an "unaccompanied alien child" (UAC) defined?

The definition of UAC is found at 6 U.S.C. § 279(g)(2), and comprises individuals under 18 years old without lawful immigration status who have no parent or legal guardian in the United States available to provide care and physical custody. Generally, children receive a UAC determination upon their arrival in the United States and apprehension by federal officials—typically employed by U.S. Customs and Border Protection (CBP). That initial UAC determination triggers a number of important protections, including prompt transfer into the custody of the U.S. Department of Health and Human Services (HHS), 8 U.S.C. § 1232(b)(3), placement into removal proceedings under INA § 240 rather than being subjected to expedited removal, 8 U.S.C. § 1232(a)(5)(D), and special asylum procedures discussed below.

What does the TVPRA say about initial jurisdiction over asylum claims filed by UACs?

Recognizing the vulnerability and special needs of UACs, in 2008 Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. 110–457, 122 Stat. 5044. Among other protections for unaccompanied children, the TVPRA grants USCIS initial jurisdiction over their asylum applications. TVPRA § 235(d)(7)(B), *codified at* 8 U.S.C. § 1158(b)(3)(C), INA § 208(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . ."). Thus, while the default rule for individuals in removal proceedings is that the immigration court has exclusive jurisdiction over their

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asylum applications, see 8 CFR § 208.2(b), the TVPRA creates a statutory exception to that rule for unaccompanied children. As the Board of Immigration Appeals (BIA) has recognized, "unaccompanied alien children have a statutory right to initial consideration of an asylum application by the DHS." *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 n.2 (BIA 2017); *see also Matter of M-A-C-O-*, 27 I&N Dec. 477, 479 (BIA 2018) ("[S]ection 208(b)(3)(C) of the Act limits an Immigration Judge's jurisdiction over an asylum application *filed by a UAC*.").

What policy does USCIS follow in determining its jurisdiction—pursuant to the TVPRA UAC provision—over the asylum applications of children in removal proceedings?

USCIS follows a 2013 policy in determining its jurisdiction pursuant to the TVPRA UAC provision. Under that policy, USCIS must take initial jurisdiction over the asylum application of an individual in removal proceedings whom ICE or CBP previously determined to be a UAC (unless there was an affirmative act by HHS, ICE, or CBP to terminate the UAC finding *before* the applicant filed the initial application for asylum). USCIS must take jurisdiction even if there is evidence that the applicant turned 18 or reunified with a parent or legal guardian after the UAC determination was made. If an applicant has no previous UAC determination, then USCIS takes jurisdiction if it finds that the applicant met the definition of UAC on the date of initial filing of the I-589—whether that filing was with USCIS or the immigration court.

What is the effect of the preliminary injunction in *J.O.P. v. DHS*?

In July 2019, four UAC asylum seekers brought suit in the U.S. District Court for the District of Maryland to challenge a May 2019 USCIS policy that would have rescinded the 2013 policy on UAC asylum jurisdiction described above. The suit challenged the legality of the 2019 policy based on the TVPRA, the Due Process Clause, and the Administrative Procedure Act. The district court, concluding that the Plaintiffs were likely to succeed on the merits,[2] issued a nationwide preliminary injunction enjoining USCIS from applying the 2019 policy. The preliminary injunction, which USCIS has posted to its J.O.P. webpage, prohibits USCIS from rejecting jurisdiction over the application of any UAC whose application would have been accepted under the previous policy, and requires USCIS to retract any adverse decisions rendered applying the 2019 policy and reinstate consideration applying the 2013 policy. In other words, the *J.O.P.* injunction requires USCIS to accept jurisdiction over UAC asylum cases if they meet the criteria outlined in the 2013 policy, described above.

How may individuals in removal proceedings protected by the *J.O.P.* injunction exercise their right to initial asylum jurisdiction with USCIS?

Respondents entitled to initial USCIS jurisdiction pursuant to the *J.O.P.* injunction should file a motion for a continuance or status docket placement in immigration court, attaching proof that they have

[2] *See J.O.P. v. DHS*, 409 F. Supp. 3d 367 (D. Md. 2019) (previous opinion granting temporary restraining order).

filed, or intend to file, an asylum application with USCIS.[3] As discussed above, those entitled to file their asylum application initially with USCIS as UACs despite being in removal proceedings are those who, at the time of first filing the asylum application, either (1) meet the definition of UAC found at 6 U.S.C. § 279(g)(2), or (2) were previously determined by ICE or CBP to be a UAC and the UAC determination has not been terminated, even if they were over 18 or living with a parent or legal guardian at the time of filing. Individuals falling into one of these categories should file an asylum application with USCIS following applicable instructions.[4]

An immigration judge's (IJ) granting of continuances or otherwise adjourning the removal case until USCIS has issued a decision gives effect to UACs' "statutory right to initial consideration of an asylum application by the DHS." *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. at 169 n.2. While immigration judges IJs operate under "performance metrics" that require them to adjudicate cases under specified timeframes, cases where the respondent has an asylum application filed with USCIS under the TVPRA provision are considered "status" cases and thus should not count toward those metrics. Executive Office for Immigration Review (EOIR) guidance recognizes these cases as appropriate for placement on status dockets and states that "cases in which a confirmed unaccompanied alien child (UAC) has filed an asylum application with USCIS must be continued while that application is pending adjudication with USCIS because USCIS has initial jurisdiction over such applications." Even if a court does not use a status docket or declines to put the case on the status docket, IJs must follow the framework set forth in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), in evaluating continuance requests. A continuance in this situation is warranted under the *L-A-B-R-* framework because the USCIS adjudication will "materially affect the outcome of the removal proceedings." *Id.* at 406. A grant of asylum by USCIS would constitute grounds to terminate the removal proceedings, see INA § 208(c)(1)(A); *cf. Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018) (termination is appropriate when DHS cannot met its burden to prove that a respondent is removable), and a USCIS decision not to grant asylum would cause the IJ to gain jurisdiction to adjudicate the asylum application.

Must IJs make an independent UAC determination in cases where a respondent's UAC determination remains in place and thus the respondent has a right to initial jurisdiction under USCIS policy and the *J.O.P.* injunction?

IJs are not required to make an independent UAC determination while a respondent is pursuing asylum with USCIS under that agency's UAC jurisdiction policy. In *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), the BIA concluded that the TVPRA asylum provision "does not prevent the Immigration Judge from determining whether initial jurisdiction over an application filed by an alien

[3] Immigration courts in the Fourth and Seventh Circuits may also grant administrative closure of these cases pending a decision by USCIS on the asylum application. *See Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020).

[4] Practitioners should carefully follow USCIS instructions for filing asylum applications pursuant to the TVPRA provision to avoid getting a defensive receipt. *See* USCIS, Form I-589 Instructions, at 10-11 (directing, among other things, that completed applications be sent to "USCIS Nebraska Service Center, UAC I-589, P.O. Box 87589, Lincoln, NE 68501-7589").

who has turned 18 lies with the Immigration Judge or the USCIS," and that a prior DHS or HHS UAC determination was not binding on an IJ. *Id.* at 479. The BIA concluded that the IJ had not erred in taking jurisdiction over the respondent's asylum application, where the respondent had filed after turning 18.[5] However, neither *M-A-C-O-* nor any other authority *requires* the IJ to independently determine jurisdiction rather than continue the case to allow USCIS—the agency Congress vested with initial jurisdiction—to adjudicate the asylum application pursuant to that agency's policy on initial jurisdiction. Indeed, a September 2017 EOIR Office of the General Counsel legal opinion states that IJs "may"—not must—"resolve any dispute about UAC status" in removal proceedings. *Cf. Matter of Castro-Tum*, 27 I&N Dec. 271, 279 n.4 (A.G. 2018) (citing to this EOIR legal opinion with approval).

IJs' holding cases in abeyance to allow USCIS to exercise its initial jurisdiction pursuant to that agency's policy facilitates coordination among agencies. EOIR issued guidance a few months after the TVPRA was enacted stating its policy "to ensure smooth coordination among government agencies responsible for the implementation of the asylum jurisdictional provision of the TVPRA." EOIR, Office of the Chief Immigration Judge, *Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance)*, at 2 (Mar. 20, 2009); *accord* 2017 EOIR General Counsel opinion at 6 n.3. In some cases ICE has taken an inconsistent position about initial jurisdiction from that of its sister agency USCIS, advocating for the IJ to take jurisdiction and against continuances to allow USCIS to adjudicate pending asylum applications. The *J.O.P.* suit alleges that this conduct by ICE, a defendant in the case, is unlawful as it furthers the enjoined policy, and the U.S. District Court for the District of Maryland in June 2020 denied Defendants' motion to dismiss the ICE defendants from the *J.O.P.* suit. Memorandum Opinion, *J.O.P. v. DHS*, No. 19-01944, 2020 WL 2932922, at *18-19 (D. Md. June 3, 2020). Currently pending before the court in *J.O.P.* is Plaintiffs' Motion to Amend the Preliminary Injunction, which if granted would prohibit ICE from opposing continuances or other postponements, or advocating for the IJ to take jurisdiction, while an individual who filed their asylum application with USCIS under its UAC policy awaits an adjudication. *See* Memorandum of Law in Support of Plaintiffs' Motion to Amend the Preliminary Injunction and Proposed Order, ECF Nos. 124-1, 124-2, *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 7, 2020). Given that USCIS—not ICE—is the agency to whom Congress granted initial jurisdiction over UAC asylum cases, IJs may determine that refraining from re-assessing jurisdiction while USCIS is adjudicating a case pursuant to USCIS's own jurisdiction policy facilitates "smooth coordination" among agencies.

What steps may practitioners take if an IJ indicates an intent to re-determine jurisdiction despite USCIS having accepted the application under that agency's jurisdiction policy?

If an IJ indicates an intent to re-determine jurisdiction despite USCIS already having accepted the application pursuant to that agency's jurisdiction policy, practitioners should request a briefing schedule and the opportunity to submit arguments and evidence in support of USCIS jurisdiction. It is

[5] *M-A-C-O-* explicitly did not reach the issue of respondents with previous UAC determinations who filed an asylum application with USCIS while under 18 but after reunifying with a parent or legal guardian. *Id.* at 480 n.3.

important that practitioners challenge any IJ jurisdictional re-determinations to preserve the best possible record for appeal to the BIA and eventual petition for review in federal court.

The question of jurisdiction can be fact-intensive and complex. It may require testimony and arguments about when the respondent first "filed" for asylum—which has been interpreted to mean the time the child first expressed an intent to seek asylum to a government official—which may be particularly relevant in a case where the I-589 receipt date was after the child's 18th birthday. It may also involve nuanced determinations about a caregiver's "availability" to provide adequate care at the time of filing. *See, e.g., D.B. v. Cardall,* 826 F.3d 721, 734 (4th Cir. 2016) ("[T]o be 'available to provide care' for a child, a parent must be available to provide what is necessary for the child's health, welfare, maintenance, and protection," including their physical and mental well-being); CIS Ombudsman, *Ensuring a Fair and Effective Asylum Process for Unaccompanied Children*, at 8 (Sept. 20, 2012) ("Exploring questions regarding parental behavior and whether it meets the child's physical, mental, and/or emotional needs is more appropriately within the purview of a trained clinician," particularly "where the UACs [sic] parents' or legal guardians' interests may be in conflict with their own"). Indeed, in the *J.O.P.* case, DHS recognized that "the question of whether a parent or legal guardian was available on the filing date can be an extremely complex factual issue and generally cannot be determined without . . . additional factfinding through [testimony]." Defendants' Opposition to Motion to Certify Class, at 13, ECF No. 126, *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 13, 2020).

Particularly given immigration court backlogs, IJs may find it difficult to allocate sufficient time to engage in the requisite level of evidence-gathering from someone who endured persecution as a child and to conduct complex factual analysis involving child welfare law concepts. However, the need for this expenditure of court resources is obviated if the IJ allows sufficient time—through status docket placement, continuances, administrative closure, or otherwise postponing the case—so that USCIS can act in accordance with its jurisdiction and pursuant to its child-centered training and expertise.