

A TREACHEROUS JOURNEY:

Child Migrants Navigating the U.S. Immigration System



CENTER FOR
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KIND
KIDS IN NEED OF DEFENSE

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All children's names have been changed to protect confidentiality.

Acknowledgments

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Cover illustration: Drawing by Brandon Garcia, a boy who KIND assisted in gaining immigration status, depicting his journey alone from Guatemala to the United States at age 11, from the film I LEARN AMERICA.

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Executive Summary

A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System addresses the issues raised by the recent historic and unabated increase in the number of children coming unaccompanied – without a parent or legal guardian – to the United States. From 6,000–8,000 unaccompanied children entering U.S. custody, the numbers surged to 13,625 in Fiscal Year 2012 and 24,668 in Fiscal Year 2013. The government has predicted that as many as 60,000 or more unaccompanied children could enter the United States in Fiscal Year 2014. These children come from all over the world, but the majority arrive from Mexico and Central America, in particular the Northern Triangle countries of El Salvador, Guatemala and Honduras.

Children come unaccompanied to the United States for a range of reasons. Numerous reports and the children themselves say that increasing violence in their home communities and a lack of protection against this violence spurred them to flee. Children also travel alone to escape severe intrafamilial abuse, abandonment, exploitation, deep deprivation, forced marriage, or female genital cutting. Others are trafficked to the United States for sexual or labor exploitation. Upon arrival, some children reunite with family members they have not seen in many years, but their migration is often motivated by violence and other factors, in addition to family separation.

Their journeys may be as harrowing as the experiences they are fleeing, with children often facing sexual violence or other abuses as they travel. The children’s challenges continue when U.S. immigration authorities apprehend them, take them into the custody of the federal government, and place them in deportation proceedings. There, they are treated as “adults in miniature” and have no right to appointed counsel and no one to protect their best interests as children in the legal system. In addition, existing forms of immigration relief do not provide sufficient safeguards to protect against deportation when it is contrary to their best interests.

Illustration: Can of Creative

FIGURE 1:
Influx of Unaccompanied Children into the United States



Main Gaps in Protection

There has been a growing recognition in the United States of the unique vulnerabilities and special needs of children in the U.S. immigration system, in particular unaccompanied children (also referred to as UACs). The Homeland Security Act (HSA) of 2002 and the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, for example, included groundbreaking provisions that have helped increase the protection of children in the U.S. immigration system. However, the HSA, TVPRA, and other legal and policy reforms do not go far enough.

A Treacherous Journey examines the major gaps in protection that remain in immigration proceedings: a lack of incorporation of the best interests of the child principle, a lack of government-appointed counsel for children, a lack of government-appointed child advocates for all UACs, and a lack of child-sensitive standards for immigration relief options. The gravity of these gaps and the need to address them have become more urgent with the recent influx.

Best Interests Principle

The “best interests of the child” standard is the cornerstone principle of child protection both internationally and in the U.S. child welfare and juvenile justice systems. The principle requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Although incorporated into other domestic legal contexts, the best interests of the child principle is not binding in immigration proceedings. Rather, migrant children must continue to raise defenses against removal (or deportation) just as an adult would. In the end, children face returning to their home country without consideration of whether return would be contrary to their best interests. Failure to consider the best interests of the child prior to repatriation has led to children being sent back to countries where they have no dedicated adult to care for them or where their well-being, and even their life, is otherwise in danger, resulting in violations of children’s human rights.

Legal Representation

Unlike in other domestic court proceedings, the U.S. government usually does not appoint counsel for unaccompanied children in immigration proceedings. As a result, the majority of unaccompanied children facing removal do not have lawyers. Therefore, children with limited education and, often, limited English skills, stand alone before trained government attorneys and immigration judges. Without counsel, the children are unlikely to understand the complex procedures they face and the options and remedies that may be available to them under the law. Lacking representation means that a positive outcome is far less likely and that a child’s experience during the proceedings will be unnecessarily negative and in some cases traumatic.

The TVPRA of 2008 has increased representation of unaccompanied children by making the Secretary of Health and Human Services responsible to “ensure, to the greatest extent practicable” that all unaccompanied children have legal representation, and encouraging the Department of Health and Human Services (HHS) to “make every effort to utilize the services of pro bono counsel” to represent them free of charge. Together, these provisions have facilitated pro bono representation and resulted in a public-private partnership model that matches pro bono attorneys in the private sector with unaccompanied children who need representation, leveraging modest resources into millions of dollars’ worth of pro bono representation for these children.

Nevertheless, a large gap remains in resources for legal counsel, so that most children appearing before immigration judges are still unrepresented. The Senate comprehensive immigration reform bill, S. 744, and the

House of Representatives' companion bill, H.R. 15, seek to address this critical deficiency by including provisions mandating appointment of counsel for unaccompanied children. Until Congress enacts these or similar provisions, the representation gap will continue to grow as the number of unaccompanied children continues to climb.

Child Advocates

Compounding lack of access to counsel, the United States also does not provide all unaccompanied children in immigration proceedings with an independent child advocate, as occurs in domestic child welfare proceedings. Thus, these children have no one to advocate for their best interests and to protect their welfare. The TVPRA granted HHS the authority to appoint an independent child advocate in cases of "child trafficking victims and other vulnerable unaccompanied alien children" to "advocate for the best interest of the child," including with respect to repatriation decisions. However, child advocates are appointed only in relatively few instances and on a discretionary basis, even for particularly vulnerable children such as trafficking victims. Child advocates are not appointed in *all* unaccompanied children's cases, even though all unaccompanied children are vulnerable (by virtue of being separated from a parent or guardian) and require special protections given that they face legal proceedings that could lead to deportation and are without an adult to advise them and ensure their welfare. Moreover, even when authorities appoint child advocates, neither the Immigration and Nationality Act nor the TVPRA *require* adjudicators to take into primary consideration the child's best interests when they rule on immigration relief or removal.

Report Overview

A Treacherous Journey – authored by Center for Gender & Refugee Studies (CGRS) and Kids in Need of Defense (KIND) with the support of the John D. and Catherine T. MacArthur Foundation – considers in detail the treatment of immigrant children in adversarial removal proceedings, in relevant administrative adjudicatory venues, and upon repatriation. We focus on unaccompanied children because they have particular and recognized vulnerabilities, although the report also contains some findings and recommendations regarding accompanied children who are principal applicants for relief. *A Treacherous Journey* offers recommendations for reform consonant with recognized principles of child protection grounded in practical experience. Because most of the report's recommendations require resources, we also broadly call on Congress to appropriate adequate funds or re-prioritize already allocated funds to implement the recommendations.

As an overarching essential recommendation, we recommend that government-funded legal counsel be provided for all unaccompanied children, using a mix of private pro bono counsel and direct representation by appointed immigration attorneys. Safeguarding every child's meaningful access to immigration relief requires the availability of legal counsel. Changes to the immigration system are largely meaningless without counsel to guide children through the complexities of U.S. immigration laws and procedures.

A Treacherous Journey also broadly calls on the government to make available to the public data on unaccompanied children that HHS' Office of Refugee Resettlement (ORR) and other agencies have statutory obligations to collect. The public report should include data on Customs and Border Protection's (CBP) apprehension and screening of unaccompanied children from contiguous countries, data on unaccompanied children in federal custody – including statistical data and the types of immigration relief sought, outcomes, and whether the children have legal representation and a child advocate, and data on the repatriation of unaccompanied children returned to their countries of origin. A lack of publicly accessible, comprehensive statistics and other information on UACs obfuscates the scope of the problem and hampers efforts to identify successful solutions.

Substantive Challenges

Section 1 looks at adjudication of the forms of relief most common for unaccompanied children and principal child applicants – asylum and related protections for those fleeing persecution and torture, Special Immigrant Juvenile Status (SIJS), and T and U visa categories – identifying the challenges children face in obtaining these forms of relief. The report concludes that the current forms of relief do not provide adequate protection, especially for unaccompanied children, from return to situations where they face danger, abandonment, or other circumstances harmful to their well-being. We recommend, therefore, that the United States create child-sensitive standards for asylum, SIJS, and other forms of relief. We also recommend that the United States enact legislation making the best interests of the child a primary consideration in all actions and decisions affecting immigrant children. We further propose that the United States create a new form of legal relief for children otherwise ineligible for protection who face return to their home country that is contrary to their best interests. To safeguard the rights of children, independent child advocates should be assigned in all cases involving UACs in removal proceedings.

Procedural Challenges

Section 2 considers the procedural issues affecting children’s immigration cases. Although this section notes recent advances in the treatment of unaccompanied children and principal child applicants, it also identifies key remaining challenges. Chief among these is the inherently adversarial nature of the system for children in removal proceedings before the Executive Office for Immigration Review (EOIR), including the way they are examined and cross-examined in an intimidating environment. There is also a lack of sufficient training of both immigration judges and officers of the U.S. Citizenship and Immigration Services (USCIS) on issues regarding child development and child-sensitive, age-appropriate questioning.

To address these challenges and improve children’s treatment, we recommend that, consistent with the TVPRA, the government adopt regulations requiring immigration judges and USCIS officers to take into account the specialized needs of unaccompanied children in handling all procedural aspects of their cases. The regulations should prohibit intimidating and otherwise inappropriate questioning of children and limit testimony to disputed issues.

Comprehensive Services

Section 3 identifies the challenges for children in removal proceedings to access comprehensive legal and other support services and to participate effectively in the proceedings. In addition, we highlight the importance of allocating resources for legal services to meet children’s legal needs and in consideration of the fact that the majority of unaccompanied children’s cases are heard following their release from ORR custody. This section recommends developing a comprehensive system – modeled on juvenile and family courts – that ensures the availability of attorneys, child advocates, and social services at the immigration court itself rather than at diverse locations. We also recommend the widespread use of juvenile dockets assigned to specialized judges.

Safe Return

Section 4 looks at the policies and procedures intended to ensure the safe return and reintegration of unaccompanied children to their home countries. Included in this population are children who choose to return as well as those ordered to return. We recommend that return should be accompanied by effective reintegration programs that not only guarantee the safety of migrant children when they get home, but also foster conditions that allow children to remain safely in their communities with opportunities to support themselves.

Urgent Need for Reform

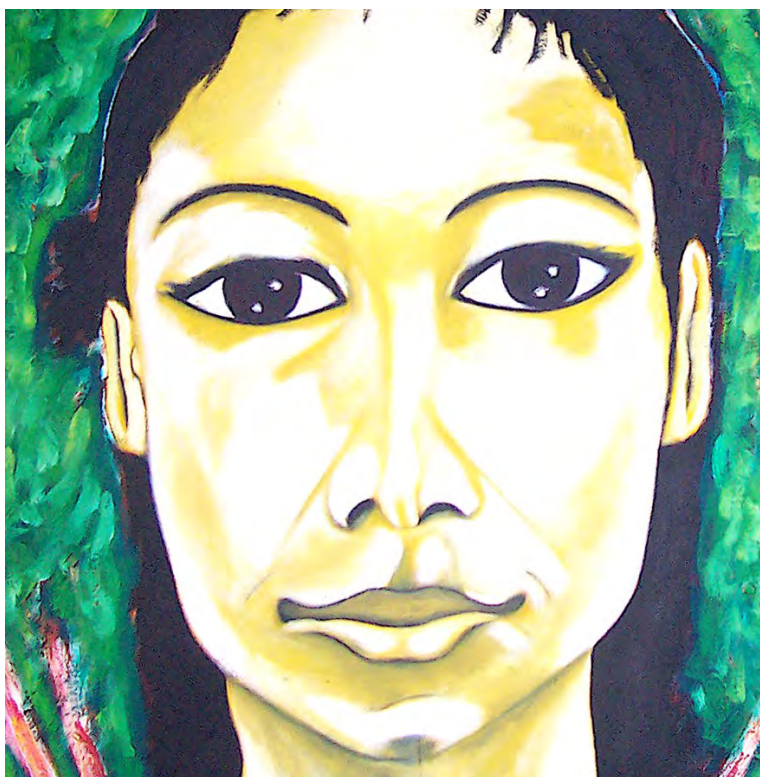
The United States has taken significant steps towards improving protections for unaccompanied children and should be commended for these actions. However, as the numbers of arriving children continue to rise to historic levels, the situation's urgency calls for further legal and policy reforms to ensure the rights and basic protections of this most vulnerable population.

Note on Methodology

A Treacherous Journey draws primarily on qualitative data that details the substantive and procedural treatment of children's immigration cases:

- Case records from unique CGRS asylum case database.
- Asylum, SJS, and T and U visa case data collected by KIND through its pro bono representation program.
- Responses from attorneys who represent children to two surveys administered by CGRS and KIND.

The report also draws upon published studies, a review of relevant domestic laws and policies and available literature, and the authors' extensive experience training and assisting attorneys representing children. Finally, the report considers statistics provided by EOIR and by USCIS on children's immigration claims.



General Recommendations

Counsel

No child should appear in any immigration proceeding without legal representation. Congress should enact legislation mandating the provision of legal counsel for unaccompanied children in deportation proceedings using a mix of private pro bono and appointed attorneys.

Best Interests of the Child

The “best interests of the child” must be “a primary consideration” in all procedures, actions, and decisions concerning unaccompanied immigrant children and principal child applicants made by a federal agency or court. Congress should enact legislation to require this standard. Legislators should also develop and enact a new form of immigration relief to prevent children from being deported to their home countries when a return is not in their best interests.

Child Advocates

All unaccompanied children are vulnerable and deserve dedicated child advocates. Congress should enact legislation to mandate that an independent child advocate shall be appointed for all unaccompanied children as soon as they are identified. In the interim, pursuant to its authority under the TVPRA, HHS should appoint child advocates for all unaccompanied children who come into its custody and are placed in removal proceedings.

Data

Protecting unaccompanied migrant children requires an informed public. The U.S. government should make publicly available comprehensive statistical information and other data on unaccompanied children.

Post-release Services

The protection needs of unaccompanied immigrant children have shifted. The U.S. government’s unaccompanied children’s program should re-focus its resources on post-release services to reflect this.

Return and Reintegration

The countries that send the majority of child migrants to the United States have profound gaps in their child protection systems. The U.S. government should use its international development and migration assistance programs to help these governments, encouraging regional as well as national solutions to protecting child migrants that involve both governmental agencies and civil society organizations. The U.S. government should support safe return and reintegration programs to help repatriated children remain safely and sustainably in their home countries.

Funding for Reforms

Immigration reform for children is an urgent need. Congress should appropriate all funds necessary to implement the recommendations set forth in this report.

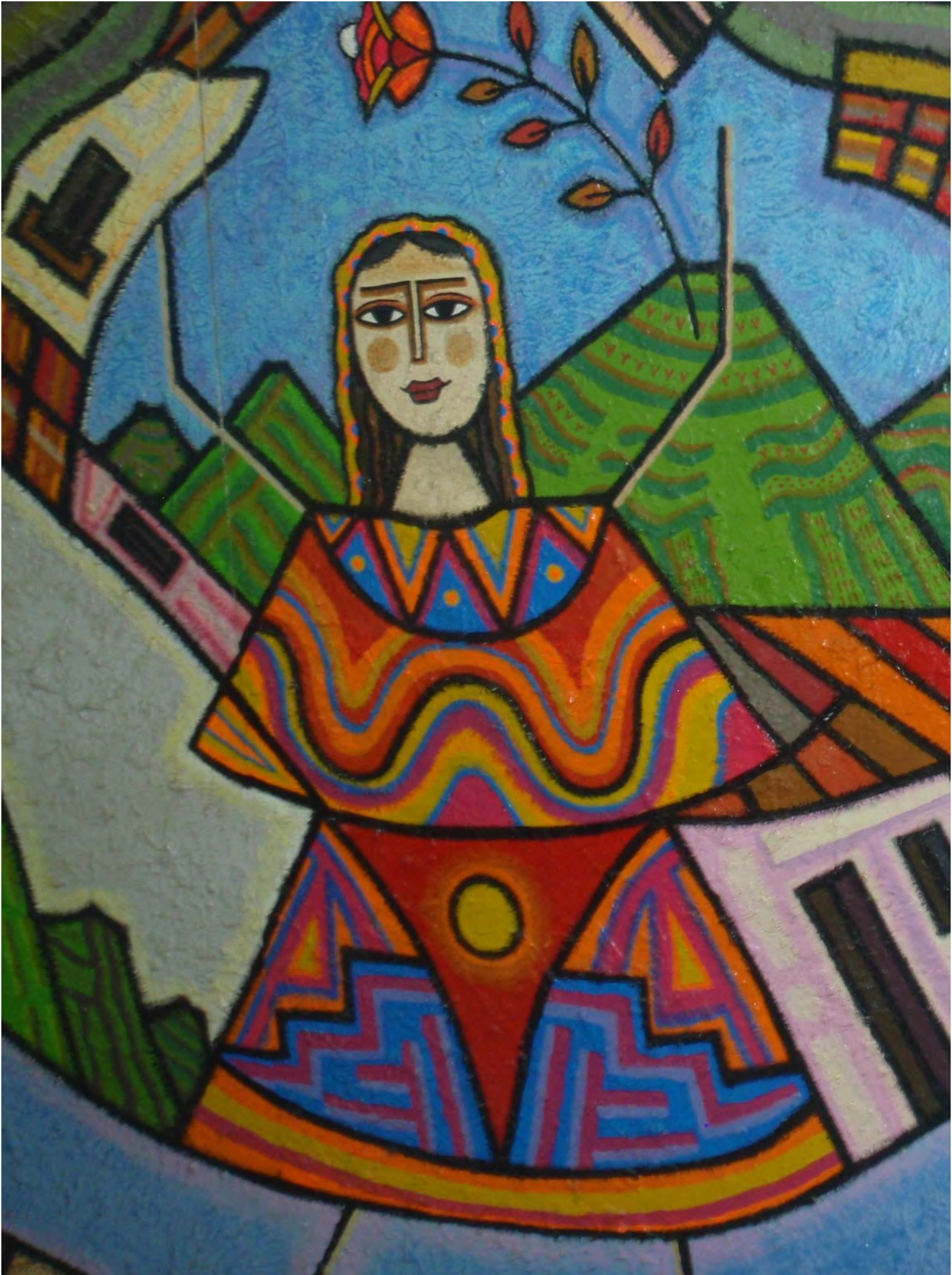


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Introduction

Fei-Yen's parents forbade her to attend school and made her work long hours. When she resisted a forced marriage, they beat her. She fled from China to the United States and applied for asylum. An immigration judge denied her claim, ruling that because she bore no physical evidence of permanent injuries, her treatment did not constitute persecution; he also dismissed her claim that she had a well-founded fear of forced marriage if she were to return.

Amelia was trafficked from Guatemala to the United States when she was 15, lured with a promise of good pay to help her impoverished family. On arrival, her trafficker forced her to work backbreaking hours for \$100 USD a month. Finally able to escape, Amelia entered government custody; she was identified as a trafficking victim and released to a program for unaccompanied minors. Granted a special visa for immigrants who have been trafficked, she now lives in foster care, receives counseling and other support services, and goes to school.

Marcia has epilepsy. She arrived in the United States from El Salvador when she was 9 and lives happily with her parents, who have lawful temporary status, and a younger sister who is a U.S. citizen. With good medical care and supportive teachers, Marcia thrives academically and socially. The government has stayed her deportation for several years, but without any formal immigration status, and unable to obtain relief through her parents, the now 14-year-old worries that she could be forced to return to El Salvador alone.

Amelia and Marcia remain, for now, safely in the United States. Fei-Yen returned to those who harmed her in China. *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* examines the circumstances of thousands of Amelias and Fei-Yens in order to understand the challenges immigrant children encounter when they travel to the United States seeking protection. The report looks at the full spectrum of these children's circumstances: why they flee their homes, how the U.S. immigration system treats them, and what happens when they are deported.

There has been a growing recognition in the United States that immigrant children come here with unique vulnerabilities and special needs, in particular unaccompanied children (also referred to as UACs).¹ The William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, for example, includes provisions that have helped increase immigration protections for children.² However, the TVPRA and other legal and policy reforms do not go far enough – major inadequacies remain in the way U.S. immigration law and proceedings treat children. Compounding these deficiencies, scant publicly available data exists regarding unaccompanied children, from their initial apprehension and screening to rates of representation, the forms of relief they seek, and the outcomes of their cases. Without comprehensive data, it is difficult to grasp the full scope of the problem and identify solutions.

¹ UAC refers to the statutory term “unaccompanied alien child.” Under the Homeland Security Act (HSA) of 2002, Pub. L. 107-296, § 462(g), 116 Stat. 2135, 2205 (2002), a UAC is a person who “(A) has no lawful immigration status in the United States, (B) has not attained 18 years of age, (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”

² William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457, §§ 235(a)(2)-(3), (5); 235(c)(4)-(6); 235(d)(1)-(5), (7), 122 Stat. 5044 (2008) provide protections such as placing all UACs in removal proceedings except children from contiguous countries who are not found to be trafficking victims or to have a fear of persecution in their country, encouraging counsel for UACs, providing for appointment of child advocates in certain UAC cases, expanding efforts to ensure safe repatriation of UACs, modifying Special Immigrant Juvenile Status (SIJS) requirements to make relief available to children it was designed for, and giving U.S. Citizenship and Immigration Services (USCIS) initial jurisdiction over UAC asylum applications.

Record Numbers

Children without a parent or legal guardian are coming to the United States in historic numbers, from an average of 6,000 – 8,000 each year through Fiscal Year (FY) 2011, to 13,625 in FY 2012, to 24,668 in FY 2013, and with 60,000 or more projected to arrive in FY 2014. There are no signs of this influx abating (see Figure 1).³ These children enter an immigration system that does not take adequate account of their needs and vulnerabilities *as children*. The children themselves, as well as numerous studies, explain this surge as resulting from increasing violence and the failure of their home countries to offer protection from it.

Children flee their countries for many reasons: to escape persecution, abandonment, exploitation, deep deprivation, or violence in their community, or to reunite with a caregiver, often after losing one at home.⁴ Human traffickers also victimize children and bring them to the United States against their will. Unaccompanied children come from all over the world, but the largest numbers arrive from Guatemala, El Salvador, Honduras, and Mexico, and they range in age from toddlers to teenagers.

Illustration: Can of Creative

FIGURE 1:
**Influx of Unaccompanied
Children into the United States**



³ See *Children Left Defenseless in Immigration Courts* (Fusion broadcast Dec. 17, 2013) (hereinafter Fusion broadcast); see also U.S. CONFERENCE OF CATHOLIC BISHOPS, *MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2* (2013) (hereinafter USCCB, *THE FLIGHT OF UNACCOMPANIED CHILDREN*).

⁴ For a more detailed discussion of the causes of migration of children and potential explanations for such demographics, see, e.g., USCCB, *THE FLIGHT OF UNACCOMPANIED CHILDREN*, *supra* note 1; KIDS IN NEED OF DEFENSE (KIND), *THE TIME IS NOW: UNDERSTANDING AND ADDRESSING THE PROTECTION OF IMMIGRANT CHILDREN WHO COME ALONE TO THE UNITED STATES* (2013) (hereinafter *THE TIME IS NOW*); WOMEN'S REFUGEE COMMISSION, *FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA* (Oct. 2012) (hereinafter WRC, *FORCED FROM HOME*); BETSY CAVENDISH & MARU CORTAZAR, APPLESEED FOUND., *CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS* (2011) (hereinafter APPLESEED, *CHILDREN AT THE BORDER*); JACQUELINE BHABHA & SUSAN SCHMIDT, *SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S.* (2006) (hereinafter BHABHA, *SEEKING ASYLUM ALONE*). The root causes for migration will also be further explored in a forthcoming report funded by the John D. and Catherine T. MacArthur Foundation that will be co-authored by the Center for Gender & Refugee Studies (CGRS), KIND, Women's Refugee Commission (WRC) Pablo Ceriani Cernadas, member to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, and local experts in Mexico, El Salvador, Honduras, and Guatemala.

No Legal Representation

The Department of Homeland Security (DHS) places nearly all of these children in immigration court removal (deportation) proceedings, but the federal government does not usually fund lawyers for these children.⁵ Some children find legal representation through advocacy organizations and pro bono law programs. But more than half must navigate this undeniably complicated adversarial system without an attorney while using an unfamiliar language.⁶ This report recommends that the government mandate provision of counsel for unaccompanied children in immigration proceedings to ensure their legal interests.

Best Interests Standard Not Mandated

Despite the fact that the best interests of the child standard serves as the foundation of our nation's child welfare system and is enshrined in international law, the U.S. government does not make this standard a primary consideration for child immigrants.⁷ In addition, the government appoints child advocates to look after the best interests of children only rarely, even for particularly vulnerable children such as trafficking victims.⁸ As a consequence, the U.S. government returns many children to situations that endanger their well-being, or even their lives.⁹ *A Treacherous Journey* concludes that it is critical for the U.S. to harmonize its immigration law with domestic child welfare and international law by creating a statutory best interests standard requiring U.S. officials to consider the best interests of the child as primary in all actions and decisions regarding immigrant children.¹⁰

Inadequate Forms of Immigration Protection

Obtaining the forms of immigration relief available to children – primarily asylum, Special Immigrant Juvenile Status (SIJS), T visas (for victims of trafficking), and U visas (for victims of crime) – can be challenging. These forms of relief do not adequately respond to children's circumstances and unique protection needs. Even when children might qualify for immigration remedies, adjudicators may apply a restrictive analysis of the law and do not always operate in a child-sensitive manner. To address these shortfalls in protection, this report recommends that the U.S. issue child-sensitive regulations mandated by the TVPRA and create a new form of immigration relief to prevent children from being deported to their home countries when a return to their home countries opposes their best interests.

⁵ Unlike in other domestic court proceedings, the U.S. government does not appoint counsel for unaccompanied children in immigration proceedings. See, e.g., *In re Gault*, 387 U.S. 1, 35–37, 41 (1967); see also COMMISSION ON IMMIGRATION, AMERICAN BAR ASSOCIATION, STANDARDS FOR THE CUSTODY, PLACEMENT, AND CARE; LEGAL REPRESENTATION; ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES § III(I), (2004) (hereinafter ABA STANDARDS).

⁶ See Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 256 (2010). Recent studies have shown that more than half of children in removal proceedings did not have attorneys. See, e.g., OLGA BYRNE, VERA INST. OF JUSTICE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 35 (2008) (citing Claire L. Workman, *Kids are People Too: Empower Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 233 (2004); OFFICE OF THE INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, REPORT I-2001-009 (2001). More recent figures for children whose removal claims are heard before EOIR are not available.

⁷ Internationally, see Convention on the Rights of the Child (CRC) art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (principle requires that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration). Domestically, all states and the District of Columbia have statutes “requiring that the best interests of the child be considered whenever specified types of decisions are made regarding a child’s custody, placement, or other critical life issues.” CHILD WELFARE INFORMATION GATEWAY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DETERMINING THE BEST INTERESTS OF THE CHILD (2012) (hereinafter HHS, DETERMINING THE BEST INTERESTS OF THE CHILD) (listing state statutes requiring best interests considerations and factors considered for such determinations). Only one form of immigration relief, SIJS, requires consideration of the best interests of the child. See Immigration and Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C. § 1101 (requiring, in part, a finding that return to the child’s country of origin is not in the child’s best interests).

⁸ TVPRA § 235(c)(6). HHS decides on a case-by-case basis who is an “other vulnerable child.” Some cases of “other vulnerable children” have included children whose capacity to express their interests is in question, whose express interests conflict with those of their parents – for example when a parent objects to a child’s application for immigration relief, and in whose case there are concerns about potentially unethical behavior of a child’s attorney. See Young Center for Immigrant Children’s Rights based at the University of Chicago Law School (formerly the Immigrant Child Advocacy Project), *What the Young Center Does*, <http://theyoungcenter.org/learn/what-young-center-does/> (describing some cases of particularly vulnerable children).

⁹ See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007) (reporting on disparities in asylum adjudication looking to whether applicants had counsel as a predictive factor).

¹⁰ See CRC art. 3, *supra* note 7. Although the U.S. has signed, but not ratified, the CRC, it is still “obliged to refrain from acts that would defeat the object and purpose of the agreement.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 (1987); see also *id.* § 312 cmt. d.i.

Inappropriate Service Delivery Model for Immigrant Children

The current immigration system largely focuses on services for children while they are in HHS custody. Because the large majority of children do not make claims for immigration relief until after their release from custody, *A Treacherous Journey* concludes that the system needs to focus primarily on providing post-release support, including access to pro bono counsel, child advocates, and social services.

Reintegration Support Lacking

Comprehensive reintegration services are lacking for children returned to their countries. Meanwhile, as told by the children, the violent or desperate conditions they left behind persist in their communities or their homes. This report recommends that the United States support safe return and reintegration projects to help returned children remain safe in their home countries, and encourage national as well as regional solutions to the protection of child migrants.

The Center for Gender & Refugee Studies (CGRS) and Kids in Need of Defense (KIND) prepared *A Treacherous Journey* with the support of the John D. and Catherine T. MacArthur Foundation. The report details the treatment of immigrant children in adversarial removal proceedings, in relevant administrative adjudicatory venues, and upon repatriation, focusing on unaccompanied children (those under 18 who arrive alone without legal status), given their particular and recognized vulnerabilities, although it also contains findings and recommendations with respect to accompanied children who are principal applicants for relief. The report's recommendations conform to recognized principles of child protection grounded in practical experience as well as domestic and international law. Because the majority of these recommendations involve costs, *A Treacherous Journey* also broadly calls on Congress to appropriate funds or re-prioritize allocated funds to implement these necessary reforms in order to help ensure that the United States protects the most vulnerable and puts children first, regardless of where they come from.

Key Overarching Recommendations

Counsel

No child should appear in immigration proceedings without legal representation. Congress should enact legislation mandating appointment of legal counsel by the Attorney General for unaccompanied children in removal proceedings. This can be accomplished through a program that includes a mix of private pro bono representation and direct representation by appointed lawyers with expertise in immigration law pertaining to children.

Best Interests of the Child

Congress should enact legislation requiring that the “best interests of the child” shall be “a primary consideration” in all procedures, actions, and decisions made by a federal agency or court concerning unaccompanied immigrant children and principal child applicants.

Child Advocates

Congress should enact legislation to mandate that an independent child advocate shall be appointed for all unaccompanied children as soon as they are identified, excluding children seeking voluntary return or withdrawal of their applications for admission at the border. In the interim, pursuant to its current authority under the TVPRA, HHS should appoint child advocates for all unaccompanied children who come into its custody and are placed in removal proceedings, as they are all “vulnerable children.”

Data

The U.S. government should make publicly available an annual report with comprehensive statistical information and other data on unaccompanied children including data on apprehension, screening of children from contiguous countries, demographic data, legal representation, appointment of child advocates, forms of relief sought, outcomes of cases, and repatriation. (We enumerate the type of information we seek in Section 4).

Funding for Reforms

Congress should appropriate all funds necessary to implement this report’s recommendations.

Methodology

A Treacherous Journey bases its conclusions primarily on qualitative data that covers the full range of substantive and procedural issues that arise in children’s immigration cases. The qualitative data derives from decisions and other case information captured by the unique CGRS asylum case database and asylum, SIJS, T and U visa case data collected by KIND through its pro bono representation program and from its staff attorneys. The report also draws upon the author organizations’ significant expertise in issues involving unaccompanied immigrant children and accompanied principal child applicants, providing representation and advice to children in immigration proceedings, and training and consultation for the attorneys who represent them. Both organizations also investigate and address the root causes of migration and work to ensure protection upon repatriation. In addition, CGRS and KIND conducted a review of all relevant domestic laws and policies and available literature and administered two surveys to attorneys who represent immigrant children, which inform *A Treacherous Journey’s* findings and recommendations.¹¹

CGRS Case Information

CGRS maintains an extensive database since 1999 containing information on more than 7,000 asylum claims involving women, children, and LGBT individuals. The information in the database has been collected from the hundreds of attorneys who request expert consultation from CGRS staff in their asylum cases each year.¹² The individual case records include information about the child’s country of origin and sex as well as key facts regarding the persecution they fled and/or fear and the procedural history and posture of the case including final outcome (granted, referred, denied, etc.) where known.

The CGRS database produced 175 child asylum cases relevant to this study from 25 jurisdictions across the country; the determinations come from 66 different immigration judges (IJs) and several different Asylum Offices (AOs). Moreover, there were cases from the Board of Immigration Appeals (BIA) and several federal Courts of Appeals.¹³ The sample included 86 written opinions for 68 of the cases. In some cases, the database included multiple decisions for a given case, for example, where either the applicant or the government appealed the case or the case was referred from the AO to the immigration courts. The information for the other 107 case outcomes we analyzed derives from notes, briefs, and other documents submitted by the applicants in support of their claims and shared with CGRS by their attorneys. The decisions range from December 18, 1997, the earliest recorded outcome in the database, to June 6, 2013, the most recent.¹⁴

¹¹ KIND created a survey that asked its pro bono attorneys and staff attorneys a series of questions about the treatment of children seeking asylum, SIJS, T and U visas in immigration courts and before USCIS Officers. The survey contained multiple-choice questions and was created in Survey Monkey. Eighty-six attorneys responded. The survey and its results are available on KIND’s website at <http://supportkind.org/en/about-us/fact-sheets/reports>. CGRS created a survey that asked attorneys a range of questions regarding their experiences representing child asylum seekers and decision making in those cases, including substantive and procedural challenges. CGRS sent the survey to attorneys from several non-profit organizations across the United States as well as to law firm pro bono counsel in April–July 2013. Twenty-four attorneys responded to the survey; all responses were provided anonymously and all questions were optional. The survey instrument and results, administered using Qualtrics, are available upon request.

¹² For this study, CGRS also collected information on dozens of additional child asylum cases from KIND, which supports a large network of pro bono attorneys representing child asylum seekers.

¹³ We analyzed only those cases involving children who were seventeen or younger at the time of applying for asylum, and only those cases in which the child was the principal applicant. The cases involve unaccompanied children as well as children either determined not to be a UAC or children for whom the UAC/non-UAC issue was not addressed, for example, if the case pre-dated the passage of the TVPRA. We excluded cases in which the child was included as a derivative on the application of a parent even if the parent’s claim was based on potential harm to the child. See, e.g., *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005) (parents applying for asylum based in part on fear of harm to disabled child); *Benyamin v. Holder*, 579 F.3d 970 (9th Cir. 2009) (parents applying for asylum based in part on fear of female genital cutting to daughter). There are two exceptions to this exception. First, at least one case was included where the case started with the child as a derivative on his/her parent’s application but was later severed and the child became the principal. See CGRS Database Case 6221. In addition, one case was included where the child was a derivative, but the IJ analyzed the child’s claim separately from that of the parent, given that the parent’s application was found to be frivolous. See CGRS Database Case 1087.

¹⁴ Because the sample outcomes in the CGRS data originate primarily from attorneys who contacted CGRS for assistance or KIND attorneys, they do not represent a random sampling of case outcomes and they are skewed towards positive outcomes.

KIND Case Information

The information collected by KIND for this report originated primarily from its national legal services program, the staff of which facilitate or provide legal representation for unaccompanied children in removal proceedings in eight cities across the country.¹⁵ Since its founding in 2008, KIND has been referred more than 5,500 unaccompanied children. Its staff has significant experience mentoring pro bono attorneys and/or providing direct representation in children's cases, which involve primarily SIJS, T visa, U visa, and asylum claims. KIND maintains a comprehensive database that tracks case progress in all of the cases referred to its offices, and all KIND cases referenced in the report are tracked in this database. KIND also maintains copies of immigration court and asylum office decisions in its asylum cases and shared that information with CGRS for purposes of this report.

Agency Statistics

A Treacherous Journey also considers statistics provided by the Executive Office for Immigration Review (EOIR) on juvenile cases before the immigration courts, and by the United States Citizenship and Immigration Services (USCIS) on children's asylum claims.¹⁶ EOIR provided data to CGRS regarding children's cases heard before the immigration courts from October 1, 1989 to September 30, 2012. USCIS provided data to CGRS from its Refugee, Asylum and Parole System (RAPS) on all cases of "Minor Principal Applicants" who applied for asylum with USCIS and whose applications were filed or adjudicated between October 1, 2008 and April 23, 2013. EOIR and DHS had an opportunity to review and comment on this report. The authors incorporated and responded to these comments as appropriate.

¹⁵ At the time of this report's publication, KIND has 17 attorneys on staff in its field offices including two Equal Justice Works Fellows. Four of its attorneys solely provide direct representation to children, 10 have as their primary function to mentor pro bono attorneys on children's cases, and three provide a mix of direct representation and pro bono mentoring.

¹⁶ The EOIR data is divided between cases involving "unaccompanied juveniles" (UJs), and those involving "juveniles" (Js) who are non-UACs (*i.e.*, those who are accompanied or who were placed in proceedings before the TVPRA distinction took effect). The data provided by EOIR captures only very basic information about cases involving UJs and Js, including the total number of cases completed by base city and the ultimate outcome (*e.g.*, asylum granted, asylum denied, asylum withdrawn, and 245 adjustment of status). The EOIR data is not disaggregated by age or gender. The data is, however, disaggregated by nationality, but only to provide information regarding the total number of cases from a certain country and not by outcome. Thus, for example, while it is possible to see how many juvenile cases heard by the immigration courts in a given year involve children from El Salvador, it is not possible to analyze the outcomes in those cases. EOIR explained to CGRS that the system is undergoing an update to capture more data regarding immigration proceedings, including child asylum cases, but at the time of writing the update had not yet taken place.

The USCIS information includes biographical data regarding the child applicants (*e.g.*, age, gender, accompanied status, and country of origin) as well as data regarding the outcome in the case where a decision has been made (*e.g.*, the outcome such as asylum granted or denied, the basis of the claim such as political opinion or particular social group, and the Asylum Office that heard the claim). The complete dataset includes approximately 4,553 cases. For purposes of this report, only a subset of the data regarding 3,124 cases was considered. The data set was limited to the following criteria: (1) the applicant was under 18 years of age at the time of filing his/her application for asylum; (2) the date of filing the application was after December 10, 1998 (the date the U.S. Guidelines went into effect); and (3) the case was not a *nunc pro tunc* (retroactively corrected) case or in any other special group, such as Nicaraguan Adjustment and Central American Relief Act (NACARA) cases. For cases decided on the merits (*i.e.*, where the cases were marked granted, ineligible, or barred), CGRS conducted a preliminary statistical analysis of the cases grouped by geographical region to determine which of the variables included in the data set may have had an impact on the decisions. More information about the linear regression model used is on file with CGRS.

Section 1 Challenges in Obtaining Substantive Protection for Children and Inadequacy of Forms of Immigration Relief for Children

Asylum

Substantive Issues in Children's Asylum Claims: Challenges, Gaps, and Patterns

Children seek asylum to escape violence at the hands of organized gangs, intrafamilial violence, sexual abuse and incest, female genital cutting, forced marriage, slavery, forced recruitment as child soldiers, and other violations of their human rights. More than 2,800 children applied for asylum with USCIS – the agency that since 2008 (as explained below) has had initial jurisdiction over unaccompanied children's claims – between October 1, 2008 and April 23, 2013.¹⁷ During a similar timeframe, from October 1, 2008 to September 20, 2012, EOIR adjudicated more than 1,200 child asylum claims.¹⁸ The majority of these children come from Central America and Mexico as well as a significant number from China.¹⁹ The children seeking asylum with USCIS in recent years include both boys and girls and range in age from birth to seventeen.²⁰

In order to be granted asylum, children must satisfy the same refugee definition as adults. A refugee is:

any person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²¹

The definition of a refugee, while the same for children and adults, should be applied in a child-sensitive manner. Doing so ensures that decision makers both understand the important differences between children and adults – such as developmental immaturity, heightened vulnerability, greater communication challenges, and forms and manifestations of persecution unique to children – and analyze children's asylum claims consistent with those differences.²²

¹⁷ See USCIS Data, *supra* note 16.

¹⁸ EOIR Data, *supra* note 16. This figure includes only the number of children's cases that reached adjudication on the merits of asylum during that period (e.g., coded as asylum or withholding granted or asylum denied), excluding those cases that reached another resolution (e.g., application abandoned or withdrawn, or adjustment of status granted). The figure also lacks the total number of asylum applications received, as that number is not publicly available.

¹⁹ Of the 3,124 child asylum claims that were filed or adjudicated by USCIS between October 1, 2008 and April 23, 2013, 22% of the child asylum seekers were from El Salvador, 16% were from Guatemala, and 11% were from China. USCIS Data, *supra* note 16. Of the total unaccompanied juvenile (UJ) and juvenile (J) cases completed by EOIR during Fiscal Years 2009-2012, the vast majority were from the "Northern Triangle" countries (Guatemala, El Salvador, and Honduras) and Mexico, 19,304 out of 21,195 cases or 91% of the UJ cases and 19,468 out of 22,377 or 87% of the J cases. See EOIR Data, *supra* note 16. Compare with BHABHA, SEEKING ASYLUM ALONE, *supra* note 4, at 188 (providing statistics from USCIS for children's cases from 1999 to 2003). See also Fusion broadcast, *supra* note 3; USCCB, THE FLIGHT OF UNACCOMPANIED CHILDREN, *supra* note 3.

²⁰ Of the 3,124 children who applied for asylum or had their claims adjudicated between October 1, 2008 and April 23, 2013 and whose claims were filed after December 10, 1998, 56% were male (1,745) and 44% were female (1,379). Most of the children were between 14–17 years old at the time of filing (84%); 15% were between 6–13 and 1% were aged birth to 5. USCIS Data, *supra* note 16. As mentioned, the EOIR data provided to CGRS does not disaggregate by gender or age.

²¹ INA § 101(a)(42), 8 U.S.C. § 1101. The burden of proof is on the asylum seeker to establish that he or she meets the definition of a refugee. In order to meet this burden, an asylum applicant must be found credible, *id.* § 208(b)(1)(B)(ii)-(iii); must not be able to relocate internally to avoid persecution, 8 C.F.R. § 208.13(b)(1)(i)(B), (b)(2)(ii) (2013); must not be barred from asylum, INA § 208(a)(2), (b)(2)(A); and must be found to merit asylum in the exercise of discretion, *id.* § 208(b)(1).

²² Absent a unique analysis, children's claims have typically been analyzed according to adult experiences, and therefore have been assessed incorrectly or overlooked altogether. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: CHILD ASYLUM CLAIMS UNDER ARTICLES 1(A)(2) AND 1(F) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 3 (2009) (hereinafter 2009 UNHCR GUIDELINES).

The United Nations High Commissioner for Refugees (UNHCR) has repeatedly urged the importance of applying the refugee definition in a manner that considers an individual child's "mental development and maturity" and rights under international law and norms, and has issued guidelines setting forth a child-sensitive analytical framework.²³ The United States has also issued guidelines on children's asylum claims that advance a child-sensitive analytical framework and procedures.²⁴ According to these guidelines, a child-sensitive analysis of asylum claims is one that: (1) takes into account a child's age, maturity, and development;²⁵ (2) recognizes that children are active subjects of rights and that they are particularly vulnerable to certain types of harm;²⁶ (3) applies relaxed requirements with regard to the elements of the refugee definition;²⁷ and (4) grants children the liberal benefit of the doubt when assessing whether the evidence establishes the elements of the refugee definition.²⁸ While comprehensive and followed by some decision makers in the United States, as discussed below, the U.S. and UNHCR guidelines are not binding on all adjudicators and are applied inconsistently.

Lack of binding standards mandating a child-sensitive approach to asylum

Lack of binding child-sensitive guidelines or regulations

Although the U.S. Guidelines bind Asylum Officers, they are not always followed in practice, and they do not bind IJs, members of the BIA, or federal judges.²⁹ Likewise, the 2009 UNHCR Guidelines do not bind adjudicators at any level, despite U.S. recognition that the UNHCR is a key authority in interpreting the refugee definition.³⁰ The non-binding nature of U.S. and UNHCR guidelines is reflected in children's asylum decisions.³¹ Out of 86 unpublished IJ, BIA, and federal court decisions reviewed for this study, only seven cite the U.S. or UNHCR guidelines. Existing child-sensitive regulations are limited in scope and do not ensure a child-sensitive analysis across all elements of the refugee definition.³² The TVPRA mandates that the United States issue asylum regulations that "take into account the specialized needs of unaccompanied alien children and ... address both procedural and substantive aspects of handling unaccompanied children's cases."³³ These regulations would be binding on adjudicators at all levels (from Asylum

²³ UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng./REV. 1, ¶¶ 213-219 (1979); UNHCR, GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM (1997) (hereinafter 1997 UNHCR UNACCOMPANIED CHILDREN GUIDELINES); 2009 UNHCR GUIDELINES, *supra* note 22. UNHCR is charged with supervising the application of the 1951 Refugee Convention and its 1967 Protocol – to which the United States sought to conform its asylum statute. Convention Relating to Status of Refugees art. 35, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (looking to UNHCR for guidance in interpreting the definition of a "refugee").

²⁴ OFFICE OF INT'L AFFAIRS, IMMIGRATION AND NATURALIZATION SERV., DOJ, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS (1998) (hereinafter 1998 INS CHILDREN'S GUIDELINES). Although these guidelines were issued by the Immigration and Naturalization Service (INS), which has since dissolved, the DHS continues to apply the guidelines and has updated them. ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE, GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS (2009) (hereinafter USCIS AO BASIC TRAINING COURSE).

²⁵ See 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 10 (cautioning Asylum Officers that "[c]hildren may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed" and instructing Officers to tailor interview questions to the "child's age, stage of language development, background, and level of sophistication"); see also 2009 UNHCR GUIDELINES, *supra* note 22, at 5.

²⁶ *Id.* at 8-10.

²⁷ The U.S. and UNHCR guidelines call for a reduced standard of persecution in children's cases and a relaxed approach to credibility assessments. 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 13-15, 19; 2009 UNHCR GUIDELINES, *supra* note 22, at 6, 27.

²⁸ 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 26; 2009 UNHCR GUIDELINES, *supra* note 22, at 27; ABA STANDARDS, *supra* note 5, at VIII(B)(5)(b) ("When two reasonable inferences can be drawn from the evidence, one in the Child's favor and the other adverse to the Child, the Immigration Court shall adopt that reasonable inference in the Child's favor or in support of the Child's asylum claim.").

²⁹ Data provided by USCIS shows significant disparities in the probability of being granted asylum by one AO as compared to another. For example, with all variables fixed except for Asylum Office, the marginal probability success (asylum granted) of a child from Latin America or the Caribbean region being granted asylum is 87% in the Arlington jurisdiction, but only 42% for children from that region heard by the New York Asylum Office. A lack of a child-sensitive approach could be a contributing factor, but this cannot be verified without more information about the adjudicator's rationale and the basis of the claims heard. See USCIS Data, *supra* note 16. Compare with SEEKING ASYLUM ALONE, *supra* note 4, at 189 (analyzing USCIS data from 1999–2003, noting a significant disparity in grant rates by Asylum Office – Arlington with the highest percentage of grants at 49.4% and Chicago with the lowest at 17.1% grants).

³⁰ The OPPM on unaccompanied children encourages IJs to consult the U.S. Guidelines when adjudicating children's asylum cases, but nothing requires IJs or BIA members to consult or apply the guidelines. DAVID L. NEAL, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 07-01: GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN 2 (2007) (hereinafter 2007 EOIR OPPM GUIDELINES FOR IMMIGRATION COURT).

³¹ As discussed, USCIS does not provide reasoned decisions. The authors received USCIS data regarding the number of UAC and principal child applicant claims adjudicated and the outcomes of these claims, but did not receive USCIS' analysis of the claims.

Officers up to federal appellate court judges) and could incorporate the child-sensitive approach set forth in the U.S. and UNHCR guidelines, but the TVPRA mandate remains unfulfilled because the law's regulations have so far not been issued.

As the agency tribunal with nationwide jurisdiction over appeals from immigration judge decisions, the BIA's opinions control adjudication unless overturned by a federal Court of Appeals. The BIA has issued few published decisions regarding children's asylum claims; those that are published do not establish child-sensitive standards or apply a child-sensitive analysis. The highly significant precedential BIA decision, *Matter of S-E-G*, which involved unaccompanied children, does not consider the relevance of the children's status to analysis of the refugee definition.³⁴ The fact that *Matter of S-E-G* does not cite the guidelines or engage in a child-sensitive analysis sends the regrettable signal that adjudicators may assess children's claims in the same manner as they assess those of adults.

Federal Court jurisprudence is helpful but limited

While some federal courts, such as the First, Second, Sixth, Seventh and Ninth Circuit Courts of Appeals, have recognized that children's asylum claims should be treated differently from the claims of adults, the majority have not. The circuits with child-sensitive precedent have held that: (1) a reduced threshold for persecution applies in children's cases;³⁵ (2) objective evidence can establish a child's well-founded fear of persecution;³⁶ (3) persecution of a child's family members must be considered in evaluating whether the child suffered persecution;³⁷ and (4) IJ or BIA failure to apply these legal rules constitutes legal error.³⁸ One court has gone so far as to reverse the BIA based on the agency's failure to apply the standards set forth in the U.S. and UNHCR guidelines.³⁹

Despite these advances, federal Courts of Appeals decisions requiring a child-sensitive analysis lack the broad approach intended by the U.S. and UNHCR guidelines and are inadequate for ensuring consistent application of a child-sensitive approach at all levels of adjudication. Most of these decisions have limited their recognition of a child-sensitive standard primarily to persecution, and have not extended a child-sensitive analysis to other asylum elements. Moreover, a federal decision in one circuit requiring a child-sensitive approach does not bind adjudicators in any other circuit. Positive precedent on the need for child-sensitive asylum assessments has not been issued in the Third, Fourth, Fifth, Eighth, Tenth, or Eleventh Circuits, leaving IJs and BIA members discretion to decide which standards to apply in children's cases arising in those jurisdictions. Finally, even Courts of Appeals that apply a child-sensitive approach do so selectively – most notably ignoring the approach when reviewing children's claims of feared persecution based on resistance to organized gangs – demonstrating the position of these courts that a child-sensitive approach is not required in all cases.⁴⁰

³² See, e.g., 8 C.F.R. 1208.13(b)(3) (listing age as a factor for consideration in assessing reasonableness of internal relocation).

³³ TVPRA § 235(d)(8) (emphasis added). The 2008 TVPRA advanced a range of asylum-related and other protections for unaccompanied children.

³⁴ 24 I. & N. Dec. 579 (BIA 2008).

³⁵ See, e.g., *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (recognizing that while “[t]here may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult,” this principle did not apply because the applicant was near the age of majority); *Kholiyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008) (finding that the IJ and BIA erred in failing to consider the cumulative nature of persecution and the applicant's age at the time of persecution and remanding to the BIA); *Zhang v. Gonzales*, 408 F.3d 1239, 1247 (9th Cir. 2005) (holding that substantial evidence did not support the IJ's finding that Zhang's economic deprivation, including deprivation of education, did not constitute persecution and citing the U.S. Guidelines for the appropriate standard of persecution in children's cases); *Mansour v. Ashcroft*, 390 F.3d 667, 678 (9th Cir. 2004) (Pregerson, J., dissenting) (citing the U.S. Guidelines, the UNHCR Executive Committee's Resolution 47 on Refugee Children, and the CRC in disagreeing with the majority's holding that the harm endured did not rise to the level of persecution, and concluding that since the harm occurred when the petitioners were children it rises beyond mere harassment or discrimination to persecution).

³⁶ See *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (holding that the IJ erred in failing to find that objective evidence could establish the child's well-founded fear of female genital cutting).

³⁷ See *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1314-15 (9th Cir. 2012) (finding past persecution of a child where the child's mother was persecuted while applicant was in utero and where the applicant was malnourished also as a result of persecution of his mother); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (holding that the IJ failed to consider Jorge-Tzoc's perspective as a seven-year-old child at the time of persecution and failed to evaluate the harm he endured in the cumulative – including his experience of watching his parents suffer when he was a dependent child – and remanding for the IJ to take these factors into account); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (ruling that “a child's reactions to injuries to his family is different from an adult's” and must be considered in evaluating whether the harm suffered rises to the level of persecution, and finding that the IJ erred when she did “not look at the events from [the respondent brothers'] perspective, nor measure the degree of their injuries by their impact on children of their ages).

³⁸ See *Abay*, 368 F.3d 634; *Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (*granting rehearing and vacating* 600 F.3d 63 (1st Cir. 2010)).

Lack of binding guidance leads to inconsistent application of existing standards and inconsistent outcomes in children’s cases

The lack of binding guidance for adjudicators leads to inconsistency in decision-making in children’s cases at the immigration courts and the BIA.⁴¹ Few of the decisions reviewed for this report applied a child-sensitive analysis of the refugee definition.⁴² In cases with similar facts, the expectation is similar outcomes, but contrary to principles of equal application of the law, where one adjudicator applies a child-sensitive approach and another does not, outcomes may diverge, leading to protection for one child but not for the other similarly situated child.

Inconsistent Application

As illustrated below, some IJs and BIA members consider the elements of asylum from the perspective of a child and according to a child’s development or maturity. On the other hand, IJs and BIA members who do not engage in a child-sensitive assessment apply the same standards in a child’s case that they would apply in an adult’s case, and sometimes do not even acknowledge that the applicant is a child.⁴³

Persecution: Whether Harm Rises to Level and Likelihood

Decisions Applying Child-Sensitive Approach

Some IJs and BIA members apply a reduced standard of persecution in children’s cases, consistent with the U.S. and UNHCR guidelines, when they consider whether the harm the child experienced or fears is severe enough to rise to the level of persecution.⁴⁴ For example, an IJ held that a fourteen-year-old Guatemalan girl endured persecution when gang members forced her into their car at gunpoint and threatened to harm her if she reported them to the police. Shortly after this incident, she witnessed gang members kidnap two girls from her school who were later found dead. The IJ ruled that she suffered past persecution based, in significant part, on her young age at the time of the incident.⁴⁵ Some IJs also recognize that harm that would likely rise to the level of persecution for an adult may have a particularly severe impact on a child.⁴⁶

The likelihood of persecution – whether persecution is “well-founded” – requires that an applicant actually fears persecution, as well as objective evidence that the applicant’s fear is reasonable. In recognition of difficulties children may face in proving the reasonableness of their fear, U.S. and UNHCR guidelines call for careful analysis of the likelihood of persecution, taking into account the child’s perspective, family members’ fear(s) of the child’s persecution, and objective evidence of future persecution, as well as applying the liberal benefit of the doubt principle when assessing the evidence of future persecution.⁴⁷ Some IJs consider whether a reasonable child would fear persecution when assessing

³⁹ *Mejilla-Romero*, 614 F.3d 572.

⁴⁰ See, e.g., *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010); *Ortiz-Puentes v. Holder*, 662 F.3d 481 (9th Cir. 2011); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012).

⁴¹ This section does not address the adjudication of cases before USCIS, because unlike immigration court and BIA decisions, USCIS does not provide asylum applicants with written decisions setting forth the agency’s analysis of claims. IJs do not always issue written decisions either; an IJ might grant a case orally and without reasoning if both parties agree to the outcome. BIA decisions are always written, but do not necessarily provide analysis. For example, the BIA might adopt an IJ decision without further reasoning. The IJ and BIA decisions highlighted in this section are written and reasoned, and therefore provide standards and rationale for their reasoning. However, as discussed in note 29, *supra*, disparities exist in the probability of being granted asylum from one asylum office to another, which may signify a lack of child-sensitive asylum analysis in some cases, as well as possible inconsistencies in analysis.

⁴² Out of 86 written asylum decisions, 31 applied a child-sensitive analysis to one element of the refugee definition and 16 applied a child-sensitive analysis to two or more elements of the refugee definition.

⁴³ CGRS Database Case 4873; CGRS Database Case 9717.

⁴⁴ Where judges have considered a claim for “humanitarian asylum” – which allows a grant of asylum in the absence of a well-founded fear, when the applicant suffered severe and atrocious past persecution or would suffer “other serious harm” upon return, 8 C.F.R. § 1208.13(b)(1)(iii) – some have considered the child’s age and perspective when evaluating the severity of the harm. See, e.g., CGRS Database Case 3918 (analyzing humanitarian asylum based on the applicant’s age at the time of persecution and the severity of the persecution from a child’s perspective); CGRS Database Case 5377 (finding eligibility for humanitarian asylum based on consistent rape and battering from a young age, and the resultant “terrible toll on her physical and mental well-being”).

⁴⁵ CGRS Database Case 4620.

whether a child's fear of persecution is well-founded. For instance, an IJ ruled that evidence of gang members' indirect threats to a boy and the unsolved murder of the cousin who had informed him of the threats established the boy's well-founded fear of persecution "particularly as it relates to minors."⁴⁸ As noted below, however, the BIA reversed the IJ. Others look to family members' fears. For instance, an IJ held that a boy had a well-founded fear of persecution based in significant part on his mother's fear that gang members would target him if he were returned to Honduras.⁴⁹

Decisions Failing to Apply Child-Sensitive Approach

On the other hand, some IJs and BIA members hold children to the same standard of persecution, and same likelihood of persecution, as adults. Some judges do so despite their recognition of the lower threshold for persecution advanced in the U.S. and UNHCR guidelines and federal case law discussed above. For example, in one case a judge cited federal cases about the relevance of persecution of family members to determine whether a child suffered persecution and noted that the threshold for persecution is lower in a child's case, but did not meaningfully apply those standards in assessing the past persecution of a Salvadoran boy. The IJ found that the boy was "hounded at school by the gang members . . . and was personally threatened with death," and witnessed gang members threaten and badly beat his brother, all while under the age of eleven. Nevertheless, the IJ ruled that he did not suffer past persecution. Meaningful application of the child-sensitive principles the judge cited would have required the IJ to recognize how terrifying a death threat and ongoing harassment by gang members would be to such a young boy, especially after witnessing the gang threaten and beat his brother.⁵⁰

Some adjudicators analyze the likelihood of persecution no differently in children's cases. For example, in the case where the boy faced an indirect threat of persecution, and where his cousin who had warned him of the threats was murdered shortly thereafter, the BIA reversed the IJ's grant of asylum, holding that the boy's fear of persecution was not well-founded.⁵¹ This approach fails to consider a reasonable child's perspective or to view the evidence according to the liberal benefit of the doubt standard.

A group of men targeted a twelve-year-old Albanian girl, offering to employ her as a prostitute overseas. When she ignored them, the men started threatening to rape and kidnap her, calling and coming to her home. One day a group of men in cars followed and encircled the girl and her mother while they were out walking, but they were able to escape. The girl fled to the United States shortly after this incident and applied for asylum. The IJ held that "[w]hile this harassment by young men might be frightening to the respondent, and possibly illegal in Albania, it does not rise to the level of persecution. . . . Mere harassment cannot serve as a basis for asylum."⁵² The IJ's conclusion, which rested in part on the fact that the men did not actually kidnap the girl, failed to mention the girl's age or status as a child and failed to grasp how terrorizing the men's actions would be to a child or that they could constitute persecution under a child-sensitive approach.

⁴⁶ CGRS Database Case 7571 (finding that while the domestic violence a girl suffered at the hands of her partner would have constituted persecution of an adult, it was especially harmful "in light of the respondent's young age at the time of this abuse"); CGRS Database Case 8411 (recognizing that the impact of beatings on the child applicant by his stepfather was "compounded" by the boy's young age at the time); CGRS Database Case 5373 (noting that physical and emotional abuse that caused permanent scars was particularly harmful because he "was a young child when he endured this physical and emotional abuse").

⁴⁷ 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 19-20; USCIS AO BASIC TRAINING COURSE, *supra* note 24, at 36-40; 2009 UNHCR GUIDELINES, *supra* note 22, at 6-7.

⁴⁸ CGRS Database Case 8284.

⁴⁹ CGRS Database Case 4032.

⁵⁰ CGRS Database Case 8664 (finding no past persecution, the IJ granted asylum based on a well-founded fear of persecution); *compare with* CGRS Database Case 1104 (holding, without any consideration of the applicant's age, that the child's fear of arrest for illegal departure constituted prosecution not persecution); CGRS Database Case 569 (holding that deprivation of education and treatment of a girl as a "second-class citizen" because of her religion did not establish persecution, without evaluating the claim from a rights-based perspective that considers the fundamental rights to an education and development recognized in numerous international documents on children's rights). In another case, the BIA held that a boy's abuse by his alcoholic mother did not rise to the level of persecution, without any consideration of how his age affected whether the abuse constituted persecution. CGRS Database Case 4873 BIA.

⁵¹ CGRS Database Case 8284.

⁵² CGRS Database Case 562.

Throughout her childhood, the parents of a Chinese girl beat her and told her she was worthless. The girl's parents forced her to drop out of school at age sixteen and to work long hours in the home. After the girl's sister fled to avoid a forced marriage, the girl's parents told her that she was to marry the man they had chosen for her sister. When she resisted, her parents beat her. The girl then fled to the United States and applied for asylum. The IJ held that her past abuse did not rise to the level of persecution because she had no permanent injuries, and because her abuse was much less severe than the spousal abuse inflicted on Rody Alvarado, the applicant in the nationally recognized domestic violence asylum case known as *Matter of R-A-*. The IJ's determination that the girl's abuse did not constitute persecution because it was not as severe as the abuse in an adult's case contravenes the U.S. and UNHCR guidelines. In addition, the IJ's dismissal of the girl's fear of forced marriage based on his finding that forced marriage was not persecution similarly fails to consider violations of children's internationally recognized rights as persecution, also contrary to the guidelines.⁵³

State inability or unwillingness to protect

Decisions Applying Child-Sensitive Approach

When considering whether a state is unable or unwilling to protect a child from persecution, some IJs use a child-sensitive inquiry by considering whether protection is effective and whether it ensures children's rights. For example, a Guatemalan girl suffered physical and sexual abuse by her stepfather and mother starting at the age of six. She fled to the streets when she was ten. The IJ devoted three of the five pages of analysis in the decision to the question of whether Guatemala was unable or unwilling to protect street children and concluded that efforts to stop persecution of street children are "grossly inadequate" because the government does not prosecute crimes against street children and does not provide such children with shelter or services.⁵⁴ This IJ understood that true protection of street children would require more than laws against rape, murder, and sexual exploitation of children, and also include the prosecution of those perpetrating crimes against them, and the provision of services and care. Some IJs also recognize that children may be especially unlikely to report harm to the authorities because of age, development, or mental status, and take this into account when ruling on a state's inability or unwillingness to protect.⁵⁵

Decisions Failing to Apply Child-Sensitive Approach

Some IJs fault children for not reporting persecution to the authorities when considering the ability and willingness of a government to control persecution, in complete disregard of how a child's age, development, and dependency on adults impedes his ability to report. For example, an IJ ruled that a Chinese girl who was enslaved in a brothel in Hong Kong did not establish that her country was unable or unwilling to protect her because she did not report her experience to the authorities. The IJ reached this ruling despite the girl's testimony that her persecutor had connections to the police, and with no consideration for her child status.⁵⁶

⁵³ CGRS Database Case 1298.

⁵⁴ CGRS Database Case 2689.

⁵⁵ CGRS Database Case 3918 (finding that being a "minor child without any resources" made it difficult for applicant to seek protection); CGRS Database Case 4829 (recognizing difficulty abused child would have seeking state intervention on his own, and ruling that Honduras was unable or unwilling to protect although the boy had not reported his abuse to authorities); CGRS Database Case 3507 (IJ found Guatemala unable or unwilling to protect girl who had been kidnapped and raped where she did not report abuse to the authorities because of her "tender age" of fourteen at time of persecution); CGRS Database Case 5377 (holding that Salvadoran girl who suffered sexual and physical abuse by stepfather reasonably did not believe she could seek protection from the state on her own as a minor).

⁵⁶ CGRS Database Case 1416. See also CGRS Cases 9525 and 9717 (finding the element of state inability or unwillingness to protect was not proven because the child applicants in these cases did not report persecution to the police).

⁵⁷ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

⁵⁸ Out of the 1,786 cases decided on the merits by USCIS in the data provided, see *supra* note 16, a significant number of cases, 264, where relief was denied are marked as "no nexus." Of the 264 no-nexus cases, the overwhelming majority of them, 233, involved children from Latin America and the Caribbean (28% of the total cases from that region), with the Northern Triangle countries and Mexico having disproportionately high no-nexus cases. Cases

Nexus

Decisions Applying Child-Sensitive Approach

Nexus refers to the required causal link between persecution and one or more of the five statutorily protected grounds and can be established through direct or circumstantial evidence of a persecutor's motive.⁵⁷ Nexus is one of the most challenging elements to prove in an asylum case, and is especially difficult for children because they may have limited knowledge or understanding of the context in which their persecution occurs, or have difficulty articulating any understanding that they do have.⁵⁸ Consequently, U.S. and UNHCR guidelines provide that in children's cases objective, circumstantial evidence of the societal context can be particularly useful and can alone establish nexus.⁵⁹ Some judges apply this framework. For example, an IJ relied on objective evidence of the status of women and children in Salvadoran society and the reasons the state fails to protect them, and found that a Salvadoran boy suffered abuse on account of membership in a particular social group defined in part by his status as a child. According to the IJ, there was "ample circumstantial evidence of a nexus between domestic violence and the social status of women and children in El Salvador, where such violence is endemic and reflects prevailing norms and beliefs regarding abused women and children."⁶⁰ Consequently, the IJ found it "reasonable to infer that the [abuser's] behavior was influenced by the lack of protection and societal attitudes towards women and children in a domestic relationship."⁶¹

Another IJ found objective, circumstantial evidence sufficient to establish that a devout, Evangelical Salvadoran girl had a well-founded fear of persecution by gang members on account of her religion. As part of her church youth group, the girl proselytized to youth in her community, encouraging them to join the church and not engage in crime. Gang members attacked and raped a girl from the applicant's youth group, which terrified the applicant so much that she fled. The IJ found nexus based on testimony by a country conditions expert regarding gang dynamics and motivations and the context in which Salvadoran gang violence occurs, as well as the evidence of the rape of a girl similarly situated to the applicant.⁶²

from South/East Asia (excluding China) had the next highest number of cases found to have no nexus, 17 cases (16% of the total cases from that region). A linear regression analysis conducted by CGRS showed that nationality is indeed an important predictor for when a case from Latin America and the Caribbean region will be found to have no nexus. For example, a child from El Salvador, Guatemala, or Honduras has a 30-36% marginal probability of his/her case being found not to have a nexus, and a child from Mexico 20%, compared to 10% or lower probability of no-nexus for children from other countries in the region. For both regions, Latin America and the Caribbean and South/East Asia (excluding China), the regression model found that the Asylum Office hearing the case is the biggest factor for predicting the marginal probability of a case being found to have no nexus. The marginal probability of a no-nexus finding for Latin American and Caribbean cases ranged from 4% if the case was heard in Newark to 47% in Los Angeles (New York 15%; Arlington 19%; San Francisco 20%; Houston 23%; Chicago 25%; Miami 34%). The marginal probability of a no-nexus finding for South/East Asian (excluding China) cases ranged from 7% in Newark to 35% in Arlington (Chicago 12%; New York and San Francisco 15%).

⁵⁹ For example, the DOJ in its Proposed Regulations of 2000 recognized that circumstantial evidence of patterns of violence against individuals similarly situated to the applicant and the failure of the legal system to protect them is circumstantial evidence that is highly relevant to the nexus analysis. Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76593 (proposed Dec. 7, 2000); See, e.g., *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009); See also Department of Homeland Security's Position on Respondent's Eligibility For Relief, *Matter of R-A*, No. A73 753 922 (2004); Department of Homeland Security's Supplemental Brief, *Matter of L-R* (2009) (hereinafter DHS Brief in L-R); 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 21; 2009 UNHCR GUIDELINES, *supra* note 22. In addition, UNHCR advises that adjudicators should have a good understanding of a child applicant's history, culture, and background in reaching a determination. See 1997 UNHCR UNACCOMPANIED CHILDREN GUIDELINES, *supra* note 23, at ¶ 8.10.

⁶⁰ CGRS Database Case 1097. UNICEF and other leading authorities on violence against women have long recognized that lack of legal protection is one of the causes of domestic violence and has urged states to end impunity for violence against women and girls. See U.N. Children's Fund (UNICEF), *Domestic violence against women and girls*, 6 INNOCENTI DIGEST 8 (2000).

⁶¹ CGRS Database Case 1097.

⁶² CGRS Database Case 9741. See also CGRS Database Case 4829 (finding nexus between harm and social group of perceived homosexuals in case of Honduran boy repeatedly raped by uncle and uncle's friends based in part on circumstantial evidence regarding status of homosexuals in Honduras); CGRS Database Cases 6840 and 7072 (cases involving Honduran cousins who were raised by their grandfather – an outspoken gang critic – and whose family was frequently threatened by gangs and some family members were murdered – two different IJs independently found nexus to a protected ground based on expert testimony, as well as other circumstantial evidence, in particular attacks against family members).

Decisions Failing to Apply Child-Sensitive Approach

When IJs or BIA members analyze nexus in a vacuum, without taking into account objective evidence such as societal norms and the availability of state protection, they tend to find that persecution is motivated by personal, criminal, or economic factors, rather than a protected ground.⁶³ For example, due in part to lack of direct evidence, an IJ found that a Honduran girl's father beat her because of personal animus, rather than membership in a social group defined by her nuclear family and/or other characteristics such as her gender and status as a child.⁶⁴ The IJ reached this conclusion despite objective evidence presented by the applicant of widespread intrafamilial violence in Honduras and impunity for it, as well as other circumstantial evidence that the father abused all of the children in the family, as well as his ex-wife.⁶⁵

Children fleeing gang-related violence,⁶⁶ primarily from the Northern Triangle countries of Honduras, Guatemala, and El Salvador, face exceptional challenges to proving nexus when adjudicators do not employ a child-sensitive inquiry.⁶⁷ In these cases, judges frequently disregard or undervalue objective, circumstantial evidence of motive.⁶⁸ In one case, for example, a Guatemalan girl's father, an Evangelical pastor, had forbidden her sister from dating a gang member.⁶⁹ In retaliation, the gang member began stalking the father and threatening to make the entire family suffer. One day while the girl was on her way to church with her grandfather, the gang member and other gang members attacked them, beating her grandfather, kidnapping the girl, and taking her to an abandoned house where two members of the gang took turns raping her. The IJ found that the gang members raped the girl for "entirely personal" reasons, ignoring the circumstantial (as well as direct) evidence that the persecutor was motivated by family membership.

In another case, a young Salvadoran boy was raped by his gang-member neighbor.⁷⁰ The child argued that he was raped on account of family membership because the gang had previously targeted several members of his family. However,

⁶³ See, e.g., CGRS Database Case 1279 (holding that persecution of Salvadoran girl who refused to become gang member's girlfriend was not on account of gender-defined social group, but instead, was merely personal and criminal); CGRS Database Case 109 (reversing an IJ's positive nexus determination in a case of a Mexican father's horrific abuse of his daughter, and wife and other children, based on conclusion that the abuse was simply personal); *Aguirre-Cervantes v. INS*, 273 F.3d 1220 (9th Cir. 2001) (reversing the BIA based on the "extensive evidence that DV [domestic violence] is practiced to control and dominate members of the family"), vacated on other grounds; CGRS Database Case 4834 (determining that a Honduran girl's sexual and psychological victimization by her stepfather was motivated by her unfortunate familial relationship with a man who had abusive tendencies, and that such motivation is not covered by the refugee definition); CGRS Database Case 9717 (finding that "[t]here is no evidence, again, that the mother sought to harm [her children] for any other reason than her clearly inadequate abilities to parents [sic] children that she birthed... Indeed, the abuse that the mother perpetrated upon the respondents [...] is premised solely upon her personal relationship with the children (as they are her biological children)").

⁶⁴ CGRS Database Case 9536.

⁶⁵ Additional circumstantial evidence of nexus included that the father reserved his most severe beatings for the applicant and her mother, did not allow the applicant or her sister to attend school, and forced all of the children to perform hard labor.

⁶⁶ Out of the 175 cases reviewed for this report, 67 were based on gang violence.

⁶⁷ Children from the Northern Triangle not only face a lack of a child-sensitive approach, but significant negative precedent that does not distinguish between children and adults and stands to bar their cases categorically. Starting with the BIA in *Matter of S-E-G-* (discussed above), courts ruling in many gang cases have held that gangs were motivated solely by a desire to swell their ranks, retribution, or criminal or economic reasons. See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 588 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008); *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008); *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012); *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010). EOIR provided data containing the number of unaccompanied and accompanied children in proceedings according to nationality, but did not provide data that showed both nationality and outcome for children's asylum cases. Therefore, the authors lack the data necessary to determine whether nationality predicts grant rates in children's asylum cases before EOIR. However, according to the results generated by a linear regression model of USCIS data conducted by CGRS, when all other variables held constant, an applicant's nationality has predictive power. The marginal probability of being granted asylum for children from El Salvador, Guatemala, and Honduras ranged from 51–67% as compared to children from Somalia and Ethiopia, who had probabilities of asylum grants of 90% and 97%, respectively. The calculations determined that gender also has predictive power: females from Latin America and the Caribbean had a 68% probability of being granted asylum, whereas males from the region had only a 61% probability. See USCIS Data, *supra* note 16.

⁶⁸ CGRS Database Case 7893 (disregarding objective evidence, finding no nexus to feared harm in case of Salvadoran boy who witnessed a gang murder and who was a member of a youth group that publicly opposed gangs and testified he refused to join due to religious and moral conviction, and in whose case a country conditions expert testified that gang would have perceived the boy as a high priority recruit because of his membership in the youth group and his opposition to gangs). The BIA upheld this ruling.

⁶⁹ CGRS Database Case 9525.

⁷⁰ CGRS Database Case 6221.

⁷¹ Requiring direct evidence of a persecutor's motive fails to recognize the importance of circumstantial evidence in children's cases and misapprehends the law: the Supreme Court very clearly set forth in *Elias-Zacarias* that circumstantial may suffice.

⁷² CGRS Database Case 8284.

ignoring the circumstantial evidence, the IJ found that the rape was not linked to a protected ground because the boy did not provide direct evidence of the persecutor's motive.⁷¹

The BIA reversed an IJ's finding that gang threats against a boy and his father, following the father's report to the police of a dead body discovered on their land, were motivated by family membership. This ruling was despite evidence that the family was well known for its opposition to gangs and that the gang had targeted different family members.⁷² The BIA held that the gang's motive was entirely personal and that to the extent that the gang was targeting the family, it was because of the father's act of reporting, rather than family membership per se. This approach disregards the children's guidelines, which recognize that children may frequently be targeted because of family membership and emphasize the importance of careful consideration of all relevant evidence of family-based persecution. Rather than relaxing the nexus standard, this approach places an unreasonable burden on children targeted because of familial ties by requiring double proof of nexus. Under this approach, children must prove *both* that the initial family member was targeted on account of a protected ground, *and* that the child was or would be targeted on account of family membership. Such an approach makes it exceedingly difficult for children to gain protection from persecution based on family membership, which they cannot change, and the approach has been rejected by some federal courts.⁷³

Internal Relocation

Decisions Applying Child-Sensitive Approach

Asylum may be denied if an individual could avoid persecution by relocating to another part of his or her country, and if such relocation would be considered reasonable under the circumstances. IJs who analyze relocation in a child-sensitive manner consider a child's age, development, mental status, and vulnerability when ruling on whether relocation is reasonable.⁷⁴ To illustrate: an IJ ruled that relocation would be unreasonable for a mentally disabled Salvadoran boy who endured intrafamilial abuse, in light of his "mental limitations." Despite the fact that the boy was no longer under the age of eighteen when the IJ decided the case, the IJ found that his intellectual functioning and life skills were "well below what is expected of his age group," making relocation particularly unreasonable.⁷⁵

Decisions Failing to Apply Child-Sensitive Approach

Although federal regulations list age as a relevant factor in evaluating the reasonableness of relocation, some IJs do not consider age and do not assess conditions of relocation when analyzing this issue in children's cases. For instance, in a case involving a Chinese girl fleeing forced marriage whose lawful permanent resident uncle planned to care for her in the United States, an IJ speculated: "It seems to me that the respondent's family might well have considered relocating her somewhere else in the vast country rather than subjecting her to the not inconsiderable perils of being smuggled to the far side of the world. Certainly given the great expense of utilizing international alien smugglers, I would imagine the cost of internal relocation would have been much less."⁷⁶ The IJ reached this conclusion without any discussion of where the girl could relocate, with whom she would live, who would care for her, or whether conditions of relocation would be safe, and without considering the availability of her lawful permanent resident uncle to care for her in the United States.

⁷³ See, e.g., *Mema v. Gonzales*, 474 F.3d 412, 417 (7th Cir. 2007) (remanding where IJ failed to consider well-founded fear of persecution where government persecuted family members in order to influence actions of applicant's father, and noting that "oft times persecutors target children of political dissidents not because they have imputed the parents' political opinions to the children, but as a means of harassing, intimidating, and influencing the behavior of the parent").

⁷⁴ 2009 UNHCR GUIDELINES, *supra* note 22, at 21–22 ("Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation.").

⁷⁵ CGRS Database Case 5373.

⁷⁶ CGRS Database Case 1104; CGRS Database Case 1298 (finding Chinese girl could relocate to her aunt's home where she hid for two months prior to leaving China, without any consideration of conditions in the aunt's home, the girl's relationship with aunt, or whether "hiding" required the girl's literal confinement); CGRS Database Case 9862 (finding that child could relocate to avoid child abuse by father because father was paralyzed from waist down and used a wheelchair, without considering the boy's age and whether relocation would be reasonable).

Credibility and Burden of Proof

Decisions Applying Child-Sensitive Approach

Adjudicators may consider a range of factors, including consistency, detail, plausibility, demeanor, candor, responsiveness, and any omissions, in determining if an applicant is credible, whether child or adult.⁷⁷ In addition, in children's cases, IJs and BIA members applying a child-sensitive analysis should take into account a child's age and developmental status when ruling on credibility. For example, an IJ did not accept ICE Assistant Chief Counsel's (ACC) argument that a Salvadoran girl lacked credibility because she was unsure whether the gang members, who knocked her unconscious and tore her blouse, had raped her, and because she did not mention the rape to the doctor who had examined her. The IJ found the girl credible, reasoning that any inconsistencies or implausibilities in her testimony were best explained by the girl's age when she was targeted and the four-year lapse between the incident and her retelling of it in immigration court.⁷⁸ When they consider whether a child applicant has met his/her burden of proof,⁷⁹ some IJs also recognize that a child should not be expected to provide the same quantum of evidence as adults and find that objective evidence, such as country conditions evidence submitted by the child, may be sufficient to meet the burden.⁸⁰

Decisions Failing to Apply Child-Sensitive Approach

In contrast to the approaches described above, some IJs and BIA members do not consider a child's age, development, or mental health when assessing credibility and hold children to the same standard as adults. An indigenous Guatemalan boy, for example, suffered a brutal rape, but he did not disclose the rape to anyone until shortly prior to his asylum hearing.⁸¹ As the hearing approached, the boy began mutilating himself. He was placed in short-term psychiatric care and disclosed the rape to staff at the facility. At his asylum hearing, his psychologist testified that the boy was suffering from post-traumatic stress disorder (PTSD) and that PTSD has an even greater impact on children than adults. The psychologist testified that the boy's PTSD, developmental stage, shame about the rape, and cultural factors explained why he had such difficulty talking about the rape earlier. Nonetheless, the IJ disregarded the psychologist's testimony and found the boy not credible because he did not include the rape in his initial asylum application. The BIA upheld this decision. Some IJs who do not consider age and developmental factors may also fail to understand what testimonial or other evidence is reasonable to expect from children, and fault children for providing "vague" testimony,⁸² or for not sufficiently corroborating their claims.⁸³

IJs also find children not credible based on family dynamics they inexplicably deem implausible, such as a child's bond to abusive family members. An IJ ruled that a Honduran boy raised by his grandparents was not credible in part because he asked his mother about his abusive grandparents' health while he was in immigration custody. The IJ was incredulous that the boy would care about his grandparents' health when they had abused him.⁸⁴ Such a determination fails to consider the perspective of a child who is dependent on caretakers regardless of their treatment, and crucially fails to understand the dynamics of abuse.⁸⁵

⁷⁷ INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158.

⁷⁸ CGRS Database Case 9740; CGRS Database Case 3996 (excusing discrepancies in Honduran boy's testimony because of his young age at the time of persecution and his lack of education); CGRS Database Case 1298 (finding that inconsistencies in Chinese girl's testimony were caused by her young age); CGRS Database Case 8664 (finding Salvadoran boy credible despite the lack of detailed testimony by considering boy's young age when he left El Salvador (12) and his even younger age at the time of the persecutory events).

⁷⁹ INA § 208(b)(1)(B)(i), (ii).

⁸⁰ CGRS Database Case 4620 (finding that a child cannot be expected to provide the same amount of evidence as an adult). This is consistent with the U.S. Guidelines, which note that children may be unable to corroborate their claims to the same extent as adults. 1998 INS CHILDREN'S GUIDELINES, *supra* note 24, at 26.

⁸¹ CGRS Database Case 9868. The asylum application he filed was based on his fear of becoming a street child.

⁸² CGRS Database Case 8411 (although ultimately granting the claim, the adjudicator questioned credibility of an indigenous Guatemalan boy because he testified in detail as to two incidents of abuse at the hands of his stepfather, but he provided only "vague" testimony about other incidents of abuse).

⁸³ CGRS Database Case 447 (finding that a Chinese boy failed to meet the burden of proof for asylum because he did not corroborate the government's persecution of his family for violating China's one-child policy).

⁸⁴ CGRS Database Case 3242.

Liberal Benefit of the Doubt

Decisions Applying Child-Sensitive Approach

Some IJs apply the liberal benefit of the doubt principle in children's favor when more than one inference can be drawn from the evidence. One case illustrates the point: an IJ applied the liberal benefit of the doubt to the evidence on whether Honduras was unable or unwilling to protect a boy whose stepfather habitually beat him, when the boy did not report the abuse to authorities.⁸⁶ The country conditions evidence on the issue was mixed. It showed that, on the one hand, Honduras had enacted laws to protect children from abuse and was making some efforts to implement them and, on the other hand, that government corruption and impunity existed and that police themselves sometimes abused street children. The government attorney argued that recently enacted laws to protect children from intrafamilial abuse and other harms, coupled with the boy's failure to report his persecution to the authorities or to seek shelter, undermined any finding that Honduras was unable or unwilling to protect him. Notwithstanding, the IJ viewed the country conditions evidence, testimony, and the boy's circumstances as a victim of intrafamilial violence in the light most favorable to him and granted relief. The IJ noted that while the country conditions evidence showed some effort on the part of the Honduran government to protect children, those efforts fell short due in part to a lack of will to enforce the laws. The IJ also noted that a dependent child who is a victim of intrafamilial violence cannot be expected to seek state protection on his own.

Decisions Failing to Apply Child-Sensitive Approach

While some IJs draw inferences in favor of child applicants, the liberal benefit of the doubt standard is not applied across the board, and this is particularly notable in cases evaluating nexus. Because the nexus element is so difficult for children to establish for the reasons discussed above, a child-sensitive analysis requires that adjudicators view any evidence of nexus – both direct and circumstantial – in the light most favorable to children. To the detriment of child asylum seekers, however, some IJs and BIA members do not apply the liberal benefit of the doubt and evaluate evidence of nexus unfavorably. In one case, for example, gang members began extorting a Salvadoran girl and threatening to sexually abuse her. One evening, they followed her home from school and attacked her, but stopped short of raping her because she screamed and someone nearby responded. After this incident, she went into hiding and ultimately fled the country. An IJ found that she suffered past persecution and had a well-founded fear of persecution in the form of further sexual abuse, but denied the case on the ground that she did not prove nexus. Based on the record, which showed alarming rates of violence against women and widespread acceptance of such violence, the IJ noted that a gender-defined social group might be, but was not necessarily, the reason the gang targeted her for sexual abuse.⁸⁷ Had the IJ applied the liberal benefit of the doubt, the IJ likely would have ruled in the girl's favor on that point.

In another case, a Haitian street child testified during his asylum hearing that he sometimes slept on the roofs of people's homes to keep safe at night. Rather than understanding this fact in the context of the youth's destitution, age, maturity, and developmental stage, or granting him the benefit of the doubt, and without any evidence to support his finding, the IJ inferred that the youth burglarized homes, which colored the analysis of the entire claim.⁸⁸

⁸⁵ See also CGRS Database Case 1104 (finding it implausible that a detained Chinese girl who fled forced marriage to the son of her father's creditor would have talked to her father about release from federal custody, rather than her anger at him during her phone call from custody). This determination indicates a lack of knowledge of and sensitivity to the high level of deference to parents in Chinese culture. It also shows a lack of appreciation about how conditions of custody drive decision-making, particularly for children who value short-term gains over long-term gains in decision-making. See, e.g., Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. LAW 741, 744 (2000) (discussing impulse-driven decision-making in adolescence); Laurence Steinberg et. al, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) (discussing emphasis on short term gains in child and adolescent decision-making).

⁸⁶ CGRS Database Case 3918.

⁸⁷ CGRS Database Case 5057.

⁸⁸ CGRS Database Case 9867.

Discretion

Because asylum is a form of discretionary relief (at the adjudicator's discretion), even if a child is found to satisfy the refugee definition, her case may be denied in the exercise of the adjudicator's discretion.⁸⁹ Discretion is often not at issue in children's cases because adverse factors created by the child are not usually present.⁹⁰ When discretion is at issue, however, a child-sensitive approach is particularly critical because a child denied asylum in the exercise of discretion faces return to persecution if he cannot meet the higher burden for withholding of removal or CAT relief.⁹¹ Nevertheless, adjudicators do not always consider factors such as a child's age, developmental stage, mental health, vulnerability, or other related factors when deciding whether adverse circumstances should result in a discretionary denial. For example, an IJ denied asylum as a matter of discretion to a Honduran boy because of his "involvement" in a gang while in Honduras. Gang members terrorized the boy when he refused to join the gang, threatening and beating him repeatedly and forcibly drugging him. After months of attacks, the gang finally beat the boy into submission, forcing him to steal on one occasion.⁹² During the few months that the boy remained in the gang before fleeing to the United States, he attempted suicide to escape his situation. Without considering the boy's mental state, age and development, or duress, the IJ ruled that he did not merit asylum because of his involvement in the gang.⁹³

Inconsistent Outcomes in Similar Cases

A lack of binding child-sensitive standards in children's cases leads not only to inconsistent application of the standards, but to inconsistent decision-making, with disparate outcomes in cases with very similar facts.⁹⁴ This inconsistency is illustrated by two claims involving Salvadoran boys abused by their families, where one IJ did not apply a child-sensitive analysis and the other did. The IJ who did not apply a child-sensitive analysis looked only at the specific incidents of abuse inflicted – rather than the impact of the abuse on the child – and held that they did not rise to the level of persecution and denied relief.⁹⁵ The IJ who applied a child-sensitive approach considered both the specific incidents of abuse as well as their impact on the child, especially because of his developmental challenges, and ruled that the boy endured past persecution.⁹⁶ Similarly, two cases involving teenage girls from El Salvador also demonstrate that a case

⁸⁹ INA § 208(b)(1)(A) (providing that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)"). When ruling on discretion judges weigh positive factors, such as ties to the community and negative factors, such as criminal history.

⁹⁰ See, e.g., *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008) (internal quotations and citations omitted) (explaining that discretionary denials "are exceedingly rare, and are generally based on egregious conduct by the applicant"); *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987) (setting forth the "totality of the circumstances" test to determine a discretionary denial).

⁹¹ Asylum seekers must establish a "well-founded" fear of persecution, which is considered a 10% or greater chance of persecution. Although withholding of removal and Convention Against Torture protection are lesser forms of relief than asylum, applicants seeking them must prove that the harm they fear is "more likely than not" to occur, or a 51% or greater chance of persecution (for withholding of removal claims) or torture (for Convention Against Torture claims). See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (setting out burden of proof for likelihood of persecution for asylum and withholding of removal); 8 C.F.R. 208.16 (burden of proof for Convention Against Torture claims).

⁹² The boy's involvement in the gang and act of stealing did not serve as a statutory bar to asylum. There is no per se bar to asylum for former gang membership, and while there is a criminal bar to asylum for commission of a serious non-political crime overseas, it does not apply in the case of a child who commits an act that in the U.S. would qualify as a juvenile delinquency offense, rather than a crime, like the applicant in this case. *Matter of De La Nues*, 18 I.&N. Dec. 140, 144 (BIA 1981) (holding adjudication of juvenile delinquency is not conviction of a crime for immigration purposes); *Matter of Ramirez-Rivero* 18 I.&N. Dec. 135 (BIA 1981) (same).

⁹³ CGRS Database Case 9861; CGRS Database Case 1104 (discussed above; holding that a Chinese girl fleeing forced marriage did not merit asylum in the exercise of discretion because she used an "alien smuggler" to gain entry to the U.S.).

⁹⁴ Although the total number of asylum applications filed before the immigration courts is unknown, see EOIR Data *supra* note 16, it is concerning that the number of children's asylum cases adjudicated on the merits in the last few years include far more denials than grants. Between October 1, 2008 and September 30, 2012, the immigration courts issued 271 asylum denials in unaccompanied juvenile cases as compared to 86 grants of asylum. In addition, the immigration courts issued 561 asylum denials in juvenile (non-UAC) cases as compared to 288 grants of asylum and five grants of withholding. In contrast to the number of denials by EOIR, of the 1,786 child asylum claims adjudicated by USCIS on the merits that this report analyzes, approximately 57% resulted in grants of asylum and just 43% resulted in denials or referrals as ineligible. While the overall grant rates may reflect the Asylum Office's application of the agency's child guidelines, this is not true across the board. As discussed above, great disparities in grant rates in children's cases across Asylum Offices may indicate lack of a child-sensitive approach.

⁹⁵ CGRS Database Case 4873.

⁹⁶ CGRS Database Case 5373.

⁹⁷ CGRS Database Cases 9740; 5057. The girl in case 9740 was granted asylum, while the girl in case 5057 was denied protection.

outcome may depend on the application of a child-sensitive analysis.⁹⁷ In both cases, the girls were stalked and threatened by gang members attempting to force them to become their sexual partner. In both cases, the IJs found the girls to be credible, including their claims of sexual assault. However, only the IJ who applied a child-sensitive approach granted relief, recognizing the applicant's youth in finding it unreasonable to expect her to relocate and in considering whether she warranted asylum as a matter of discretion.⁹⁸

Challenges to Establishing Membership in a Particular Social Group Lead to Inadequate Protection

Compounding the failures of protection that result from a lack of binding child-sensitive standards, children seeking asylum based on membership in a particular social group (the ground argued in many child cases)⁹⁹ frequently fail due to burdensome legal standards and incorrect application of legal principles.¹⁰⁰ Not only is social group the most contentious and least developed ground for protection, but children's social group claims – the majority of which are based on intrafamilial violence¹⁰¹ and resistance to organized gangs – are among the most controversial.¹⁰² As a result, children struggle to gain protection both before the Asylum Office and the Immigration Courts, even when it has been determined that the child suffered egregious harm rising to the level of persecution and is likely to suffer persecution in the future, because they cannot show that the harm was or will be inflicted because of a protected ground.¹⁰³

Immutability, Social Visibility, and Particularity

Courts recognize two different standards for membership in a particular social group. Under the immutable or fundamental characteristics standard – also known as the *Acosta* standard – a social group is a group of individuals who share a common characteristic that they are unable to change (such as sex) or should not be required to change because it is fundamental to conscience or identity (such as religious or other deeply held beliefs).¹⁰⁴ Under the standard applied by the majority of courts, however, a social group must not only meet the *Acosta* standard but also have “social visibility” (which requires that the group be perceived as a group or treated distinctly by the society) and particularity (which requires that the group be clearly defined) – also known as the *Acosta*-plus approach. Imposition of the social

⁹⁸ CGRS Database Case 9740.

⁹⁹ Out of the 1,786 claims adjudicated on the merits by USCIS that were analyzed for this study, more than half (908) were analyzed based on the particular social group ground. It is possible that even more of the claims were based on social group, because USCIS data indicates the ground upon which the Asylum Officer adjudicated the claim, which is not necessarily the ground argued by the applicant. In addition, 264 of the 1,786 cases decided on the merits have no basis of claim listed, meaning that while the protected ground might have been determined to be cognizable (capable of judicial recognition), a decision was made that the harm was not inflicted on that ground. Thus, it is possible that some of the 264 “no nexus” cases also include claims based on social group, but this information is not recorded by the agency. See also BHABHA, SEEKING ASYLUM ALONE, *supra* note 4, at 191 (reporting that USCIS statistics on children's cases from 1999 to 2003 show particular social group as the second most common basis of claim listed after political opinion).

¹⁰⁰ See, e.g., *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012) (rejecting social group of “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”); *Gomez-Guzman v. Holder*, 485 F. App'x 64 (6th Cir. 2012) (rejecting social group of “Guatemalan children under age fourteen”); *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010) (rejecting social groups of “young Guatemalan men recruited by gang members who resist such recruitment” and “street children”); *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009) (rejecting social group of “young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities”).

¹⁰¹ This includes physical and sexual abuse at the hands of family members, non-family member caretakers, and intimate partners.

¹⁰² Out of 175 children's asylum claims reviewed for this study, 150 were based in whole or in part on violence at the hands of organized gangs or intrafamilial violence.

¹⁰³ Several attorneys surveyed commented that the greatest gap in protection for children seeking asylum are the challenges to proving membership in a particular social group and nexus. See CGRS Survey, *supra* note 11; see also CGRS Database Case 9545 (USCIS referred to the immigration court based on a finding persecution was not on account of a protected ground in a case of a Salvadoran young woman who was savagely gang raped and beaten because she refused to date a gang member); CGRS Database Case 9557 (USCIS referred to immigration court based on finding past and feared persecution not on account of protected ground in case of a boy whose entire family was targeted by gang members after his parents testified against them in court for rape of his sister).

¹⁰⁴ *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). Every circuit to rule on the issue adopted *Matter of Acosta* (see discussion below regarding the Ninth Circuit's adoption of the standard), and it remained the standard in the federal courts for over twenty years, until the BIA, erroneously citing UNHCR refugee guidelines, stated that the *Acosta* standard was only a threshold and that social visibility and particularity also needed to be established. *Matter of C-A-*, 23 I. & N. Dec. 951, 959-960 (BIA 2006).

visibility and particularity requirements has been controversial and criticized by advocates, scholars, and the courts alike for the confusion these requirements have created and their restrictive interpretation of the refugee definition.¹⁰⁵

Federal Court of Appeals, unpublished BIA, and IJ decisions applying the *Acosta* standard have approved social groups defined by childhood and other immutable/fundamental characteristics such as gender, nationality, or lack of protection.¹⁰⁶ “Children,” and subsets of children, have also been recognized as particular social groups by Canada, the United Kingdom, New Zealand, and other countries that are parties to the 1951 United Nations Refugee Convention or its 1967 Protocol.¹⁰⁷ In contrast to the success that child-defined social groups have enjoyed under the *Acosta* standard, Courts of Appeals, BIA, and IJ decisions applying the *Acosta*-plus approach have consistently rejected social groups defined in part or in whole by childhood based on finding that such groups lack social visibility and/or particularity.¹⁰⁸

Social groups defined in part or in whole by childhood should be cognizable under either social group standard, when properly applied.¹⁰⁹ As mentioned above, age or childhood is an immutable characteristic at a given moment in time. Moreover, children or subgroups of children are arguably perceived as a group in society (or socially visible),¹¹⁰ and there are clear benchmarks by which to determine membership in a child-defined group (establishing particularity).¹¹¹ Indeed, in many societies, children or subgroups of children are targeted precisely because of their status in society and vulnerability as children. The reality, however, is that there is great resistance on the part of adjudicators to find that children in a range of circumstances constitute a cognizable social group, and the social visibility and particularity criteria have posed insurmountable barriers for some child asylum seekers.

¹⁰⁵ Some courts have treated social visibility in the literal sense, insisting that individual members of the group must be identifiable as group members to complete strangers, while others require that the group be recognized or perceived as a group in society. See Center for Gender & Refugee Studies Brief as Amici Curiae on Behalf of Non-Profit Organizations and Law School Clinics and Clinicians, *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (2013) (No. 09-71571). In addition, some courts conflate social visibility and particularity with other elements of the refugee definition, such as whether the nexus to a protected ground has been established, or whether an applicant has a well-founded fear of persecution. See, e.g., *Matter of S-E-G*, 24 I. & N. Dec. at 585; *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011); *Matter of C-A*, 23 I. & N. Dec. 951. See also, e.g., Benjamin Casper et al., *The Evolution-Convolution of Particular Social Group Law: From the Clarity of Acosta to the Confusion of S-E-G*, in IMMIGRATION PRACTICE POINTERS: TIPS FOR HANDLING COMPLEX CASES 565 (American Immigration Lawyers Association, 2010-11 ed.); see also Brief of UNHCR as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Att’y Gen.*, 502 F.3d 285 (3d Cir. 2007) (No. 08-4564). Two Courts of Appeals have rejected the requirements as unreasonable interpretations of the statute, causing a circuit split, and the BIA is currently reconsidering the issue. See *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011).

¹⁰⁶ See, e.g., *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (approving a particular social group of former child soldiers); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (“young girls in the Benadirri clan” can be a social group); DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 390 (2013) (citing *Matter of B-F-O*, No. 78-677-043, 24 IMMIG. RPT. B1-41, 43-44 (BIA Nov. 6, 2001) as recognizing “abandoned street children in Nicaragua” as a social group); but see *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005) (rejecting social group of “Honduran street children” based on finding that age is not immutable and that group is too broad and diverse). The Third Circuit’s rationale in *Escobar* is flawed. First, federal courts and the BIA have recognized age as an immutable characteristic; while age is not static, neither age nor status as a child can be altered at a given moment in time. See, e.g., *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (recognizing as a cognizable group “young Albanian women who live alone,” concluding that “[n]either their age, gender, nationality, or living situation are alterable”); *Matter of S-E-G*, 24 I. & N. Dec. at 583-84 (acknowledging that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”). Second, concern about the size or breadth of a social group is not a legally sound basis for denial. See discussion below.

¹⁰⁷ See, e.g., *Canada (Minister of Citizenship and Immigration) v. Patel*, [2009] 2 F.C.R. 196 (Can.) (finding “abandoned children” is a social group); *Li and Others v. Minister of Citizenship and Immigration*, [2000] IMM-932-00 [Federal Court] (recognizing “children from Fujian province” as a social group); *Canada (Citizenship and Immigration) v. Oh*, [2009] F.C. 506 (approving “children of the mentally ill in Korea” as a social group); *ST (Child asylum seekers) Sri Lanka v. Secretary of State for the Home Department*, (2013) UKUT 00292 (Upper Tribunal) (U.K.) (approving “children” and “children without family” as a particular social group); *DS (Afghanistan) v. Secretary of State for the Home Department*, (2011) EWCA Civ. 305 (Court of Appeal) (Afghan child orphans is a particular social group); Appeals Nos. 76305, 76306, 76307, 76308, [2010] (Refugee Status Appeals Authority) (recognizing “children” as a social group).

¹⁰⁸ See, e.g., *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010) (rejecting social group of “Guatemalan youth resisting gang recruitment” for lack of social visibility and particularity); *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012) (rejecting social group of “Salvadoran males between the ages of 8–15 who have been recruited by Mara 18 but refused to join the gang because of their principal opposition to the gang and what they want” [sic] under social visibility and particularity criteria); *Barríos v. Holder*, 581 F.3d 849 (9th Cir. 2009) (rejecting social group of “young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang’s criminal activities”); *Gomez-Guzman v. Holder*, 485 F. App’x 64 (6th Cir. 2012) (rejecting the group of “Guatemalan children under the age of 14” for want of particularity).

¹⁰⁹ See, e.g., CGRS Database Case 8602 (approving “children perceived to be from an illicit affair”); CGRS Database Case 3821 (approving “young poor females in Guatemala without the support of immediate family”); CGRS Database Case 216 (approving “children whose parents have abandoned them and who lack a surrogate form of protection”).

¹¹⁰ For example, most countries have special laws to protect children or distinguish children in some way. See, e.g., DHS Brief in *L-R*, *supra* note 59 (stating that distinct treatment in society exhibited either by higher levels of violence or lack of state protection, or other distinction establishes social visibility).

Social Groups Recognized by IJs and the BIA Under the *Acosta* Standard

- “Street children”
- “Young, poor females in Guatemala without the support of immediate families”
- “Honduran children who have been abandoned by parents and who lack a surrogate form of protection”
- “Young, poor females in Guatemala without the support of immediate family”
- “Maya Quiche female children who lack adult protection”
- “Orphaned immediate family”

Social Groups Rejected by IJs and the BIA Under the *Acosta-Plus* Social Visibility and Particularity Standard

- “Guatemalan children living with an abusive parent”
- “Children from impoverished families”
- “Young Honduran girls who lack protection from adult family members”
- “Young Salvadorans whose parents are unavailable to protect them”
- “Girls who reported their rape to the police”
- “Youth who oppose gang activity and have reported it to the police”
- “Young girls who resisted gang recruitment and witnessed gang crime”

Size of the Group

Some IJs have rejected social groups in children’s cases based on size, fearing that approving broadly defined groups will open the proverbial floodgates while not recognizing that establishing social group membership fulfills only one element of an asylum claim. For instance, an IJ denied the social group of “Chinese daughters in families,” reasoning that “allowing ‘daughters in a family’ or sons in a family or ‘cousins in a family’ to become a social group would open the door for almost [any] person fitting into some type of social group.”¹¹² Another judge rejected the group of “young Guatemalan women who are not adequately protected by family or the state” on the basis that the social group would “include every young woman in Guatemala.”¹¹³

IJs who reject a social group based on its size fail to recognize that approving a particular social group says little about the number of people who might ultimately qualify for asylum based on membership in the group. The stringent requirements of the refugee definition, such as proving well-founded fear of persecution and that the persecution feared is *on account of* group membership (nexus), filter out who can ultimately receive protection.¹¹⁴ Rejecting a social group based on its size is also not justifiable as a matter of statutory interpretation; as recognized by some courts, the particular social group ground should be read as similar in kind to the other enumerated grounds – race, religion, nationality, political opinion – each of which is susceptible to including large numbers of individuals.¹¹⁵ Moreover, recognition of broad groups does not necessarily lead to mass influxes of group members.¹¹⁶

¹¹¹ For example, a country’s laws addressing child welfare almost invariably define who is a child, and thus delineates who is and is not a member of a child-defined group. See *id.* (arguing that particularity is a question of an adjudicator’s ability to determine who is and is not a member of the group); see also *Matter of S-E-G-*, 24 I. & N. Dec. at 584 (explaining that particularity is a question of whether the group is too amorphous or is clearly defined).

¹¹² CGRS Database Case 1298.

¹¹³ CGRS Database Case 3704.

¹¹⁴ See *Cece*, 733 F.3d at 673 (rejecting fear of floodgates argument and explaining that even if a protected group of persons is large, the number who can demonstrate nexus is likely small); see also *Matter of H-*, 21 I. & N. Dec. 337, 343-44 (BIA 1996) (observing that “the fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership”).

¹¹⁵ See *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (noting that “we have rejected the notion that a persecuted group may simply represent too large of a population to allow its members to qualify for asylum”); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (approving the social group of “all alien homosexuals”); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/GIP/02/02, ¶ 18 (2002) (stating that “[t]he size of the purported social group is not a relevant criterion in determining whether a particular social group exists”).

¹¹⁶ See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 132-133 (2007) (noting that the U.S. reported no increase in claims based on female genital cutting following BIA’s approval of asylum in a female genital cutting case based on social group membership in *Matter of Kasinga*, and that Canada reported no increase in gender-based claims following its recognition of women as a social group).

Circularity

Adjudicators at all levels have rejected children’s social groups when defined in part by the harm a child has suffered or feared on the basis that the group is impermissibly “circular.” Generally it is true that a group cannot be defined solely by the persecution (e.g., “abused children”), because the characteristics of the group must be what motivate the persecution. In other words, it is the status of being a child that motivates the harm and the abuse is the result, but not the cause. However, when past harm places a person at higher risk of future harm (e.g., past targeting for sex trafficking), it is permissible to include that past harm as a characteristic, because past harm is a “shared past experience” that is immutable under the *Acosta* test and can also be something that gives the group social visibility.¹¹⁷ However, judges appear to be confused and have rejected groups defined in part by past harm. For example, an IJ rejected the group of “Haitian restaveks” as circularly defined, finding that the status as a “restavek” – a live-in child domestic servant – inherently includes persecution. However, the IJ misunderstood the facts, disregarding evidence that being a restavek does not itself equate with persecution, but it is the characteristics of children who are restaveks that make them susceptible to persecution – their status and vulnerability as children lacking parental protection and dependent on a host family for care, and instead focused only on the abuse restaveks endure. In addition, the IJ failed to recognize that the fact of having been a restavek in the past makes a child more susceptible to future persecution because of societal views stigmatizing children subjected to those practices.¹¹⁸

Recommendations

- 1) DHS and the Department of Justice (DOJ) should issue draft asylum regulations as expeditiously as possible that comply with the TVPRA mandate to issue regulations that “take into account the specialized needs of unaccompanied alien children,” in order to provide guidance to adjudicators and ensure consistent and fair application of the law. Looking to the U.S. and UNHCR guidelines and the Refugee, Asylum, and International Operations Combined Training Course Materials on children’s claims as models, the regulations should provide guidance on how to assess each element of the refugee definition, as well as issues of corroboration, credibility, discretion, and bars to asylum, in a child-centered manner – taking into account age, developmental stage, maturity, mental health, and cultural factors, and granting each child the liberal benefit of the doubt. The regulations should define the particular social group ground according to the standard set forth in *Matter of Acosta* (requiring a common immutable or fundamental characteristic among group members) without any additional requirements, and should clarify that a social group need not be small to be cognizable. Under the *Acosta* standard, “children” or subsets of children defined by immutable or fundamental characteristics in addition to the immutable characteristic of childhood should qualify as a particular social group. The regulations should also address the problematic nexus element, clarifying that objective or other circumstantial evidence that the state or society tolerates persecution against individuals similarly situated to the applicant can establish nexus. In addition, the regulations should require adjudicators to consult all reliable country conditions evidence submitted in a case.

¹¹⁷ See *Cece*, 733 F.3d 662 (recognizing social group of young Albanian women who live alone and, as a result, are targeted for prostitution); *Matter of Kasinga*, 21 I. & N. Dec. 357 (recognizing the social group of “young women of the Tchamba-Kusuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice”); see also *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2010) (approving “women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing”); cf. *Escobar v. Holder*, 657 F.3d 537, 545 (7th Cir. 2011).

¹¹⁸ CGRS Database Case 9869.

¹¹⁹ The 2007 EOIR OPPM GUIDELINES FOR IMMIGRATION COURT, *supra* note 30, encourages IJs to consult the U.S. Guidelines, but this has been insufficient to ensure that IJs and the BIA apply them.

- 2) Congress should enact Section 5 of the Refugee Protection Act of 2013, S. 645, which clarifies that “any group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of a person’s human rights, such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement,” and that “Direct or circumstantial evidence, including evidence that the State is unable to protect the applicant or that State legal or social norms tolerate such persecution against persons like the applicant, may establish that persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion.”
- 3) Until regulations are issued, EOIR and USCIS should make the 2009 UNHCR Guidelines binding on IJs, the BIA, and the USCIS Asylum Office. DHS and DOJ should also clarify that the 1998 INS Guidelines are binding on Asylum Officers and on EOIR adjudicators, respectively, except to the extent that they have been superseded by case law. The EOIR Office of the Director should oversee application of the U.S. and UNHCR guidelines so that they are consistently applied, and so that IJs and the BIA can be held accountable for failing to implement them.¹¹⁹
- 4) The BIA should *sua sponte* (of its own accord) reopen and vacate its decision in *Matter of S-E-G*- based on its failure to consider or apply the U.S. or UNHCR guidelines. In the alternative, the Attorney General should certify and vacate *Matter of S-E-G*- based on the BIA’s failure to consider or apply the U.S. or UNHCR guidelines.

Convention Against Torture Claims: Lack of Guidance and Lack of Child-Sensitive Decisions

An individual seeking protection under the Convention Against Torture (CAT) must prove that he or she would more likely than not be subjected to torture by the government, or with the “consent or acquiescence” of the government.¹²⁰ Logically, recognition that a child-sensitive approach should be applied when considering forms of persecution of children for asylum should extend to analyzing child-specific forms of torture and government acquiescence to torture in CAT cases. However, neither the U.S. nor the UNHCR guidelines address children’s CAT claims (the latter, issued before implementation of the CAT into U.S. law). The high burden of proof in CAT claims – including the likelihood, type of harm, and State action required to establish eligibility – combined with the absence of guidance regarding how to analyze CAT claims for children, makes winning CAT protection especially difficult for children.

Of the 28 CAT determinations reviewed for this study at the IJ and BIA levels,¹²¹ only three resulted in CAT grants, and only one IJ applied a child-sensitive analysis. The applicant in that case was a Honduran street child who endured abuse in the family home he fled, as well as exploitation and beatings while living in the streets. The IJ granted CAT based on the government’s deplorable treatment of street children – including evidence that some police officers exploited or physically and sexually abused street children – and its failure to protect street children from the many criminals who targeted them, as well as its failure to provide them shelter and necessary care or services.¹²² Critically, the IJ analyzed the government’s failure to provide care, services, and protection to street children as part of determining if the State acquiesced to the torture.

¹²⁰ 8 C.F.R. § 208.18(a)(1) (setting forth the definition of torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for impermissible purposes – including discrimination, coercion, or to obtain a confession, “when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or another person acting in an official capacity”).

¹²¹ Many of the decisions collected by CGRS did not reach the issue of CAT eligibility because the child did not seek CAT protection or because asylum or withholding of removal was granted.

¹²² CGRS Database Case 3996.

Judges who do not apply a child-sensitive analysis to the CAT elements do not consider whether governments have a heightened duty to protect children from harm such as torture and do not apply a reduced threshold of torture in children's cases.¹²³ Other judges do not include a legal rationale at all for why a child has not established eligibility for CAT protection or provide only minimal analysis.¹²⁴ For example, a Chinese girl claimed that if she were forced to return to China she would be arrested and placed in a re-education camp for having left the country illegally. She argued that conditions in the camp would amount to torture, and that in addition she would be tortured by camp officials. Without any regard for her status as a child and how it affected whether conditions in the camp would constitute torture for a child, and with little analysis of the evidence or legal elements, the IJ held that being placed in a re-education camp did not amount to torture. The IJ failed to address the girl's argument that in addition to the conditions themselves rising to the level of torture, guards would torture her.¹²⁵

Recommendation

DHS and DOJ should draft regulations setting out a child-sensitive framework for evaluating each element of the Convention Against Torture, including most significantly torture, government acquiescence, and likelihood of harm.

ICE Office of the Chief Counsel's Position in Children's Asylum Cases

Recognition of Child-Sensitive Standards is Not Consistent

ICE has designated and trained attorneys in each Office of the Chief Counsel to handle cases involving UACs. This approach is commendable, and in many cases, ICE Assistant Chief Counsel appear sensitive to the special needs of child asylum seekers in line with domestic agency and international guidelines. For example, ICE Assistant Chief Counsel stipulate to grants of relief in some cases, applying a child-sensitive approach to the elements of the refugee definition.¹²⁶ However, some ICE Assistant Chief Counsel also sometimes take positions inconsistent with established guidelines and standards that should apply in children's cases. For example, some ICE attorneys argue against finding that the elements of asylum have been proven without considering the reduced and special standards for children concerning persecution,¹²⁷ nexus,¹²⁸ state inability and unwillingness to protect, relocation, corroboration, and application of the statutory bars to asylum.¹²⁹ Moreover, ICE Assistant Chief Counsel frequently argue for a restrictive interpretation of the particular social group ground for asylum in children's cases.¹³⁰ Some ICE attorneys have also contested the credibility of child applicants for minor inconsistencies or implausibilities in their testimony, without considering what is reasonable to expect from a child's testimony.¹³¹

¹²³ See, e.g., CGRS Database Cases 6221; 9525; 9861; 9869; 3242; 4620.

¹²⁴ Failure to provide a legal rationale for denying CAT protection constitutes legal error. See 8 C.F.R. § 1240.12(a) (stating that the decision of the immigration judge in removal proceedings shall contain the reasons for granting or denying a request for relief from removal); cf. *Matter of M-P*, 20 I. & N. Dec. 786, 787 (BIA 1994) (faulting the IJ for failing to provide any explanation for denying the respondent's motion to reopen).

¹²⁵ CGRS Database Case 369.

¹²⁶ See, e.g., CGRS Cases 3624 (ICE attorney agreed to limit testimony to avoid revictimization and stipulated to relief on basis of the documents submitted); 5237 (ICE attorney stipulated to a grant of asylum without testimony); 8602 (ICE attorney did not contest the child's credibility, allowing for more limited testimony).

¹²⁷ CGRS Database Case 9536 (ICE attorney argued that girl's beatings by father, being forced to work, being stripped of education, and witnessing father's abuse of mother – including father shooting at mother – did not rise to the level of persecution, but the Judge disagreed and found persecution).

¹²⁸ CGRS Database Case 9717 (ICE attorney disregarded country conditions evidence showing high rates of child abuse, societal acceptance of child abuse, and failure of the state to protect children from violence in the family, and argued that Guatemalan mother's violent and brutal abuse of her three children was motivated by her alcoholism and inability to control her anger, rather than a protected ground).

¹²⁹ See, e.g., CGRS Database Case 8284 (ICE attorney argued child failed to prove persecution could not be avoided through relocation because the family made no effort to move, but applicant was a UAC and ICE failed to consider reasonableness for child to move on own or child's inability to make family move); Case 3869 (ICE attorney argued that former child soldier forced into Lord's Resistance Army should be barred from asylum as a persecutor of others and for committing serious non-political crime).

¹³⁰ See, e.g., CGRS Database Case 1097 (ICE attorney argued that family was not a particular social group where the father was not in the social group because he was the persecutor); CGRS Database Case 5377 (ICE attorney argued that Salvadoran stepdaughters is not a social group).

Stipulating to Lesser Forms of Relief Can Discourage Children from Seeking Asylum

Some ICE Assistant Chief Counsel offer to stipulate to a grant of withholding or CAT in lieu of asylum prior to testimony being taken, which can be positive in that it allows the child to avoid having to testify, and perhaps be subject to protracted litigation. However, these statuses offer fewer long-term protections. A better outcome would be to stipulate to asylum in such cases so that the child can obtain permanent status and receive benefits, which do not accompany a grant of withholding of removal or CAT.¹³² Offers of these lesser forms of relief can serve the child poorly in that they discourage the child from pursuing more favorable and permanent protection. For example, in the case of a Salvadoran girl who was kidnapped by the 18th Street gang (Mara 18) and enslaved for several months during which gang members beat and raped her and forced her to clean, cook, and otherwise serve the gang, the government offered a grant of CAT relief.¹³³ ICE Assistant Chief Counsel indicated that the government would have opposed a grant of asylum or withholding of removal, which could have meant a drawn-out legal battle and no form of protection at all. Rather than take her chances, the girl accepted CAT, despite her valid claim to persecution on account of a protected ground related to her gender-defined social group.

Restrictive Use of Prosecutorial Discretion

Like all law enforcement agencies, ICE has the authority to exercise “prosecutorial discretion” at any point during a case for a range of prosecutorial decisions – such as whether to initiate removal proceedings, whether to oppose a motion, whether to settle a case or particular issues in a case, whether to appeal a decision, and whether to execute a removal order.¹³⁴ Despite the broad range of opportunities to exercise prosecutorial discretion favorably, some ICE Assistant Chief Counsel do not exercise it to limit contested issues or to waive appeal in cases of principal child applicants.¹³⁵

In 2011, the Obama Administration announced that ICE would exercise prosecutorial discretion to terminate or administratively close certain “low priority” immigration cases in removal proceedings so that ICE could focus its limited resources on pursuing removal of immigrants who pose a threat to national security or public safety.¹³⁶ Prosecutorial discretion halts removal proceedings temporarily, but it does not provide legal status or create a path to citizenship, and the government can withdraw the reprieve it affords at any point.¹³⁷ Under the policy, ICE Assistant Chief Counsel have offered to exercise this discretion to administratively close removal proceedings of principal child asylum applicants. This can be seen as a positive development for children with weak claims, but ICE attorneys sometimes offer prosecutorial discretion to children with viable asylum claims, leading children to accept administrative closure when they might be eligible for asylum.

¹³¹ CGRS Database Case 5500 (ICE attorney argued child was not credible because of two month disparity between his testimony about when last threatened by gangs and his parents’ testimony about the same); CGRS Database Case 9543 (ICE attorney argued child diagnosed with PTSD not credible because of omission regarding his rape).

¹³² Asylum provides more permanent protection than withholding of removal and relief pursuant to the CAT, such as the ability to seek permanent residence after one year and eventual citizenship. Unlike an individual granted withholding of removal or CAT protection, an asylee can also petition to bring her spouse and children to the U.S. In addition, significant benefits attach to asylum that do not attach to withholding of removal or CAT, such as access to federal foster care for refugees under the age of 21, education benefits, English language instruction, and more. See THE ADVOCATES FOR HUMAN RIGHTS, *Advising Your Client After Asylum is Granted*, in PRO BONO ASYLUM REPRESENTATION MANUAL 70-74 (2010).

¹³³ CGRS Database Case 8722.

¹³⁴ Since 1976, immigration agency leaders have issued memoranda on the appropriate use of prosecutorial discretion in the immigration enforcement context. See, e.g., SAM BERNSON, INS GENERAL COUNSEL, LEGAL OPINION REGARDING SERVICE EXERCISE OF PROSECUTORIAL DISCRETION (1976); BO COOPER, INS GENERAL COUNSEL, INS EXERCISE OF PROSECUTORIAL DISCRETION (2000); DORIS MEISSNER, INS COMMISSIONER, EXERCISING PROSECUTORIAL DISCRETION (2000); WILLIAM HOWARD, PRINCIPAL LEGAL ADVISOR, U.S. DEPARTMENT OF HOMELAND SECURITY, PROSECUTORIAL DISCRETION (Oct. 24, 2005).

¹³⁵ CGRS Survey, *supra* note 11.

¹³⁶ See National Immigration Law Center, *Obama Administration Finally Flexes its Prosecutorial Discretion Muscle*, Aug. 18, 2011, <http://www.nilc.org/2011aug18pd.html>.

¹³⁷ JOHN MORTON, DIRECTOR, 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 (2011).

In some jurisdictions, ICE Assistant Chief Counsel simply refuse to offer discretion to terminate or administratively close removal proceedings of principal child asylum applicants. In one jurisdiction, for example, ICE Assistant Chief Counsel claims that UACs do not qualify for prosecutorial discretion because of their recent arrival to the United States.¹³⁸ ICE balances a range of factors when deciding whether to exercise its discretion to administratively close cases, considering positive factors such as an immigrant's length of presence in the U.S. and ties to the community, and whether the immigrant is a minor or an elderly person, or is pregnant or disabled. Noticeably absent from this list is being a UAC. Negative factors ICE considers include criminal history, gang membership, and multiple immigration violations. Although recent entry is a negative factor in this analysis, being a minor should be a positive factor that might outweigh the recent nature of entry to the United States, but ICE does not consider it in all cases.¹³⁹

In addition, while not a widespread practice, some ICE Assistant Chief Counsel are willing to make prosecutorial discretion offers prior to merits hearings in order to save the time they would otherwise put into litigating these cases. However, they might not be willing to extend an offer to exercise prosecutorial discretion to waive appeal or administratively close proceedings once asylum has been denied if the child refused the offer before the hearing. One case in particular highlights the need for binding guidance on offers of prosecutorial discretion for ICE field and Office of Chief Counsel offices (where ICE Assistant Chief Counsel practice) across the country. In that case, an ICE attorney pressured a Honduran girl who sought asylum based on child abuse to accept prosecutorial discretion in lieu of proceeding on her asylum claim. The girl declined the offer, preferring to pursue asylum. When the IJ indicated that she was inclined to grant the case, the ICE attorney expressed her intent to appeal the decision. The girl's attorney contacted ICE Assistant Chief Counsel to ask if ICE would consider exercising prosecutorial discretion to waive appeal, but ICE Assistant Chief Counsel told the girl's attorney that she would not waive appeal because the girl had turned down the offer made prior to litigation.¹⁴⁰ Penalizing a child for not accepting an offer of prosecutorial discretion is harsh and does not take into account child asylum seekers' vulnerabilities. Furthermore, offering to exercise prosecutorial discretion only before a merits hearing makes some sense from an efficiency standpoint, but doing so after a decision equally conserves ICE attorney resources by saving time on litigating an appeal.

Recommendations

- 1) ICE Assistant Chief Counsel should be guided by, and adopt positions consistent with, the U.S. and UNHCR guidelines in every child's asylum case. The Office of the Principal Legal Advisor for ICE should hold local Offices of the Chief Counsel accountable for lack of compliance with the guidelines.
- 2) ICE should amend its memorandum, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (Jun. 17, 2011), to explicitly address the use of prosecutorial discretion in cases of UACs. Age is already a positive factor for consideration under the memorandum, but UACs are not recognized for their heightened vulnerability of lacking a parent or legal guardian to provide care and support in the face of potential removal, in addition to their child status. Specifically, the memorandum should state that:
 - a. Being a UAC is a positive factor for consideration of prosecutorial discretion.
 - b. ICE should exercise prosecutorial discretion favorably in UAC cases at every point of decision making, unless doing so compromises national security or public safety in a particular case.

¹³⁸ CGRS Survey, *supra* note 11; CGRS Database Case 9894.

¹³⁹ See MORTON, PROSECUTORIAL DISCRETION MEMO, *supra* note 137, at 4 (listing "age – with particular consideration given to minors" as a factor for consideration of prosecutorial discretion).

c. ICE Assistant Chief Counsel offers to terminate or administratively close proceedings in UAC cases should apply as long as a case is pending, unless negative factors under the prosecutorial discretion policy have arisen.

3) Guidance for ICE Assistant Chief Counsel should clarify that it is not appropriate to offer settlement deals that restrict children to limited relief and benefits (e.g., CAT), when they may be eligible for more generous forms of relief that afford greater access to benefits (i.e., asylum). Instead, Assistant Chief Counsel should be encouraged to stipulate in advance of hearings to the form of relief for which the child is eligible that provides the most permanent protection and benefits.

Procedural Issues Specific to Children’s Asylum Claims

Initial Jurisdiction

The TVPRA of 2008 granted the USCIS Asylum Office initial jurisdiction over asylum claims of all UACs, including children in removal proceedings claiming UAC status.¹⁴¹ This positive change in law recognized that unaccompanied children should have their claims heard in the non-adversarial setting of the Asylum Office, by officers who receive more intensive training in asylum and in interviewing children than do immigration judges.¹⁴²

After the provision went into effect, advocates and the USCIS Ombudsman (CISOMB) raised concerns about USCIS’ implementation of its initial jurisdiction authority, including that: (1) USCIS conducted redeterminations of UAC status for children previously found to be UAC by a federal agency such as Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), or EOIR, and that this approach – which resulted in children being subjected to “multiple UAC determinations” – was at odds with TVPRA’s “express purpose” to “provide timely, appropriate relief for vulnerable children;”¹⁴³ and (2) children were questioned on initial jurisdiction and asylum at the same interview, which meant that children ultimately found not to be UACs unnecessarily testified about the basis of their asylum claims, only to have to repeat their testimony in court.¹⁴⁴ In addition, advocates expressed concern that Asylum Officer interviews regarding initial jurisdiction intimidated children.¹⁴⁵

In response, USCIS recently issued a new, improved policy that addresses some of these concerns. USCIS should be commended for this new policy. As discussed below, however, the new policy is not without flaws – both as written and as implemented. Limits to the policy itself include: (1) lack of retroactivity to children found not to be UACs under USCIS’ previous, more restrictive policy; and (2) no change in procedures in cases where USCIS must determine in the first instance whether a child is a UAC. Implementation challenges include IJ and ICE Assistant Chief Counsel confusion about who qualifies under the new policy, and resistance to transferring cases to USCIS. Moreover, even if the new policy were expanded and better implemented, it would not benefit accompanied children in removal proceedings who are principal asylum applicants.

¹⁴⁰ Ultimately ICE agreed not to appeal, but only after both the Chief Counsel and DHS headquarters were alerted. CGRS Database Case 9860.

¹⁴¹ TVPRA § 235(d)(7)(B).

¹⁴² IJs have jurisdiction over a much broader range of claims than do USCIS Asylum Officers who focus solely on asylum. As a result of their broader jurisdiction, IJs receive training on a broader range of issues than Asylum Officers. This explains, in part, why Asylum Officers receive more extensive training on asylum than IJs.

¹⁴³ CISOMB RECOMMENDATION, ENSURING A FAIR AND EFFECTIVE ASYLUM PROCESS FOR UNACCOMPANIED CHILDREN 4-5 (2012) (hereinafter CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS).

¹⁴⁴ *Id.*

¹⁴⁵ CGRS Survey, *supra* note 11.

New USCIS Policy, as of June 2013

Under its prior policy, USCIS made its own determination of UAC status for every child in removal proceedings who claimed such status, even when CBP or ICE had already determined that a child was a UAC; this separate USCIS UAC redetermination process received much criticism.¹⁴⁶ Under the new USCIS policy, if a decision has been made by CBP or ICE officials that a child is a UAC, USCIS will accept the determination and find that it has jurisdiction over the case. The group of immigrant children most affected by this new policy will be those apprehended by CBP or ICE who are determined to be UACs and placed in the custody of ORR. Children who are released from ORR custody to a parent or legal guardian will continue to be viewed as unaccompanied, and USCIS will not readjudicate this classification unless CBP, ICE, or HHS has affirmatively terminated UAC status.¹⁴⁷ Instead, USCIS will interview these children only on the merits of their asylum claims.

Most children in removal proceedings will have had contact with ICE or CBP and will have received a UAC determination at the time that ICE or CBP issued the charging document placing the child in removal proceedings.¹⁴⁸ However, a small number of children in removal proceedings may not have received a UAC determination because they were accompanied at the time the charging document was issued and only later became unaccompanied. USCIS will continue to interview children in this situation on both UAC status and asylum in order to decide whether it has initial jurisdiction over their asylum claims.

Consistent with TVPRA's intent, the new policy ensures that a greater number of children will benefit from the more appropriate setting of the Asylum Office than the immigration courts, without having to undergo multiple UAC determinations.¹⁴⁹ It also increases efficiency by reducing the number of cases heard by two different agencies, and lessens burdens on the immigration courts. In addition, this policy improves the quality of asylum interviews by keeping them focused on the merits of the claim, rather than on UAC status when a determination has already been made, which streamlines the interview and reduces stress for children.¹⁵⁰

Shortfalls of the new USCIS policy

While a positive advance, the new USCIS policy falls short in two respects as written. First, the policy does not apply retroactively to children who USCIS previously found not to meet the definition of a UAC under its former policy, even if they would now qualify as unaccompanied under USCIS' new approach of deferring to previous UAC determinations made by CBP and ICE.¹⁵¹ These children were referred to immigration court solely because they were found not to qualify

¹⁴⁶ CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143, at 4. USCIS found that it lacked jurisdiction in 44% of cases filed in 2010 and 39% of cases filed in 2011, and in March 2012, USCIS found no jurisdiction in 45% of cases filed. *Id.* at 6.

¹⁴⁷ See LORI SCIALABBA, DEPUTY DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, RESPONSES TO CISOMB RECOMMENDATIONS, "ENSURING A FAIR AND EFFECTIVE ASYLUM PROCESS FOR UNACCOMPANIED CHILDREN," 3 (2013) (hereinafter USCIS RESPONSES TO FAIR AND EFFECTIVE ASYLUM PROCESS).

¹⁴⁸ A charging document is the written instrument that initiates removal proceedings before an immigration judge. In children's cases, a charging document may include a Notice to Appear or a Notice of Referral to Immigration Judge. 8 C.F.R. § 244.1.

¹⁴⁹ Advocates expressed concerns about USCIS' previous approach, including that children had to undergo UAC determinations twice (first by CBP or ICE and then again by USCIS), and that Asylum Officer questions related to UAC status stressed, confused, and unnecessarily traumatized children. See CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143, at 6-7 (stating that USCIS jurisdictional assessments "explor[e] the parent- or legal guardian-child relationship," and noting that stakeholders nationwide reported that up to half of USCIS' questions during UAC asylum interviews focused on jurisdiction). Advocates also voiced concern about USCIS' policy of interviewing children on both UAC status and the merits of their asylum claims during the same interview; in cases where USCIS found no jurisdiction, children had to retell their stories in immigration court – and risked having USCIS forward "potentially harmful records to ICE." *Id.* at 7. Advocates also noted with concern that having to retell their stories unnecessarily placed children at risk of traumatization and re-traumatization. These concerns came to light through the CGRS attorney survey.

¹⁵⁰ The number of UACs placed in the custody of the Office of Refugee Resettlement has increased significantly in recent years, from 7,000-8,000 annually prior to FY 2012, to 13,625 in FY 2012, and 24,668 in FY 2013. ADMIN. FOR CHILDREN AND FAMILIES, DEP'T OF HEALTH AND HUMAN SERVICES, REFUGEE AND ENTRANT ASSISTANCE, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 233 (2013); Fusion broadcast, *supra* note 3; see also KIND, THE TIME IS NOW, *supra* note 4 (reporting influx of UACs from October 2011-June 2012); WRC, FORCED FROM HOME, *supra* note 4. USCIS' new policy regarding jurisdiction, combined with the increased number of children in ORR custody will result in Asylum Offices hearing many more UAC claims than under its previous policy. This increase in UAC asylum claims heard at USCIS calls for USCIS' careful attention to the range of issues raised in this report.

as UACs and now must continue to pursue asylum in an adversarial setting. USCIS' decision not to make the new policy retroactive harms such children who have already testified before USCIS and must tell their stories again in immigration court, subjecting them to potential traumatization or re-traumatization.¹⁵² It is also a poor use of government resources, because USCIS could issue decisions in these cases based on interviews already conducted, rather than requiring EOIR to adjudicate them.

Second, USCIS' new policy does not change how the agency will conduct determinations for children in removal proceedings who have not received a prior UAC determination by any federal agency. In these cases, USCIS will continue to question children about UAC status and their asylum claims during the same interview – interviewing children first about their parents' whereabouts and immigration status and the parent-child relationship, and then about their asylum claim¹⁵³ – despite concerns raised by advocates that Asylum Officer questions related to UAC status stress, confuse, and unnecessarily traumatize children. Advocates have also voiced concern about this aspect of USCIS' policy because of the mental health risks to children found not to be UACs and who must repeat their stories in immigration court if USCIS finds it does not have jurisdiction to decide the merits of the claim.¹⁵⁴ Rather than interviewing children without a prior UAC determination about both UAC status and asylum during the same interview, USCIS could determine UAC status based on documentary evidence provided by children, such as evidence that they have no parent or legal guardian in the U.S., evidence of their age, and evidence of lack of legal immigration status, and limit interviews to the merits of a child's asylum claim.

Implementation Challenges of the New UAC Determination Policy

USCIS' implementation of its new policy has been smooth internally. The agency has not been re-interviewing children about their UAC status and has not readjudicated UAC status in cases where ICE or CBP previously determined that a child is a UAC.¹⁵⁵ However, some children have experienced difficulty transferring their cases from EOIR to USCIS because of resistance on the part of IJs or ICE Assistant Chief Counsel, who appear to be confused by the new policy.

Following enactment of the TVPRA, EOIR issued a memorandum to IJs and all court staff that encourages IJs to "ensure smooth coordination among government agencies responsible for the implementation of the asylum jurisdictional provisions of the TVPRA, while ensuring that the UAC experiences the smoothest possible prompt access to all available relief."¹⁵⁶ The memorandum states that "in order to meet EOIR's obligations under the TVPRA, and meet the goal of smooth implementation of the TVPRA, it will be necessary in most or all cases to grant continuances to allow the UAC to pursue asylum before USCIS."¹⁵⁷ Consistent with EOIR policy and USCIS' new policy, many IJs grant continuances for children to seek asylum before USCIS when they appear to qualify under USCIS' new policy. However, some IJs seem confused by the new policy and deny motions to continue or to administratively close cases when they believe a child does not fall within the policy, even when CBP or ICE has made a determination that the child is a UAC.¹⁵⁸ One IJ recently held an evidentiary hearing on whether a child – who had been held in ORR custody following a determination by CBP

¹⁵¹ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, UPDATED PROCEDURES FOR DETERMINATION OF INITIAL JURISDICTION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN 4 (2013).

¹⁵² See *infra* section on Importance of Procedural Protections in Cases of Past Trauma.

¹⁵³ CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143, at 7; CGRS Survey, *supra* note 11; KIND Survey, *supra* note 11.

¹⁵⁴ CGRS Survey, *supra* note 11.

¹⁵⁵ Information provided by KIND field offices.

¹⁵⁶ MICHAEL C. MCGOINGS, ACTING CHIEF IMMIGRATION JUDGE, DOJ, IMPLEMENTATION OF THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 ASYLUM JURISDICTIONAL (INTERIM GUIDANCE) (2009) (encouraging IJs to grant continuances in order for USCIS to adjudicate UAC claims).

¹⁵⁷ *Id.*

¹⁵⁸ Reports from KIND field offices. One IJ, for example, advised a child not to file with USCIS because the IJ believed the child was not a UAC since the child was living with a parent, although the child had been in ORR custody and thus qualifies as a UAC under USCIS' new policy.

that he was a UAC – was in fact unaccompanied. Because the child had been released from ORR custody to his parent, the IJ found that he did not meet the definition of a UAC under the statute (which defines a UAC in part by the lack of a parent or guardian in the United States to care for the child) and denied his motion to continue to file his claim with USCIS. The child’s attorney argued that he qualified as a UAC under USCIS’ June 2013 policy and that the TVPRA granted USCIS, not EOIR, jurisdiction to make such a determination, but the IJ was not persuaded.¹⁵⁹

Confusion extends to ICE Assistant Chief Counsel. While some Assistant Chief Counsel have assisted children seeking to have their claims heard by the Asylum Office, others have opposed motions to continue or administratively close cases for children who fall within the new policy to seek asylum before USCIS.¹⁶⁰ In certain jurisdictions, ICE attorneys question children in an effort to make their own UAC determinations and contest UAC eligibility for those they think do not meet the legal definition, even when they clearly meet USCIS’ new requirements.¹⁶¹ USCIS issued two documents intended to provide guidance on its new policy, but these documents have been insufficient to clarify the confusion.¹⁶²

Accompanied Principal Child Applicants Not Protected

Because the TVPRA’s initial jurisdiction provision is limited to UACs, accompanied principal child asylum applicants in removal proceedings must proceed on asylum before the immigration court.¹⁶³ Thus, children falling into the latter category seek asylum in an adversarial setting that was not designed for children, where they are subject to cross-examination and may lack legal representation.¹⁶⁴ Regardless of their status as accompanied or unaccompanied, all child asylum seekers who are principal applicants are vulnerable by virtue of their age and developmental stage, the fact that they have fled past harm or fear persecution, their risk of deportation, and their involvement in a complicated legal system. All of these factors render the adversarial setting of the immigration courts an inappropriate venue for children’s asylum claims.

Recommendations

- 1) Congress should expand TVPRA’s initial jurisdiction provision to grant USCIS jurisdiction over all principal asylum applicants who are younger than 18 years of age on either the date the asylum application is filed or the date the Notice to Appear is issued, regardless of their unaccompanied status.
- 2) USCIS should expand its Updated Procedures for Determination of Initial Jurisdiction Over Asylum Applications Filed by Unaccompanied Alien Children to retroactively apply to all children USCIS determined were not UACs under its initial jurisdiction procedures in effect until June 10, 2013, who would otherwise qualify as UACs under the updated procedures because ICE or CBP previously found them to be UACs and have not formally terminated their UAC status. To resolve confusion on the part of some IJs, ICE Assistant

¹⁵⁹ CGRS Database Case 9895.

¹⁶⁰ An applicant recently sought administrative closure to file an asylum application with USCIS. The ICE trial attorney had no knowledge of USCIS’ new policy and objected to administratively closing the case because the applicant had recently turned 18 and so did not qualify as a UAC under the definition in the Homeland Security Act. However, under USCIS’ new policy, the boy – who had been placed in ORR custody as an unaccompanied minor – and in whose case neither CBP, ICE, nor HHS had taken affirmative action to terminate UAC status – qualifies as a UAC.

¹⁶¹ CGRS Survey, *supra* note 11.

¹⁶² See TED KIM, ACTING CHIEF OF ASYLUM DIVISION, DHS, UPDATED PROCEDURES FOR DETERMINATION OF INITIAL JURISDICTION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN, (2013); USCIS QUESTIONS AND ANSWERS: UPDATED PROCEDURES FOR DETERMINATION OF INITIAL JURISDICTION OVER ASYLUM APPLICATIONS FILED BY UNACCOMPANIED ALIEN CHILDREN (2013) (hereinafter USCIS, UPDATED PROCEDURES Q&A).

¹⁶³ Children who fall into this category include: (1) children who USCIS previously determined are not UACs; (2) children without a prior UAC determination who USCIS interviews and finds are not UACs; and (3) children who previously were designated as a UAC but have had such designation terminated. See TED KIM, UPDATED PROCEDURES FOR DETERMINATION OF INITIAL JURISDICTION *supra* note 162; USCIS, UPDATED PROCEDURES Q&A, *supra* note 162, at 4.

¹⁶⁴ See Section 2 for detail on challenges for children in the adversarial immigration court system.

¹⁶⁵ Currently, only nine states have enacted laws that entitle individuals to state identification cards or drivers’ licenses recognized as a valid form of identification regardless of immigration status. See NAT’L IMMIGRATION LAW CTR., CURRENT & PENDING STATE LAWS AND POLICIES ON DRIVERS’ LICENSES FOR

Chief Counsel, and children’s counsel, USCIS should further clarify in its updated procedures which children qualify as UACs under the new policy, and should establish a specific procedure for transferring asylum claims pending before the immigration courts, the BIA, or the federal Courts of Appeals to USCIS.

- 3) EOIR should revise its March 2009 Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance) Memorandum to incorporate USCIS’ updated procedures and to clearly state that IJs should grant continuances or administratively close the cases of children claiming UAC status and should not make their own finding as to UAC status. EOIR should also provide training to immigration judges on implementing this policy.
- 4) Headquarters of the Office of the Principal Legal Advisor of ICE should issue additional internal guidance to all Offices of the Chief Counsel that clarifies which children fall within USCIS’ new policy, and specifies that ICE Assistant Chief Counsel should not oppose motions to continue cases in order for children claiming UAC status to exercise their right to pursue asylum before USCIS. The guidance should also specify that Assistant Chief Counsel should not oppose motions to administratively close cases once children claiming UAC status have filed an asylum application with USCIS. All ICE Assistant Chief Counsel should receive training on implementing the new policy.
- 5) In those cases in which UAC status and USCIS jurisdiction remain at issue, prior to scheduling the asylum interview, USCIS should make a UAC determination based on proof of UAC status filed by a child. For cases where USCIS finds jurisdiction, it should promptly schedule an asylum interview. For cases where USCIS finds no jurisdiction, it should refer children in removal proceedings back to court without conducting an asylum interview.

Work Authorization

Children seeking asylum are often eager to apply for work authorization to use as a form of identification,¹⁶⁵ or to work on a part-time basis if they are old enough to work legally. Asylum applicants become eligible to receive work authorization 180 days after filing for asylum if no determination has been made in their case.¹⁶⁶ However, principal child asylum applicants in removal proceedings face challenges to receiving work authorization because they often cannot reach the 180-day mark (1) because of the way that the 180-day period is calculated, and (2) because of the confusion that has resulted from the interchange between USCIS and EOIR in UAC cases.

“Asylum Clock”

USCIS and EOIR calculate the number of days an asylum case has been pending before their respective agencies through an “asylum clock.” The clock does not run continuously. Rather, under the federal regulations, 8 C.F.R. § 208.7(a)(2), the clock stops for “any delay requested or caused by the applicant,” such as seeking a continuance, failing to appear at the asylum interview, or failing to follow the biometrics procedures (method of identity verification that includes fingerprinting and a photograph). The respective agency can restart their respective clocks once the applicant proceeds with the case again.

IMMIGRANTS (2013). Without a valid state or federal identification, children (like adults) face challenges related to transportation, entry to federal buildings, establishing a bank account, and accessing benefits to which they may be entitled. Lack of valid identification also discourages some children from reporting crime and makes children particularly vulnerable in an encounter with law enforcement.

¹⁶⁶ INA § 208(d)(2), 8 U.S.C. § 1158; 8 CFR § 208.7. The applicant is entitled to file an application for work authorization 150 days after filing for asylum. 8 CFR § 208.7(a)(1).

Asylum clock calculation makes no accommodation for children

Two statutory provisions govern an asylum seeker's eligibility for work authorization. The first requires that, absent "exceptional circumstances," adjudication of asylum applications "shall be completed within 180 days" of the date they are filed.¹⁶⁷ The second provides that asylum applicants are not eligible for work authorization prior to 180 days after filing for asylum.¹⁶⁸ These statutes apply to children as well as adults, but EOIR policy exempts children from case completion goals.¹⁶⁹ Under regulations interpreting these provisions, the 180-day period during which applicants must wait for work authorization eligibility begins once an asylum application has been properly filed and does not include any applicant-caused delays.¹⁷⁰ The regulation makes no exception for children who are principal applicants for asylum.

EOIR's calculation of the asylum clock (which counts the 180-day wait period) is not sensitive to children's unique needs and vulnerability. EOIR distinguishes between "expedited cases" (those that USCIS refers to EOIR with less than 75 days pending on USCIS' asylum clock), which are subject to the 180-day case completion requirement, and "non-expedited cases" (those that USCIS refers with more than 75 days pending on USCIS' asylum clock), which are not subject to the completion requirement.¹⁷¹ EOIR instructs IJs to ask asylum applicants whose cases are considered expedited whether they would like an expedited hearing date. When an applicant chooses not to proceed on an expedited hearing, the asylum clock stops, and the hearing is scheduled after the 180-day period.¹⁷² When an applicant chooses to proceed on an expedited basis, judges are instructed to offer "the first available date within the 180 day adjudications deadline," but not sooner than 45 days from the master calendar hearing unless the applicant is detained or requests an earlier hearing date.¹⁷³

Thus children (and adults) must choose between an expedited hearing, which may be scheduled as quickly as 45 days after the official filing of the asylum application at the master calendar hearing, and a non-expedited hearing that allows more preparation time but stops the clock because it is considered an applicant-caused delay.¹⁷⁴ This approach places undue pressure on children, does not accommodate their unique circumstances – such as difficulties securing legal counsel, developmental, cognitive, mental health, and other special considerations – and does not provide for individualized determinations about whether a child's need for additional time should be considered an applicant-caused delay. In addition, subjecting children to expedited hearings does not make sense because unlike adults, children are exempt from the 180-day asylum adjudication deadline under EOIR policy. Children with "non-expedited" cases can

¹⁶⁷ INA § 208(d)(5)(A)(iii). The 180-day case adjudication requirement does not include time a case is on appeal before the BIA.

¹⁶⁸ *Id.* at § 208(d)(2).

¹⁶⁹ 2007 EOIR OPPM GUIDELINES FOR IMMIGRATION COURT, *supra* note 30, at 8, § VI(B). While EOIR exempts children from case completion goals as a matter of policy, there is no statutory or regulatory exemption for them.

¹⁷⁰ 8 CFR § 208.7 (a)(2). Under the recently issued ABT Settlement Agreement, which resulted from federal litigation regarding USCIS and EOIR handling of work authorization provisions (Settlement Agreement in *B.H., et al. v. United States Citizenship and Immigration Services, et al.*, No. CV11-2108-RAJ (W.D. Wash.)), the asylum clock will begin counting the 180 days from the date a defensive asylum application is either filed in open court or is "lodged" at the clerk's office. A "lodged" application is one that is deposited at the clerk's office. Because asylum applications must be filed in court, a "lodged" application is not technically considered a filed application, but under the ABT Settlement agreement, the depositing of the application at the clerk's office is sufficient to trigger the start of the asylum clock. See BRIAN M. O'LEARY, CHIEF IMMIGRATION JUDGE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 13-03: GUIDELINES FOR IMPLEMENTATION OF THE ABT SETTLEMENT 2-3 (2013).

¹⁷¹ BRIAN M. O'LEARY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 13-02: *THE ASYLUM CLOCK*, 5, 8 (2013) (hereinafter 2013 EOIR OPPM ASYLUM CLOCK PROCEDURES). Asylum seekers who first file their applications in immigration court must also choose between an expedited and a non-expedited hearing.

¹⁷² *Id.* at 7, 9.

¹⁷³ *Id.* at 10. In cases of detained applicants, judges are instructed to schedule merits hearings no sooner than 14 days after the asylum application is officially filed. *Id.*

¹⁷⁴ One attorney surveyed reported that in her jurisdiction IJs treat children's "expedited" cases the same as adults, offering hearings sometimes as soon as 30 days after the asylum application is filed. Several KIND attorneys reported that judges require children to choose between an expedited hearing date and a non-expedited hearing date. Expedited hearings in those cases were scheduled 45–90 days after the asylum application was filed. One KIND attorney noted that a Judge offered a child a hearing three weeks after the date of filing. KIND Survey, *supra* note 11. Previous EOIR policy in place until the recent ABT Settlement Agreement allowed for expedited hearings to be scheduled as quickly as 14 days after the filing of the asylum application at a master calendar hearing. BRIAN M. O'LEARY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 11-02: *THE ASYLUM*

ultimately become eligible for work authorization if granted asylum or if they reach the 180-day mark, but they may have to wait years for either of those occurrences.¹⁷⁵

Confusion resulting from transfer of cases between EOIR and USCIS

EOIR and USCIS each maintains its own “asylum clock,” which calculates the 180-day period, but the agencies fail to coordinate their clocks. As a result, a child in proceedings who claims UAC status and files her asylum application with USCIS or has her application transferred to USCIS begins to accrue time on the USCIS clock – and may even reach the 180-day point – while EOIR’s clock may remain at zero days.¹⁷⁶ If USCIS refers the child’s case back to immigration court (based on ineligibility for asylum or lack of jurisdiction), EOIR does not always adjust its clock to reflect the number of days accumulated on USCIS’ clock, which is inconsistent with stated USCIS and EOIR policies that the original filing date with USCIS triggers the start of the asylum clock.¹⁷⁷ In addition, EOIR sometimes stops the asylum clock for children who seek to transfer their cases to USCIS after having filed an asylum application with the court. EOIR generally restarts the clock at the next hearing date for cases referred back to court, but as previously mentioned does not necessarily credit the clock with the number of days the case was pending before USCIS.¹⁷⁸ Stopping the clock in this situation penalizes children for exercising their right to proceed on asylum before USCIS.

Although USCIS adjudicates applications for work authorization, the agency sometimes bases decisions on its own clock, yet at other times it relies on EOIR’s clock, leading to inconsistent results. Children whose work authorization applications are calculated based on USCIS’ clock may be granted a work permit, while those whose applications are based on EOIR’s clock may be denied, when in both cases they have been pending without decision for 180 days or longer.¹⁷⁹ Lack of consistency regarding which agency’s clock takes precedence, as well as lack of coordination between the respective agencies, results in the denial of work authorization to children who are entitled to it by law based on the fact that their claims have been pending 180 days or longer without a decision.

Recommendations

- 1) The asylum regulations that the agencies are required to promulgate under the TVPRA of 2008 should exempt children who are principal asylum applicants from the 180-day asylum adjudication (or case completion) deadline and from stoppages to the asylum clock, which calculates the number of days an application has been pending for purposes of determining the timeframe in which the applicant can seek work authorization.

CLOCK (2011) (superseded by 2013 EOIR OPPM ASYLUM CLOCK PROCEDURES). As mentioned above, the new procedures require 45 days between the master calendar hearing and the asylum hearing, unless an applicant is detained or requests an earlier date. The ABT Settlement will thus ensure that child asylum seekers have a minimum of 45 days to prepare for “expedited” hearings, but this is not enough. Forty-five days may be insufficient preparation time for many child asylum seekers, and the 45-day minimum does not shield children from feeling pressured to accept an expedited hearing date in order to keep the asylum clock running.

¹⁷⁵ On the date of the new hearing, the asylum clock restarts. See 2013 EOIR OPPM ASYLUM CLOCK PROCEDURES, *supra* note 171, at 7. Some IJ’s calendars are booked several years out. See, e.g., Cindy Chang, *Immigration Court Backlogs Increase 85% Over Five Years*, LOS ANGELES TIMES, Oct. 25, 2013, (reporting on data collected by Transactional Records Access Clearinghouse showing a 562-day waiting average in immigration courts across the country, and some waits as long as 600–700 days).

¹⁷⁶ KIND is aware of numerous examples of cases that had started at the Asylum Office but were referred to the Immigration Court in which the Asylum Office’s clock counted many more days than the Immigration Court’s clock.

¹⁷⁷ In some KIND pro bono cases, EOIR did not count the number of days the asylum claim was pending before USCIS. Notices of lack of jurisdiction state as follows: “If you have not already received employment authorization and the immigration judge does not deny your asylum application within 150 days of the date your asylum application was first accepted by USCIS (not including delays in processing you may have requested or caused), then you will be eligible to submit a Form I-765 request for employment authorization with USCIS.” See also 2013 EOIR OPPM ASYLUM CLOCK PROCEDURES, *supra* note 171, at 4 (stating that EOIR begins to track its clock calculating from the day when a complete application was filed with USCIS).

¹⁷⁸ In some KIND pro bono cases, when concerns were raised about clock stoppages, some IJs and court administrators seemed confused about when to stop and start the asylum clock in cases of children claiming UAC status.

¹⁷⁹ KIND is aware of cases in which there were inconsistent outcomes with work authorization applications based on which agency’s clock was used. In some cases, USCIS granted work authorization where its own asylum clock counted 180 days or longer, but EOIR’s did not; in other such cases, USCIS denied work authorization, claiming that USCIS is required to follow EOIR’s clock because the case is before EOIR.

The regulations should clarify that the 180-day period used to determine work authorization eligibility begins on the date the initial asylum application is filed with USCIS, or is “lodged” or filed (see note 170 for an explanation) with EOIR and runs straight without stopping, and that 180 calendar days after a principal child applicant has filed or lodged an application for asylum, the child is eligible for work authorization.

- 2) Until the issuance of TVPRA regulations, EOIR should update its Operating Policies and Procedures Memorandum (OPPM) 13-02, *The Asylum Clock*, with a new section on application of the asylum clock in cases of principal child applicants, clarifying that because children are not subject to case completion requirements, their cases should not be considered expedited, and they should not be asked to proceed with an expedited hearing in order to keep the asylum clock running. The OPPM should also clarify that a child’s request for a continuance for good cause, such as in order to find an attorney, or because of developmental, mental or physical health, cognitive, or other special factors should not be considered a delay under 8 CFR § 208.7(a)(2), and does not stop the asylum clock. In addition, the OPPM should clarify that EOIR’s asylum clock will not stop when a child claiming UAC status files an asylum application with USCIS or when USCIS refers a child’s case to immigration court. The OPPM should instruct court administrators that when calculating the asylum clock for children whose cases were previously before USCIS, they should incorporate the number of days on USCIS’ asylum clock.
- 3) Until the issuance of TVPRA regulations, USCIS should produce internal guidance on calculating the asylum clock in cases of principal child applicants, clarifying that when a child in removal proceedings files an asylum application with USCIS, USCIS should add any days on EOIR’s asylum clock to USCIS’ asylum clock, and that when adjudicating work authorization applications, any discrepancy between agency asylum clocks should be resolved in the child’s favor.

One-year filing deadline as a barrier to asylum in accompanied children’s cases

As a general rule, applicants for asylum must file within one year of their last entry to the United States unless they can demonstrate “extraordinary” or “changed” circumstances that justify their delay in filing.¹⁸⁰ Federal regulations adopted in 1997 implementing the statutory asylum provisions provide that being an “unaccompanied minor” is a “legal disability,” which constitutes an “extraordinary” circumstance.¹⁸¹ The TVPRA of 2008 codified this exception for unaccompanied children, providing a special exemption for UACs from the one-year bar.¹⁸² While accompanied children who are principal asylum applicants are not explicitly exempted under either the regulations or the statute, USCIS policy is to apply the extraordinary circumstances exception to the one-year filing deadline to their cases.¹⁸³ USCIS adopted this policy based on the agency’s recognition that the same logic that applies to exempting unaccompanied children from the deadline should apply to accompanied children who are principal asylum applicants: “minors are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.”¹⁸⁴

¹⁸⁰ See INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158.

¹⁸¹ See 8 C.F.R. § 208.4(a)(5)(ii) (regulations providing non-exhaustive list of circumstances that are considered “extraordinary”).

¹⁸² See INA § 208(a)(2)(E) (one-year statute as amended by the TVPRA).

¹⁸³ The changed circumstances exception may also apply in children’s cases, for example when country conditions change, but this does not involve an inquiry into the age of the applicant as it relates to the delay. See, e.g., CGRS Database Case 7253 (waiving the one-year bar in light of the 2009 coup d’état in Honduras, making no finding regarding the relevance of the applicant’s age).

The statutory exemption for unaccompanied children under the TVPRA applies with equal force to claims heard by the Asylum Office as to claims before EOIR. However, unlike USCIS, EOIR does not as a matter of policy follow the USCIS' child-sensitive approach to the one-year bar in cases involving accompanied children who are principal asylum applicants. This has led to inconsistent application of the one-year bar. Some immigration judges, like USCIS, read the extraordinary circumstances exception to cover all child asylum seekers as having a "legal disability" by virtue of their age and waive the one-year bar without regard to whether a child is unaccompanied.¹⁸⁵ By contrast, some judges ruling on the one-year bar in children's cases do not even mention the age of the applicant, demonstrating that the adjudicator does not consider the applicant's status as a child relevant to application of the bar.¹⁸⁶ ICE attorneys in certain jurisdictions also take the position that the one-year filing deadline applies in cases of accompanied children who are principal asylum applicants, and that they are not under a legal disability.¹⁸⁷ This approach harms child asylum seekers because it disregards children's unique vulnerability and the fact that they may be dependent on adults to help them file for asylum and do not necessarily have legal representation.

The Border, Security, Economic Opportunity, and Immigration Modernization Act, S.744 (also known as Comprehensive Immigration Reform or CIR), which passed the Senate on June 27, 2013, eliminates the one-year filing deadline for all applicants. Legislation eliminating the one-year filing deadline, H.R. 15, was introduced in the House of Representatives on October 2, 2013. If passed, this legislation would benefit children in removal proceedings found not to be UACs.

Recommendation

Congress should pass legislation eliminating the one-year filing deadline. In the alternative, Congress should expand TVPRA § 235(d)(7)(A), which exempts unaccompanied children from the one-year filing deadline, to exempt all principal child asylum applicants from the one-year filing deadline. In the alternative, the asylum regulations mandated by TVPRA 2008 should clarify that all principal child asylum applicants are under a legal disability that qualifies as an extraordinary circumstance under INA § 208(a)(2)(D).

¹⁸⁴ U.S. CITIZENSHIP & IMMIGRATION SERVICE, ASYLUM OFFICER BASIC TRAINING COURSE: ONE-YEAR FILING DEADLINE 15 (2009).

¹⁸⁵ See, e.g., CGRS Database Case 6221 (finding that all minors are exempt from the one-year filing deadline under Ninth Circuit law even though the regulations only explicitly include unaccompanied children) (citing *Himri v. Ashcroft*, 378 F.3d 932, 936 (9th Cir. 2004)). In addition, some judges waive the bar based on childhood coupled with mental health concerns, such as PTSD, which is also considered an extraordinary circumstance. See, e.g., CGRS Database Case 9536 (waiving the one-year bar where the applicant filed for asylum nine months after reaching the age of 18 and a year and a half after entering the U.S. because she was a child at the time of entry and suffered from PTSD); CGRS Database Case 6840 (finding that the extraordinary circumstances exception to the one-year bar applied where applicant was an 11-year-old child who depended on adults and who suffered from mental disabilities related to her persecution); CGRS Database Case 7072 (reasoning that the child's young age of 10 in combination with his PTSD justified waiving the one-year bar and finding that, although he was accompanied, he was still under a legal disability as a minor in need of an attorney).

¹⁸⁶ See, e.g., CGRS Database Case 6987 (indicating agreement with DHS argument that the one-year bar applied where principal child applicants were accompanied, but making no decision on the one-year deadline because the case was administratively closed for prosecutorial discretion); CGRS Database Case 4360 (baldly concluding, without reference to age of applicant, that no extraordinary circumstance applied and barring the applicant from asylum, which was affirmed by the BIA the following year); CGRS Database Case 569 (without addressing the relevance of her age, ruling that limited English and lack of knowledge did not constitute extraordinary circumstances); See also CGRS Database Case 1034 (denying asylum for failure to meet the one-year filing deadline, by one month, to an Albanian girl who was kidnapped and raped repeatedly over the course of several days by a man who intended to sell her to human traffickers and was suffering from PTSD as a result, using as reasons for the denial that the applicant could speak English, was successfully studying in high school in the U.S., was able to hold a job, knew individuals who had been granted asylum, and lived in New York where there are many non-profit organizations that could have helped her).

¹⁸⁷ CGRS Database Case 9896.

Special Immigrant Juvenile Status: Protecting Immigrant Children Who are Victims of Abandonment, Abuse, or Neglect

Background

Special Immigrant Juvenile Status (SIJS) is a unique form of protection that has existed since 1990.¹⁸⁸ It confers a visa status that leads to immediate permanent residency and is designed to protect immigrant children without legal status who have been abandoned, abused, or neglected and for whom it is not in their best interests to return to their home country. SIJS is the only form of immigration relief that takes into account the best interests of the child and, in addition, is also unique in that it involves both family and immigration law. Congress first created this special status to address a particular gap in the protection of children without legal status who were placed in state foster care programs. While the state was able to protect these children from their harmful caregivers, the children lacked an avenue for permanent lawful status in the United States and thus a plan for their permanent well-being.¹⁸⁹

Prior to 2008, SIJS was available only to children dependent on a juvenile court who had been “deemed eligible for long term foster care.”¹⁹⁰ This requirement was widely interpreted to mean that SIJS was available for children for whom reunification with both parents was no longer a viable option. In addition, amendments issued in 1997 required that immigration authorities consent to juvenile court jurisdiction over dependency proceedings in cases of detained children. This consent, called “specific consent,” was often not granted, and very few detained children were able to take advantage of SIJS protection. The 1997 amendments also mandated that the government consent to the dependency order as a precondition to a grant of SIJS, commonly referred to as “express consent.” In 2008, the TVPRA broadened the eligibility criteria for SIJS status and amended the consent requirements.¹⁹¹

Currently, for a child to be eligible for SIJS, a U.S. state juvenile court must: (1) make the child dependent on the court (or place the child under the legal custody of a state agency or other individual appointed by the state); (2) declare that the child cannot be reunited with one or both of his or her parents due to abuse, abandonment, or neglect; and (3) declare that it is not in the best interests of the child to be returned to his country of citizenship.¹⁹² Thus, Congress opened up the possibility for a child to file for SIJS based upon abuse, neglect, or abandonment by only one parent.

There are various interpretations of what constitutes a “one-parent” SIJS claim.¹⁹³ The predominant interpretation is that the statute allows claims of abuse, neglect, or abandonment against one parent while the child resides with the non-offending parent. In many of these cases, the abusive parent has been absent for much of the child’s life. Another interpretation allows claims based upon a finding of abuse, neglect, or abandonment against only one parent, while the child lives with a non-parent. In these cases, the non-offending parent may still participate in the child’s life in some way.

There are several types of state court avenues for pursuing SIJS findings. For example, an adult other than a parent can petition for legal guardianship, or either a parent or adult other than a parent can seek custody/conservatorship of a child. There are also delinquency proceedings in which a juvenile justice court has confined a juvenile to a state juvenile

¹⁸⁸ Immigration Act of 1990, Pub. L. 101-649, § 153, 104 Stat. 4978 (1990).

¹⁸⁹ Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 238 (2006). See also Special Immigrant Status, 58 Fed. Reg. 42843 (Aug. 12, 1993) (original law creating SIJS designed to address the growing concern for “court-dependent” children who were “eligible for long-term foster care”).

¹⁹⁰ INA § 101(a)(27)(j)(i) (2006) (amended Sept. 30, 2008) (“an immigrant who is present in the United States who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment”)

¹⁹¹ TVPRA § 235(d)(1)(B)(ii).

¹⁹² See INA § 101 (a)(27)(J); 8 C.F.R. § 204.11 (defining the term “juvenile court” as a court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles; the exact name of juvenile courts can differ from state to state)

¹⁹³ ANGIE JUNCK, VERA INSTITUTE OF JUSTICE, PRACTICE ADVISORY: AN UPDATE ON ONE-PARENT SPECIAL IMMIGRANT JUVENILE STATUS CLAIMS 2 (2013) (on file with KIND).

Monica and Manuel, siblings from Guatemala, came to the United States fleeing their abusive father. The children's mother left them with their maternal grandmother after she decided to travel to the United States in order to get away from her own abusive relationship with the children's father. Because their father constantly harassed the children, they were forced for their own safety to move from family member to family member. After her father raped her at her aunt's house, Monica called her mother to tell her what had happened. The mother immediately arranged for her children to come to the United States. In a Texas family court, the children's mother successfully filed suit against the father for sole custody. The required SIJS findings were included in the final order, the children were later granted SIJS by USCIS, and they are on their way to obtaining permanent residency.¹⁹⁴

detention center or ordered a form of supervision in which the state is responsible for the care and custody of the juvenile. Child welfare/dependency proceedings, typically applicable to children who have been placed in the foster care system or with a third party caretaker, serves as an additional avenue for pursuing SIJS.

SIJS allows a child to apply for lawful permanent residence while remaining in the United States. Children without immigration status in the United States can seek SIJS affirmatively, or children in immigration removal proceedings can seek it defensively. USCIS determines the initial SIJS petition and typically the adjustment of status petition in both types of cases.¹⁹⁵

Despite the progress made following passage of the TVPRA, there remain challenges for children attempting to obtain this form of protection. Most notably, challenges arise (1) in identifying eligible children; (2) in the receptivity of some state courts to issuing the necessary special findings; and (3) in USCIS adjudications procedures.

Challenges in Identifying Children in the U.S. Foster Care System Eligible for SIJS

While the number of children seeking SIJS has increased since the enactment of the TVPRA – from 1,484 petitions received in FY 2009 to 1,879 in FY 2010 and 2,959 in FY 2012¹⁹⁶ – the overall number of children likely to be eligible for SIJS and identified to pursue it remains low. In 2012, nearly 14,000 children entered the United States alone; advocates believe the just short of 3,000 SIJS applications received merely scratches the surface of potentially eligible children. In addition, these numbers are well below the annual cap on the number of SIJS visas, which are part of the employment-based fourth preference category of visas that rarely becomes oversubscribed.¹⁹⁷

Children in removal proceedings who have legal counsel to represent them stand a good chance of being identified and obtaining SIJS if eligible; however, the majority of children still lack legal counsel. In addition, many immigrant children placed in the U.S. foster care system due to abuse, neglect, or abandonment are SIJS-eligible but are not being identified. These are children who have not come to the attention of immigration authorities, are not in immigration removal proceedings, and lack information about their legal options for pursuing SIJS. Most child welfare agency officials and state court judges remain unaware of SIJS, and some local governments are not receptive to paying the costs of having these children in their foster care systems. In some cases, local officials seek to send these children back to their home countries.¹⁹⁸

¹⁹⁴ KIND Database Cases HO-322 and HO-323.

¹⁹⁵ There are times when an Immigration Judge may retain jurisdiction over the adjustment of status application in cases of children in removal proceedings.

¹⁹⁶ See LORI SCIALABBA, DEPUTY DIRECTOR, USCIS, RESPONSE TO RECOMMENDATION 47, SPECIAL IMMIGRANT JUVENILE (SIJ) ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES 3 (2011) (hereinafter USCIS RESPONSES TO BEST PRACTICES RECOMMENDATION); USCIS, SERVICE-WIDE RECEIPTS AND APPROVALS FOR ALL FORM TYPES, FISCAL YEAR 2012: OCTOBER 2011 – SEPTEMBER 2012 (2012).

¹⁹⁷ The quota for special immigrant visas outlined in 8 U.S.C. § 1153(b)(4) extends generally to all special immigrants, not only juveniles, and is 7.1% of the worldwide allocation of employment-based visas. The worldwide employment-based allocation is 140,000 under 8 U.S.C. § 1151(d), which means that 9,940 visas are available to the general category of special immigrants each year. The various types of visa petitions available under the special immigrant category are specified in 8 U.S.C. § 1101(a)(27).

¹⁹⁸ KIND is aware of cases in which a particular county sent undocumented children who were in the foster care system back to their home countries. These children were never placed in formal immigration removal proceedings or provided independent legal counsel to assess their eligibility for SIJS or other relevant immigration protections.

Thus, many eligible immigrant children in the U.S. foster care system never obtain SIJS protections and remain undocumented. When they turn age 18 (or, in some cases, 21 – depending on state law), these children face many challenges. They are unable to obtain employment authorization, a driver’s license in many states, access to social service benefits, and in most states, are not eligible for in-state tuition at state colleges and universities. They are also subject to deportation if they come to the attention of immigration authorities. Many of them have lived in the United States most of their lives and do not have parents or an appropriate caretaker in their home country.

Owen’s family came to the United States from Mexico when he was a young child. For as long as Owen can remember, his father controlled the household with violence, threats, and manipulation. He abused Owen’s mother and repeatedly and severely abused Owen. Eventually, he kidnapped Owen’s younger siblings and fled to Mexico, leaving Owen and his mother in the United States.

Owen struggled to recover from a tumultuous childhood, deep psychological wounds, and the loss of his siblings. He appeared before a juvenile court judge who was vocal about his discontent at having an undocumented immigrant and his mother in his courtroom, and who took action that led to Owen’s mother’s deportation to Mexico. Following his mother’s deportation, the judge placed Owen in the custody of the county foster care agency, but made clear that he intended to return Owen to Mexico where the judge was emphatic he belonged. Owen’s then attorneys informed the judge that Owen feared returning to Mexico because of his father’s abuse and that he planned to seek SIJS and asylum. Without holding an evidentiary hearing on Owen’s best interests, without a report on Owen’s best interests from the foster care agency, and without ordering an overseas home study to determine whether Owen could return safely to the custody of his father, the judge nevertheless made a baseless determination that it was in Owen’s best interests to return to Mexico and ordered the foster agency to return him to his biological father. The judge refused to entertain a motion to stay Owen’s return to Mexico so that he could seek immigration relief based on the abuse by his father because, in the judge’s words, “he has no family [in the United States], has nothing here, [and] he’s not a citizen here,” and the Mexican government can decide whether to place him with a family member or in government custody.¹⁹⁹

There have been some positive efforts to address this issue. For example, the Casey Family Foundation has funded a three-year fellowship for a child welfare specialist to work within USCIS on outreach to and training of state entities working on child welfare issues, such as the juvenile courts and child welfare programs, on SIJS.

In addition, Congressman Beto O’Rourke (D-TX) introduced in May 2013 the Foster Children Opportunity Act, H.R. 2036, which authorizes federal agencies to inform state child welfare agencies and court officials about SIJS, and requires child welfare agencies to screen immigrant children in foster care for SIJS eligibility.²⁰⁰ The bill authorizes the state to use court funds to educate and train child welfare and court staff, including judges, social workers, court-appointed special advocates, and attorneys to assist immigrant children in achieving special immigrant juvenile status, lawful permanent resident status, and other forms of relief under immigration law. It also clarifies that the federal government will reimburse state and local governments for costs they incur in providing care for children who qualify for SIJS. Finally, it ensures that SIJS-eligible children can qualify for federal health, nutrition, and other benefits without the five-year waiting period imposed on other immigrants.

Recommendations

- 1) Congress should pass the Foster Children Opportunity Act, H.R. 2036, which would help ensure that child welfare officials identify undocumented children in the child welfare system and that children have a meaningful opportunity to apply for SIJS or other available forms of immigration protection.
- 2) USCIS should enhance its outreach to and training of state court judges and local entities that encounter children who are potentially SIJS-eligible. USCIS should permanently institutionalize and fund a position dedicated to state outreach and training on SIJS.

Challenges in Obtaining Predicate Orders from State Courts

SIJS petitioners also encounter hesitancy in some state courts to grant a “predicate order” with the findings required for a grant of SIJS status: that a child has been abused, abandoned, or neglected by one or both parents; that reunification with the parent(s) is not viable; and that it would not be in the best interests of the child to be returned to his/her home country. SIJS is still new to some state courts. Even with courts that are familiar with SIJS, there are often new judges who do not have experience with this status.²⁰¹

Some state court judges are confused by the federal immigration laws related to SIJS²⁰² and others are unaware that they have the authority to grant the special findings.²⁰³ Specifically, some state court judges do not understand that granting the special findings does not mean the judge is granting an immigration benefit.²⁰⁴ Some of these judges express concern that they are stepping outside of their prescribed role in making the required findings, despite the fact that the findings are in many ways similar to determinations made in other cases involving the care and custody of children, and some ask for specific case law or statutory authority for their ability to grant the findings. Others are confused because the SIJS regulations have not been updated, and they look to the old regulations and think there is no authority for them to grant the findings.²⁰⁵

While living in Mexico, Marta’s alcoholic mother beat her with fists, cords, and metal spoons –which she first boiled in water – and left her home alone or with strangers, sometimes for weeks at a time. Marta’s grandmother brought her to the United States when she was seven years old to escape her mother’s torturous abuse. Marta struggled to recover from deep psychological wounds and made some mistakes that led to her involvement in the juvenile delinquency system. She was declared a ward of the juvenile court and placed under the care and custody of her local probation department.

Marta’s attorney sought a predicate order from the delinquency court so that Marta could pursue SIJS based on abuse and neglect by her mother and inability to reunify with her mother, her best interests – which clearly compelled that she remain with her grandmother in the United States and not return to Mexico, and the juvenile court’s jurisdiction over her case. However, the juvenile delinquency judge presiding over her case denied her request in significant part because he wrongly equated issuing a predicate order with a grant of immigration status, which he believed to be undeserved by children who commit acts of juvenile delinquency. The judge speculated that declaring juvenile delinquents “dependents” for purposes of SIJS would incentivize children to commit crimes because it would apply to “any minor who breaks the law [and] goes into custody” and would therefore be “inconsistent with Congress’ intent.”²⁰⁶

¹⁹⁹ CGRS Database Case 9898. The Young Center for Immigrant Children’s Rights also reports that its attorneys have been appointed or recognized as child advocates in cases where a child welfare agency or court was considering placement options – including return to the home country – for a child lacking immigration status, without first asking the child about his or her wish to explore possible immigration relief, and despite clear eligibility for protection such as SIJS or a U visa.

²⁰⁰ Foster Children Opportunity Act, H.R. 2036, 113th Cong. (introduced May 16, 2013).

²⁰¹ For instance, some Washington state courts that regularly hear SIJS cases have a turnover in the bench every few years, and practitioners must educate the new judges on the law and their authority to make special findings.

²⁰² State court judges in certain counties served by KIND have questioned whether the SIJS statute pertains to cases in which a child is living with one parent. KIND Database Case 10-100016; BA-79. See also generally JUNCK, PRACTICE ADVISORY, *supra* note 193 (surveying SIJS practitioners on a nation-wide basis and finding that some local courts have strongly resisted attempts to bring SIJS orders before them in one-parent cases).

²⁰³ A state court judge in KIND Database Case BO-271 stated at the outset of a hearing that she was going to deny the special findings because “she is not an immigration judge and it is not her role to make immigration decisions.” After a great deal of legal advocacy by a pro bono attorney, the judge ultimately did sign an order with the special findings. Judges in one county have indicated that they do not believe they have the authority to issue SIJS findings and want to hear from an Immigration Judge on this question. Some judges in other counties have at least initially refused to make the special findings due to their belief that they do not have the authority to do so. Other state court judges have hesitated to issue the special findings out of concern that it may encourage more children to immigrate from Central America. KIND Database Case 11-6001357; KIND Database Case 11-6001445; KIND Database Case 12-7002465.

²⁰⁴ Some judges, for example, have been hesitant to grant SIJS findings because they feel they are circumventing the immigration laws or that these findings are an issue for the immigration authorities. KIND Database Case NY-15; KIND Database Case NY-16.

²⁰⁵ For example, in KIND Database Case 13-3002826, the judge questioned whether eligibility for long-term foster care, included in the old SIJS regulations was still a factor in the SIJS analysis.

²⁰⁶ CGRS Database Case 9897.

Some states have adopted standardized form predicate orders to be used in SIJS proceedings, which has helped to legitimize state court involvement in SIJS cases. For instance, California, one of the states that has long recognized the role of state courts in SIJS cases,²⁰⁷ has adopted a standard mandatory form for the special findings.²⁰⁸ Standardized SIJS forms not only help familiarize new state court judges with SIJS and the special findings, but also help legitimize state court authority for issuing these findings.

In addition, USCIS guidance to state court judges regarding their role versus USCIS' in relation to SIJS petitioners could help alleviate judges' confusion. For instance, in the context of T and U visas, which are forms of protection for victims of trafficking and serious crimes (discussed in depth below), USCIS has issued guidance to law enforcement agencies on their role in certifying that a visa applicant has been helpful to law enforcement. The guidance is designed to help local law enforcement agencies understand the relevant federal immigration law and recognize that certification does not equate to granting a federal immigration status.

Recommendations

- 1) USCIS should issue guidance concerning the role of state courts in SIJS cases similar to the guidance issued to law enforcement agencies regarding the law enforcement certification requirement for T and U visas.
- 2) States should create standard forms for the required factual findings for Special Immigrant Juvenile Status in order to emphasize the legitimacy of SIJS and the authority of state court judges to issue the special findings.

Challenges with USCIS Adjudication of SIJS Petitions

Inappropriate Requests for Copies of State Court Records

USCIS is responsible for determining whether a child will be granted SIJS after a "juvenile" court makes factual findings concerning the care and custody of the child and whether it is in the child's best interests to return to his or her home country and issues a predicate order containing those findings.

The TVPRA made clear that USCIS should honor state court findings and that these findings should not be readjudicated. The federal SIJS statute and regulations place with the juvenile courts sole responsibility to make findings regarding whether a child's reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law.²⁰⁹ The TVPRA removed the requirement that the Attorney General "expressly consent to the dependency order," which USCIS guidance had previously explained "require[ed] the Attorney General to determine that neither the dependency order nor the administration or judicial determination of the alien's best interests was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for

²⁰⁷ See Kristen Jackson, *Special Status Seekers: Through the Underused SIJS Process, Immigrant Juveniles May Obtain Legal Status*, L.A. LAWYER, Feb. 2012, at 20.

²⁰⁸ See Judicial Council Form JV-224, <http://www.courtinfo.ca.gov/forms/fillable/jv224.pdf>.

²⁰⁹ See INA § 101(a)(27)(J)(i)-(ii), 8 U.S.C. § 1101; TVPRA § 235(d)(1)(A).

²¹⁰ WILLIAM R. YATES, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, MEMORANDUM #3 – FIELD GUIDANCE ON SPECIAL IMMIGRANT JUVENILE STATUS PETITIONS 2 (2004) (hereinafter USCIS FIELD GUIDANCE ON SIJS).

²¹¹ TVPRA § 235(d)(1)(B)(i).

²¹² See USCIS FIELD GUIDANCE ON SIJS, *supra* note 210. The 2004 guidance initially states that adjudicators generally should not question the state court rulings or whether the court's order was properly issued and that "only the juvenile court order making the SIJS factual findings is required as evidence in support of the bona fides of the SIJS application." *Id.* at 4-5. However, the guidance then indicates that "[e]xpress consent should be given only if the adjudicator is aware of the facts that formed the basis for the juvenile court's rulings on dependency (or state custody), eligibility for long-term foster care based on abuse, neglect, or abandonment, and non-viability of family reunification, or the adjudicator determines that a reasonable basis in fact exists for

the purpose of obtaining relief from abuse or neglect”²¹⁰ – in other words, that the underlying basis for SIJS status (abuse, abandonment, neglect, or other similar basis) was bona fide. The TVPRA replaced the “express consent” requirement with a requirement that DHS consent instead to the status of SIJ.²¹¹ Congress thus clearly intended to change USCIS’ focus from examining the dependency order as a precondition to a grant of SIJS, to focusing on the grant of the status itself.

Specifically, in removing the express consent requirement, Congress signaled that DHS consent does not require reexamining the evidence of abandonment, abuse, neglect, and best interests, because the state court has the authority and expertise to do so and already has determined these issues. Rather, DHS has the opportunity to review the SIJS petition to confirm that the petitioner meets all of the eligibility requirements and to consider relevant discretionary factors. Accordingly, without the express consent requirement, USCIS need not explore whether SIJS was sought primarily for immigration purposes, and it is appropriate to assume that a SIJS petition is bona fide if the petitioner meets the eligibility requirements as evidenced by the state court order and establishes proof of age.

USCIS, however, has taken a different view. The agency continues to adhere to its pre-TVPRA guidance from 2004, which allows officers to ask for additional evidence other than the predicate order.²¹² USCIS has included its 2004 approach in its proposed SIJS rules even though this guidance was developed when USCIS had the express consent function.²¹³ Consistent with USCIS’ approach to its guidance, there appears to be an alarming and growing trend among some USCIS offices to request additional factual evidence beyond the predicate order.²¹⁴

A vulnerable child should not be required to compromise his or her personal and sensitive information outside the state court proceeding, which tends to be closed and confidential. A child should reasonably expect that the information he or she discloses to the state court will be used to make best interests determinations and that such a forum is a safe place to discuss sensitive issues without fear that third parties will become privy to that information and use it to remove the child from the United States. A child who has been abused, abandoned, or neglected may be afraid to seek protection from the court or to disclose critical information due to fear that USCIS may access this information for purposes other than determining the child’s best interests.

In addition, there are other privacy concerns that must be respected. For example, juvenile court records often contain information not only about the SIJS applicant, but also about siblings and other persons who are not the SIJS applicant and who also have a right to privacy. These proceedings are not a matter of public record. In many states, adjudicators would be asking applicants and attorneys to violate state confidentiality laws in providing records of the proceedings.²¹⁵ USCIS would also be imposing significant burdens on counsel who, in many cases, would have to seek special permission

these rulings.” *Id.* at 4. The memo further states that the state court “findings need not be overly detailed, but must reflect that the juvenile court made an informed decision” and that USCIS officers may seek additional evidence beyond the predicate order if an order is not sufficient to establish a reasonable basis for consent. *Id.* at 5. In such instances, the guidance states that the adjudicator must review additional evidence to determine whether a reasonable factual basis exists for the court’s rulings and may request that the petitioner provide actual records from the judicial proceeding. It does remind adjudicators that they “must be mindful that confidentiality rules often restrict disclosure of records from juvenile-related proceedings, so seeking such records directly from the court may be inappropriate, depending on the applicable state law.” *Id.* The guidance allows adjudicators to request that the petitioner provide an affidavit from the Court, or the state agency or department in whose custody the child has been placed, summarizing the evidence presented to the court.

²¹³ Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,985, § 204.11(c)(i) (proposed Sept. 6, 2011). In addition, in its 2011 response to recommendations made by the CISOMB, USCIS stated: “The May 27, 2004 memorandum entitled Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions discusses when it is appropriate to request further evidence for purposes of making a consent determination. Although parts of this memorandum are outdated due to TVPRA 2008, the rest of the memorandum is still in effect, including the parts relating to evidence.” USCIS RESPONSES TO BEST PRACTICES RECOMMENDATION, *supra* note 196, at 5. USCIS states that this guidance was confirmed in the USCIS March 24, 2009 memorandum on the new TVPRA 2008 provisions – although a close reading of the memorandum does not support this conclusion.

²¹⁴ KIND Database Cases 11-3001796, 11-3001793, 11-3001759, 10-3000928, 11-3001677, 12-6002420, 12-6002088, and other cases on file with KIND.

²¹⁵ See, e.g., N.J.S.A. 9:2-1, 9:2-3. These statutory provisions regarding custody proceedings state: “The records of such proceedings, including all papers filed with the court, shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parents, or their attorneys, and to no other person except by order of the court made for that purpose.” In addition, New Jersey Rule, R. 1:38-3(d)(13), excludes from public access: “Child custody

from the state court to disclose such documents. Finally, it is not USCIS' role nor does the agency have the expertise to make or analyze findings of abuse, abandonment, or neglect. CISOMB has identified this problem and has recommended that USCIS cease requesting such records.²¹⁶

USCIS at times justifies its requests for additional evidence with the argument that the petitioner has the burden to establish that the SIJS was not pursued primarily for an immigration benefit. However, as discussed above, this should no longer be a requirement given that the TVPRA removed DHS' express consent function. Moreover, this outdated approach fails to appreciate that typically the state court first determines the dependency or custody issue before it issues the requisite SIJS findings, which are generally contained in a separate, special order, and that this order is issued specifically for the purpose of facilitating the child's petition to obtain immigration status. It is appropriate that a component of the state court's efforts to protect the child include ensuring the child's ability to pursue immigration relief. In fact, such efforts are consistent with Congress' original intent that state courts make findings to support the permanency and well-being of immigrant children for whom it is in their best interests to remain in the United States.

In some of the cases, indications in the child's file that the parent/guardian had a role in bringing the child to the United States trigger a request for additional evidence. USCIS' proposed SIJS rules note that evidence that a parent or guardian brought a child to the United States would suggest that the child was seeking SIJS classification only for an immigration benefit.²¹⁷ In fact, the opposite is often true – generally, the parent or prospective guardian who arranged for the child to travel to the United States did so to ensure relief from abuse, abandonment, or neglect. Numerous cases exist where, as soon as the family member learned about abuse by a parent or neglect by another caregiver, the family member sent for the child because there was no one else to provide protection against continued abuse, neglect, or abandonment.²¹⁸ In addition, a child granted SIJS is not able to petition for immigration status in the United States for one or both parents. This rule is designed to prevent parents from sending their children to the U.S. as a means of obtaining immigration status for themselves.

Recommendation

In keeping with the spirit and intent of the TVPRA, USCIS should adopt regulations and, in the interim, issue guidance clarifying (1) that in cases in which a predicate order contains the requisite special findings, officers are not authorized to request copies of state court records or additional evidence regarding abuse, abandonment or neglect; and (2) that it is no longer the SIJS petitioner's burden to establish that SIJS was not sought primarily for immigration purposes.

evaluations, reports, and records pursuant to . . . N.J.S.A. 9:2-1, or N.J.S.A. 9:2-3." This practice of asking for confidential juvenile court records is also a problem in removal proceedings, particularly in children's defensive asylum cases, where ICE District Counsel sometimes seeks and procures juvenile delinquency records in violation of state confidentiality laws. See Cases on file with Public Counsel, Los Angeles.

²¹⁶ U.S. CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN RECOMMENDATION, SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES (2011) (hereinafter CISOMB, BEST PRACTICES RECOMMENDATION).

²¹⁷ SIJ Petitions, 76 Fed. Reg. 54,982, *supra* note 213.

²¹⁸ Examples include KIND Database Cases BO-492; BO-400; 12-3002294; 12-3002292; 13-1002871; 11-1001324; BA-71.

²¹⁹ 8 C.F.R. § 204.11(d)(1) provides that the documents submitted with a SIJS petition should include: "Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age."

²²⁰ The SIJS proposed rules would amend 204.11(d) to require individuals requesting special immigrant juvenile classification to submit: "(1) A Petition completed in accordance with the instructions on the [I-360] form; (2) Evidence of the alien's age." SIJ Petitions, 76 Fed. Reg. 54,985, *supra* note 213 (proposing amendment of 8 C.F.R. § 204.11 (d)(1), (2)). The current instructions for the I-360 application form indicate only that the petitioners must file "a copy of the juvenile's birth certificate or other evidence of his or her age."

²²¹ See U.S. DEPARTMENT OF STATE, RECIPROcity TABLES, http://travel.state.gov/visa/fees/fees_3272.html.

Inappropriate or Burdensome Requests Regarding Birth Records

Requirements regarding production of birth certificates

Current SIJS regulations allow officers to consider a range of official foreign documents or other evidence that in the officer's discretion establish a petitioner's age.²¹⁹ However, USCIS' proposed SIJS rules appear to prioritize birth certificates to prove age, and although they allow officers to consider other evidence of age, there is little guidance on what evidence will suffice.²²⁰ This creates difficulties given that, in some cases, children may not have access to copies of their birth certificates.

Children traveling alone to the United States may lack a copy of their birth certificates for a range of reasons. Families who mistreat their own children in physical and emotional ways often also act in controlling or neglectful ways with regard to official documentation or registration. They may fail to ensure that their children's births were properly recorded, leaving the children without vital papers that they need in their immigration proceedings, including for SIJS petitions. Also, child victims may come from countries where events such as births and deaths are not routinely recorded in an organized, systematic manner. For example, SIJS petitioners may be orphans coming from Haiti or other countries where records may simply not exist or are virtually impossible to obtain. In addition, some countries do not prioritize birth registration. For instance, Afghanistan, Bhutan, Chad, Iran, North Korea, Liberia, Pakistan, Solomon Islands, and Somalia either do not have birth certificates or the availability of these records varies widely.²²¹

Neither the current nor the proposed rules provide specific guidance on what evidence of age will suffice. As a result, USCIS officers may default to the general rule regarding production of primary evidence (official foreign documents), which can be onerous or impossible for child SIJS petitioners.²²²

There is a more specific rule for Violence Against Women Act (VAWA) applicants, which eases the documentary requirements and would be more appropriate for SIJS petitioners.²²³ The VAWA rule provides that USCIS "will consider any credible evidence relevant to a self-petition filed by a qualified spouse or child," and that the petitioner "may, but is not required to, demonstrate that preferred primary or secondary evidence," such as church or school records, "is unavailable."²²⁴

Evidence regarding parentage

USCIS often considers evidence of parentage, although neither the regulations nor the SIJS application require such evidence. In addition, USCIS' approach can be overly restrictive. Sometimes birth certificates may have incorrect information regarding parentage, and it may be difficult to have the errors corrected. Births in certain countries may be registered late or by someone other than the parent.

One case highlights this issue: a Honduran girl's birth certificate incorrectly listed the grandparents as her parents because the girl's biological mother was only 16 when she gave birth, did not have identification documents, and thus could not register her child. The child's attorneys included the correct information regarding the child's parents' names in the adjustment of status application submitted to USCIS. At the interview, the USCIS officer requested additional proof identifying the child's biological mother despite the fact that the pro bono attorneys had submitted the following evidence:

²²² Generally, when petitioning for an immigration benefit, federal regulations require an applicant or petitioner to demonstrate that a required document does not exist by submitting an original written statement on government letterhead from the relevant government or other authority. Furthermore, "[t]he statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available" unless "the Department of State's Foreign Affairs Manual indicates this type of document generally does not exist." 8 C.F.R. § 103.2(b)(2)(i)-(ii).

²²³ VAWA is discussed below.

²²⁴ 8 CFR § 103.2.

- 1) A notarized letter from the grandparents named on the birth certificate indicating that their daughter is the girl's biological mother, explaining the circumstances of the girl's birth and registration, and stating that the mother should have legal custody of her daughter and that she is best suited to take care of her.
- 2) A notarized letter indicating that registration of a birth does not occur at the time of birth in Honduras, but often takes place days or even years later, explaining why someone other than the biological parent might register a child.
- 3) The mother's birth certificate to show that it names the same mother as the one listed on the child's birth certificate.

The USCIS officer instructed the pro bono attorneys to either change the names of the parents on the application, which put the attorneys in the uncomfortable position of being asked to alter an official foreign state document, or produce an amended Honduran birth certificate within one week, which was an impossible task given the time it takes to amend a Honduran birth certificate, if it can be amended at all. Ultimately, USCIS granted the adjustment application, but the inaccurate information as to the child's parents remained on record.²²⁵

To remedy this problem, USCIS should issue specific guidance or regulations that allow SIJS petitioners to produce secondary evidence of parentage in these types of situations. The agency has issued such guidance for Amerasian special immigrant petitions in recognition that establishing parentage can be difficult in those cases.²²⁶ Amerasian petitioners may submit the following types of evidence to prove the identity of a petitioner's father: "birth or baptismal records; local civil records; an affidavit, correspondence or other evidence of financial support from the father; photographs of the father (especially with the child); or, absent other documents, affidavits from knowledgeable witnesses that detail the parentage of the child and how they know such facts."²²⁷

Recommendations

USCIS should revise its proposed rules and, in the interim, issue guidance to its adjudications officers clarifying that SIJS petitioners may have difficulty obtaining the requisite documentation regarding their birth, and that there should be generous latitude provided in accepting proof of birth records or correcting mistakes in birth records. Specifically, the rules and interim guidance should state that USCIS will consider any credible relevant evidence to establish age and parentage in SIJS cases, and that the petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable. USCIS guidance should also encourage adjudicators to accept alternative forms of evidence such as state court orders with findings of fact regarding an applicant's age, affidavits from child welfare workers, guardians ad litem, and others with knowledge of the child's history and dependency status, and affidavits from non-abusive family members or persons with knowledge of the child's age or parentage.

²²⁵ KIND Database Case 10-5000646.

²²⁶ SIJS for Amerasians is designed to provide status to individuals from Korea, Vietnam, Laos, Kampuchea or Thailand whose fathers were U.S. citizen soldiers during U.S. conflicts in those regions. Often the mothers of these children not only did not officially record their children's fathers' names, they hid any evidence of the fathers. See, Michael Bengé, *The Living Hell of Amerasians*, FRONTPAGE MAGAZINE, Nov. 22, 2005.

²²⁷ USCIS Form I-360 instructions.

²²⁸ Victim of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 8 U.S.C. 1101 §§ 101(a)(15)(T), 101(a)(15)(U), 214(n), 214(p), 245(l), and 245(m).

²²⁹ CISOMB, IMPROVING THE PROCESS FOR VICTIMS OF HUMAN TRAFFICKING AND CERTAIN CRIMINAL ACTIVITY: THE T AND U VISA 2 (2009) (citing Victim of Trafficking and Violence Protection Act).

²³⁰ ALISON SISKIN & LIANA SUN WYLER, U.S. CONGRESSIONAL RESEARCH SERV., TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 15 (2013); HUMAN SMUGGLING AND TRAFFICKING CENTER, DOMESTIC HUMAN TRAFFICKING: AN INTERNAL ISSUE 2 (2008).

²³¹ U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 381 (2013).

T and U Visas: Protection of Children who are Victims of Trafficking or Other Serious Crimes

Creation of Visas to Protect Victims of Trafficking and Other Serious Crimes

To advance the protection of undocumented men, women, and children in the United States who are victims of human trafficking or other serious crimes, the Victims of Trafficking and Violence Protection Act of 2000 established the T and U non-immigrant visas.²²⁸ These visas provide temporary legal status, and the possibility of permanent status, to foreigners who are victims of trafficking and enumerated crimes, respectively, and who assist with investigations or prosecutions of criminal activity.

Congress' intent in creating the T visa was to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims."²²⁹

Human trafficking of both U.S. citizens and noncitizens occurs in every state, and as many as 17,500 people are trafficked to the United States each year.²³⁰ "The United States is a source, transit, and destination country for men, women, and children – both U.S. citizens and foreign nationals – subjected to forced labor, debt bondage, involuntary servitude, and sex trafficking."²³¹

Congress created the U visa "to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes" while offering protection to victims of such crimes.²³² Congress also sought to encourage law enforcement officials to better serve immigrant crime victims.²³³ Moreover, the U visa was designed to help victims feel safe in reporting crimes and to encourage their assistance in the investigation or prosecution of criminal activity without fear of removal from the United States.²³⁴

The Justice Department reports that the victimization rate for children between the ages of 12 and 17 was 28.1 per 1,000 in 2010.²³⁵ Some of these child crime victims lack legal status and may not feel comfortable coming forward to seek police assistance for fear of deportation.

Eligibility Requirements and Benefits of T and U Visas

T Visa

T non-immigrant status (commonly referred to as the T visa) protects victims of "severe" forms of human trafficking, including the recruitment, harboring, transportation, provision, or obtaining of a person for sex trafficking or labor or services.²³⁶ Anyone induced by force, fraud, or coercion to engage in commercial sex, or any child under the age of 18 engaged in commercial sex, is considered a victim of trafficking that falls within this ambit.²³⁷ To be eligible for the visa, trafficking victims generally must cooperate with reasonable requests from a law enforcement agency for assistance in

²²² See VTPVA § 1513(a)(2)(A) (Title V, entitled the Battered Immigrant Women Protection Act (BIWPA)).

²²³ *Id.*

²³⁴ 72 Fed. Reg. 53,015 (Sept. 17, 2007).

²³⁵ BUREAU OF JUSTICE STATISTICS, DOJ, MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 8 (2013).

²³⁶ INA § 101(a)(15)(T)(i)(I), 8 U.S.C. § 1101.

²³⁷ VTPVA § 103(8)(A).

investigating or prosecuting human trafficking.²³⁸ Notably, children under the age of 18 at the time of their victimization and those who suffer trauma that prevents them from cooperating are exempt from this assistance requirement.²³⁹

The T non-immigrant visa allows eligible victims of trafficking to legally remain in the United States for up to four years and, after three years, T visa holders can apply for lawful permanent residence.

Amelia, who is from Guatemala, became a victim of trafficking when she was only 15 years old. The older sister of Amelia's friend asked Amelia to come to the United States to work for her under reasonable pay and conditions, and Amelia agreed in the hopes of helping her family out of abject poverty. Once in the United States, however, the woman forced Amelia to work in her home 14 hours a day, seven days a week for \$100 a month and under conditions of severe physical and emotional abuse, complete physical control, and debt bondage. From the very first day, the woman worked Amelia to exhaustion. She physically and emotionally abused Amelia in order to force her to clean and cook for the trafficker's in-home food service business. Amelia could not leave the house on her own, and never received even a half-day break. Her trafficker refused to provide Amelia with a key and, after six months, she forced Amelia to work as a member of a hotel cleaning staff and arranged for her earnings to be paid directly to her rather than to Amelia. Finally, after about nine months of suffering and isolated from her family and home, Amelia was able to escape with the help of a woman she met at the hotel. She took a bus to her brother in Washington, DC, who lived with a foster family. Child welfare services became involved and turned Amelia over to ICE. ICE placed Amelia in ORR custody where she was assessed as being a trafficking victim and was released to the Unaccompanied Refugee Minors (URM) Program. She now lives with a bilingual foster mother, is receiving case management and counseling services, and is in school. Amelia was granted a T visa. She continues to face the effects of the trauma she suffered.²⁴⁰

U Visa

The U visa protects individuals who have suffered substantial physical or mental abuse as a result of having been a victim of certain serious crimes.²⁴¹ To obtain the visa, the individual must have information concerning the qualifying criminal activity and must provide a U non-immigrant status certification from a U.S. law enforcement agency that demonstrates the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the criminal activity.²⁴² Notably, unlike the T visa, children are not exempt from this requirement, but the statute does permit a parent, guardian, or "next friend" to present the "helpful" information to law enforcement on behalf of a child 16 or younger.²⁴³

Certifying agencies can be federal, state, or local law enforcement agencies, prosecutors, judges or other government authorities who detect, investigate, or prosecute criminal activity. Other agencies such as child or family protective services, the Equal Employment Opportunity Commission, and the Department of Labor also qualify as certifying agencies since they may detect or investigate qualifying criminal activities within their respective areas of expertise.

If granted, U non-immigrant status is generally available for four years. After three years, the visa holder may seek permanent residency.

²³⁸ While commonly referred to as a T-visa, this form of relief is technically not a "visa"; rather, it is a form of non-immigrant status. A visa is needed to gain entry to the United States. There are two categories of visas, non-immigrant visas such as tourism or student visas that do not lead to permanent residence, and immigrant visas that provide a path to lawful permanent residency. A visa itself, however, is not a form of legal status. Unlike a visa, non-immigrant status is a form of legal status.

²³⁹ INA § 101(a)(15)(T)(i)(III)(aa)-(cc).

²⁴⁰ KIND Database Case 11-3001929.

²⁴¹ This form of legal relief is also technically a type of non-immigrant status rather than a visa. See above discussion regarding T visas. The list of crimes include: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; "female genital mutilation" being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. INA § 101(a)(U)(iii). The crimes of stalking and fraud in foreign labor contracting were newly added as qualifying crimes in 2013. Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, §§ 801, 1222 (2013).

Challenges in Obtaining T and U Visas

Despite the major advance represented by these new forms of protection, challenges to obtaining T and U visas still remain in children's cases, including difficulties identifying child trafficking victims, particularly at the border, and administrative hurdles in obtaining the visas and the permanent residency status associated with them.

Identifying Child Victims of Trafficking

Inadequacies in screening for trafficking victims at the borders

Given the high numbers of victims trafficked to the United States each year, the number of individuals seeking T visas remains extremely low.²⁴⁴ This low number reflects the harsh reality that, as with the alarming international trend highlighted in the U.S. Department of State's (DOS) 2013 Trafficking in Persons Report,²⁴⁵ trafficking victims in the United States are not being adequately identified or protected. This may be particularly true for unaccompanied children from contiguous countries who arrive in the United States along the southern border.

"During FY 2012, more than 13,625 [unaccompanied children] were referred to HHS for care and custody," according to the DOS report.²⁴⁶ However, it is unknown how many of these children were identified as victims of trafficking, either prior to or after their transfer. What we do know is that only 40 trafficking victims were placed in the URM Program, a federal program funded by ORR to provide assistance, care, and services to unaccompanied immigrant children.²⁴⁷

Certain requirements regarding screening for victims of trafficking and children at risk of trafficking bind both CBP and HHS staff who encounter UACs. The TVPRA requires that children from contiguous countries (i.e., Canada and Mexico) identified as UACs be screened to determine if they are victims of trafficking or at risk of trafficking if returned to their home country, if they have a fear of returning to their home country, and if they are capable of making an independent decision to withdraw their applications for admission.²⁴⁸ The TVPRA included this provision because unaccompanied children from Mexico were being subjected to immediate return to their country of nationality without screening for a legitimate fear of return or a meaningful option to seek defense from removal.²⁴⁹

Under current government guidance, CBP is charged with implementing this newly imposed screening mandate. CBP reports that its policy is to screen all children, regardless of nationality, for the above factors, in an effort to ensure systematic screening of all UACs.²⁵⁰ Nevertheless, concerns remain that CBP fails to ensure systematically that Mexican children – who can be returned directly from CBP custody, unlike children from non-contiguous countries – are not returned to dangerous or exploitative situations.²⁵¹ Although CBP refers children found to be at risk of trafficking to ORR custody rather than repatriating them, no data is available publicly on either the number of UACs repatriated after CBP

²⁴² INA § 101(a)(U)(III).

²⁴³ *Id.* at § 101(a)(U)(II)-(III).

²⁴⁴ In FY 2011, there were only 967 principal applicants for T visas, and in FY 2012 only 885. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, VICTIMS OF TRAFFICKING FORM I-914 (T) AND VICTIMS OF CRIME FORM I-918 (U) VISA STATISTICS (SECOND QUARTER, FY2013), (2013).

²⁴⁵ See U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 381, 7 (2013) (hereinafter 2013 U.S. TRAFFICKING IN PERSONS REPORT) (indicating that worldwide "only around 40,000 victims have been identified in the last year").

²⁴⁶ *Id.* at 384.

²⁴⁷ *Id.*

²⁴⁸ See 8 U.S.C. § 1232(a)(2)(A).

²⁴⁹ Prior to the TVPRA, inadmissible children from contiguous countries (Canada and Mexico) could be offered voluntary withdrawal of their application for admission without any analysis of risk factors upon return, and thousands of Mexican children were repatriated under voluntary return. See AMY THOMPSON, CENTER FOR PUBLIC POLICY PRIORITIES, A CHILD ALONE AND WITHOUT PAPERS, A REPORT ON THE RETURN AND REPATRIATION OF UNACCOMPANIED UNDOCUMENTED CHILDREN BY THE UNITED STATES 25 (2008) (hereinafter THOMPSON, A CHILD ALONE AND WITHOUT PAPERS). By contrast, children arriving from other countries without documentation were placed in removal proceedings, which provides judicial oversight to their removal process and allows children an opportunity to raise any relevant defenses to removal, such as an asylum claim or eligibility for other forms of protection.

²⁵⁰ Correspondence with DHS.

²⁵¹ See WRC, FORCED FROM HOME, *supra* note 4; APPLESEED, CHILDREN AT THE BORDER, *supra* note 4; THOMPSON, A CHILD ALONE AND WITHOUT PAPERS, *supra* note 249 (exploring the effect of repatriation on nearly 43,000 unaccompanied, undocumented children removed from the United States and sent back to their home countries through interviews with Mexican and Honduran personnel and undocumented, unaccompanied Mexican and Honduran children).

determines that they are not at risk of trafficking, or the number of UACs identified by CBP to be at risk of trafficking. This gap in information should be remedied. In a 2011 report, Appleseed found that an “overwhelming” number of unaccompanied children from Mexico were still being quickly repatriated.²⁵² The number of unaccompanied children from Mexico referred into ORR care and custody has been relatively low since the new policy was put into place in March 2009, another potential indicator that CBP screening of Mexican children may be insufficient.²⁵³

Furthermore, even if/when screening occurs, CBP officers lack the training and expertise to be able to screen these children effectively and ensure that unaccompanied children who need U.S. protection are identified.²⁵⁴ CBP officers are law enforcement officers who are not experienced in child protection and screening to determine whether children are at risk. While CBP reports that it has developed a training program for its officers, it has not made publicly available a copy of the training despite numerous requests. To address these concerns, CIR mandates that child welfare professionals assist CBP with the training related to and the actual implementation of the screening mandate.²⁵⁵ The House of Representatives’ version of the Senate bill, H.R. 15, includes this language as well; a bill introduced in July 2013 by

Recommendations

- 1) Congress should enact legislation requiring enhanced training of CBP officers and the hiring of child welfare professionals to assist CBP with its screening function to identify children with protection concerns at the border.
- 2) In the interim, the Administration should mandate participation of non-governmental organizations (NGOs) or persons with child welfare expertise in screening children encountered by CBP and identified as UACs from contiguous countries.
- 3) The U.S. government should make publicly available an annual report with statistical information and other data on unaccompanied children including: (a) the number, nationalities, ages, and gender of all unaccompanied children apprehended by CBP; (b) the number, nationalities, ages, and gender of all unaccompanied children from contiguous countries apprehended by CBP and the number, nationalities, ages, and gender of such children repatriated from the border pursuant to contiguous country agreements; (c) the number, nationalities, ages, and gender of all unaccompanied children from contiguous countries found to have a credible fear of persecution; (d) the number, nationalities, ages, and gender of all unaccompanied children from contiguous countries found to be victims of human trafficking or at risk of human trafficking.²⁵⁸
- 4) As mandated by the TVPRA of 2013, the GAO should promptly conduct a study on whether CBP screening and repatriation of UACs conforms to the requirements of the TVPRA of 2008.

²⁵² APPLESEED, CHILDREN AT THE BORDER, *supra* note 4, at 17.

²⁵³ “While the U.S. Border Patrol reports apprehending 13,974 unaccompanied children from Mexico in FY 2012, Office of Refugee Resettlement statistics show that only 8 percent of the 13,625 unaccompanied children referred to ORR in FY 2012 were from Mexico (1,090 children).” U.S. Border Patrol, Unaccompanied Children (Age 0-17) Apprehensions, FY 2008 through April, FY 2012 *as reported in* KIND, THE TIME IS NOW, *supra* note 4, at 15.

²⁵⁴ See APPLESEED, CHILDREN AT THE BORDER, *supra* note 4 (finding CBP had little guidance or training on how to screen UACs from contiguous countries pursuant to the TVPRA); see also WRC, FORCED FROM HOME, *supra* note 4 (finding that based on interviews with CBP officials, CBP lacks adequate training to perform its screening function). In addition, KIND visited the southwest border in 2011 as part of a delegation that also included WRC, UNHCR, and USCCB. KIND met with the El Paso Sector of CBP, local non-governmental organizations and government officials on both sides of the El Paso/Ciudad Juarez border, and visited a government-funded shelter facility. Based on conversations with CBP officials, the delegates observed a lack of in-depth understanding of the vulnerabilities and sensitivities of working with unaccompanied children.

²⁵⁵ The bill requires DHS to “provide adequately trained and qualified staff and resources, including the accommodation of child welfare officials . . . at U.S. Customs and Border Protection ports of entry and stations.” It also requires the Secretary of Health and Human Services, in consultation with the Secretary of DHS, “to hire, on a full- or part-time basis, child welfare professionals who will provide assistance, either in person or by other appropriate methods of communication, in not fewer than 7 of the U.S. Customs and Border Protection offices or stations with the largest number of unaccompanied alien child apprehensions in the previous fiscal year.” Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3612(d) (passed by the Senate on June 27, 2013) (hereinafter Senate CIR).

Representative Lucille Roybal-Allard (D-CA) and co-sponsored by Representative Ileana Ros-Lehtinen (R-FL), the Child Trafficking Victims Protection Act, H.R. 2624,²⁵⁶ mandates that child welfare professionals help CBP officials screen unaccompanied children. In addition, the Trafficking Victims Protection Reauthorization Act of 2013 mandates that the Government Accountability Office (GAO) investigate whether CBP is conducting screening and repatriation of UACs consistent with the requirements in the TVPRA.²⁵⁷

The need for better training of community actors to identify victims of trafficking

A lack of effective screening at the border is not the only reason that children trafficked to the United States may not be identified. Of the thousands of children trafficked to the United States each year, many pass undetected upon entry and thus are not screened either through CBP procedures for Mexican children or by ORR when they enter federal custody. Because these children are undetected, they are also not placed in removal proceedings that would lead to some judicial inquiry into their situation. These children are in such vulnerable positions that they may be unable to seek help or apply for T visas, asylum, or other protection.²⁵⁹ While the number of children in this situation is unknown, it is notable that Guatemala, Honduras, and Mexico were among the top three countries of origin of victims of trafficking in FY 2011²⁶⁰ and FY 2012²⁶¹ and that more than 90% of UACs who come to the United States come from Guatemala, Honduras, El Salvador, and Mexico.²⁶² These correlations indicate that there may be large numbers of unaccompanied children in trafficking situations.

One way to ensure that trafficking victims are identified is to take steps so that community members who work with them receive education about the availability of T visas and how to identify potential trafficking victims. U.S. federal, state, and local law enforcement as well as NGO service providers, and the general public, have received training on protecting victims of trafficking.²⁶³ In addition, DHS has conducted victim identification training and established referral mechanisms for asylum officers. DHS has also trained federal, state, and local law enforcement on T visas (as well as U visas) and required screening for human trafficking indicators of the immigrants held in DHS custody. Despite these positive advances, additional training is needed, particularly in law enforcement field offices.²⁶⁴ In addition, "inconsistent screening by law enforcement and other government officials of vulnerable populations [has] often resulted in failure to identify trafficked persons."²⁶⁵

Recommendation

Federal, state, and local law enforcement officers, including employees in the child welfare system, should receive additional training to ensure that officers understand how to identify victims and the nuanced aspects of victimization, including psychological coercion and the "traumatic bonding" that occurs between victims of trafficking and their abusers.

²⁵⁶ Child Trafficking Victims Protection Act, H.R. 2624, 113th Cong. (introduced July 8, 2013).

²⁵⁷ See VAWA, *supra* note 241, at § 1264 (citing TVPRA § 235(a)(4)).

²⁵⁸ This data is consistent with what is required under the HSA § 462(b)(1) (K) (mandating that HHS collect and compile statistical information from the Departments of Justice, Homeland Security, and State "on each department's actions relating to unaccompanied alien children").

²⁵⁹ There are no statistics on the number of immigrant children without legal status who find themselves in human trafficking situations in the United States. Children in this situation are so vulnerable that they are unlikely to come forward for help on their own and are hard to identify. KIND, *THE TIME IS NOW*, *supra* note 4, at 24-25.

²⁶⁰ U.S. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT 360* (2012).

²⁶¹ 2013 U.S. *TRAFFICKING IN PERSONS REPORT*, *supra* note 245, at 381.

²⁶² ORR, HHS, *About Unaccompanied Children's Services: Most Common Native Countries of UAC*, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about> (last accessed Jan 16, 2014).

²⁶³ 2013 U.S. *TRAFFICKING IN PERSONS REPORT*, *supra* note 245, at 385.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

Administrative Hurdles in Pursuing T and U Visas

Difficulties in Obtaining Law Enforcement Certification in U Cases

Many different law enforcement officials are authorized to sign law enforcement certifications in U cases²⁶⁶ and have received education on the U visa process.²⁶⁷ However, there are still children who encounter difficulties obtaining the law enforcement certification necessary to seek a U visa, despite being the victims of serious crimes and providing helpful information to law enforcement agencies.

For instance, a 17-year-old Honduran boy who was the victim of a felonious assault fully cooperated with law enforcement by making himself available for police interviews and to testify if needed, but he has been unable to obtain a U visa certification from a County Attorney's office. The County Attorney cited the child's indication of a different date of birth from the one listed on his work authorization as grounds to find the child untrustworthy. The child's pro bono attorney has repeatedly tried to explain to the County Attorney that the difference in birth dates stems from a USCIS error, that it is difficult to obtain a correct birth certificate from Honduras, and that the child still meets the eligibility criteria for issuance of a certification. Nevertheless, the County Attorney has not relented, and the child has given up. He is pursuing asylum, but he has a challenging case.²⁶⁸

The case of a 16-year-old girl from El Salvador whose smuggler raped her after she came across the border provides another example. When the girl was apprehended by immigration authorities, she reported the rape to an ICE agent who helped her file a report with the local police department. Her pro bono attorneys attempted to obtain a U visa certification from the police department, but the department told them that it has a stated policy of not signing U visa certifications. The attorneys also tried to contact the District Attorney, who did not respond for many months. The ICE agent who helped the girl file a police report appeared willing to see if ICE would issue the certification. However, ICE formally denied the request on the grounds that the decision to provide certification is entirely discretionary and that the girl did not meet the U visa requirements – which is not an issue ICE should be determining at the certification stage. ICE encouraged the girl to file a report with the law enforcement agency, prosecutor, judge, or any other authority with responsibility for the investigation or prosecution of the crime or criminal activity of which she claimed to be a victim. Fortunately, in the end, the District Attorney responded and signed the certification, but the overall process took approximately six months. This case demonstrates how difficult and time-consuming the process can be.²⁶⁹

Recommendations

- 1) As it did for the T visa program, Congress should enact legislation to exempt U visa applicants under the age of 18 from the law enforcement certification requirement.
- 2) In the interim, DHS should issue guidance to ICE and CBP officers encouraging them to provide law enforcement certification in cases in which individuals, and in particular children, have been the victims of crimes of which the officer has observed or received credible reports.
- 3) In the interim, DOJ should issue similar guidance to U.S. attorneys and law enforcement officials.

²⁶⁶ See discussion below in procedural issues section.

²⁶⁷ See discussion below regarding training provided to local law enforcement officers. See also DHS, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, available at http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf (last accessed Jan. 11, 2014) (guide provided to federal and local law enforcement agencies).

²⁶⁸ KIND Database Case DCR-99.

²⁶⁹ KIND Database Case 12-5002402.

²⁷⁰ While the 10,000 annually available U visas have been consistently granted for the last five fiscal years, the authors are aware of cases in which a child qualifies for a U visa but may seek SIJS instead. See U.S. Citizenship and Immigration Services, *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, Dec. 11, 2013.

Length of Adjudication Time and USCIS Application Requirements in T and U Visa Cases

Children who may be eligible for T or U visas often seek SIJS instead, as the process for obtaining SIJS is faster and, in some jurisdictions, easier.²⁷⁰ As a result, some children are not availing themselves of the specialized benefits available to T and U visa holders even if they are technically eligible for these forms of relief.

In many jurisdictions, SIJS predicate orders can be obtained within a few months. Once a predicate order is obtained, if there are no admissibility issues, it is easy to predict that the permanent residency will be obtained expeditiously as USCIS must adjudicate SIJS applications within 180 days.²⁷¹ In contrast, it can take up to a year or more for USCIS to adjudicate the T or U visa application.²⁷² Moreover, there is a three-year waiting period for T and U visa holders to adjust their status to permanent residency,²⁷³ whereas SIJS visa holders are immediately eligible to adjust to permanent residency.

Beyond timing, SIJS may also be viewed as easier to obtain in terms of the proof needed for submission. T and U visa applications require lengthy and detailed personal statements, and applications are stronger when submitted with a psychological evaluation, which may involve a cost to the client. Depending on state court procedures, a SIJS petitioner may be able to provide a less detailed personal statement, and there is typically not a need for a psychological evaluation.

Because they often do not pursue T and U visas, the number of child victims of trafficking and other serious crimes are underreported, and trafficking victims are unable to take advantage of federally funded benefits and services.²⁷⁴ Children who receive SIJS are not eligible for these benefits.²⁷⁵ In addition, children who obtain SIJS rather than a T or U visa forego the opportunity available to T and U visa holders to immediately apply or petition USCIS on behalf of certain family members for derivative non-immigrant status, even if these family members are overseas.²⁷⁶ SIJS does not provide any derivative status to family members and, in fact, a child granted SIJS status can never petition for immigration status for a parent.²⁷⁷

Recommendations

- 1) Congress should enact legislation allowing children under 18 who are granted T and U visas to be considered eligible for permanent residency immediately.
- 2) Congress should enact legislation mandating that T and U visa applications, similar to SIJS petitions, be adjudicated within 180 days of the date of application.

²⁷¹ INA § 245(h), 8 U.S.C. § 1255; TVPRA § 235(d)(2).

²⁷² The authors understand that USCIS has recently added more resources to reduce adjudication time for T and U visas, and that it aims to cut adjudication time to six months by mid-2014.

²⁷³ There is an exception to the three-year waiting period for T visa applicants when the investigation is completed and the law enforcement agency certifies to this effect – an exception that usually is not applicable to children, as they are not subject to the law enforcement certification requirement. INA § 245(l)(1)(A).

²⁷⁴ Victims of trafficking who have been certified by ORR are eligible for the same services as a person designated a refugee by USCIS. If the victim is under the age of 18, he or she is eligible for certain benefits without the requirement of certification. Such benefits can include food stamps, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Refugee Cash and Medical Assistance (RCA & RMA), health care such as Medicaid or the State Children's Health Insurance Program (SCHIP), and other social services, including placement in ORR's Unaccompanied Refugee Minors program, a long-term foster care program administered by states. HHS, SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE GUIDE FOR SOCIAL SERVICE PROVIDERS (2012).

²⁷⁵ A child granted SIJS status is eligible to apply for designation into the URM program only if the predicate order is obtained while the child is in ORR custody. TVPRA § 235(d)(4)(A). As discussed below, the majority of UACs are released from ORR custody, and those who are released and obtain SIJS are living with a guardian or custodian and would not be eligible for the URM program.

²⁷⁶ Spouses, children, parents, and unmarried siblings under age 18 of T or U visa holders under the age of 21 are considered derivative beneficiaries. 8 C.F.R. § 245.23(b)(2); 8 C.F.R. § 245.24(a)(2).

²⁷⁷ A child granted permanent residency on the basis of SIJS could arguably petition for a sibling, but only once the child becomes a US citizen. In addition, the sibling's ability to obtain lawful status depends on the availability of a family-based visa. Thus, it could take many years for a sibling to gain status in this manner.

Maria's father abandoned her at birth, and her mother severely physically and emotionally abused her on a daily basis, deprived her of food, and allowed men to sexually abuse her. Her mother and mother's boyfriend hung her upside down with ropes and forcibly burned her hands and feet until she lost consciousness. Maria's mother forced her to work starting at five years of age in restaurants and as a housekeeper instead of attending school. Maria's grandmother also beat her; she hit her with the flat side of a machete and fired a pistol at her, the bullet barely missing her. Eventually, her mother sold her to sex traffickers who brought her from El Salvador to the United States. During the trip, numerous people raped and molested Maria and her trafficker threatened to kill her if she did not submit to rape by him and other men. Maria managed to escape after arrival in the U.S. and was placed in immigration removal proceedings. Maria has cooperated fully with federal investigators seeking to indict the traffickers; nevertheless, after many discussions weighing her options, she and her lawyer decided to pursue SIJS, rather than a T visa, for these reasons:

- Maria did not want to wait four years to apply for permanent residency, which made SIJS with its ability to immediately adjust status more desirable.
- Maria was not interested in petitioning for immigration status for her mother through a T visa given her history with her, and Maria did not have any siblings for whom she wished to petition immediately. Thus, the immigration benefits for family members available to T visa holders but not to children granted SIJS were not relevant to Maria.
- Maria was placed in foster care in Massachusetts where she can receive benefits until age 21, so she was not in need of the benefits a T visa would provide
- Maria was highly traumatized and did not wish to discuss the details of the abuse, trafficking, and rapes repeatedly and in detail. The state juvenile court did not require Maria to testify in order to have the special findings granted, whereas to obtain a T visa she was likely to have to revisit the details in the law enforcement interviews necessary to show she was being cooperative.
- Maria's attorney was concerned about her immigration status being contingent on the government's view that she was either cooperating throughout the four-year waiting period or that she was not required to cooperate due to being a child. By contrast, obtaining SIJS did not involve this type of DHS assessment, and the process was straightforward and rapid.²⁷⁸

²⁷⁸ KIND Database Case BO-391.

²⁷⁹ Child migrants who arrive in the United States may have a qualifying family member who has achieved the required legal status in the United States and can petition for them. For example, U.S. citizen or lawful permanent resident parents or a U.S. citizen sibling may petition for an immigrant child. However, the majority of child migrants arriving in the United States do not qualify for family-based petitions because immediate family members in the country lack the legal status required to petition for them. Limits to humanitarian relief for children are discussed in the asylum, SIJS, U, and T visa sections, as well as in the section on gaps in relief.

²⁸⁰ VAWA protection is available for certain children who have been abused by a U.S. citizen or lawful permanent resident parent or spouse – or whose non-citizen parent has been abused by a U.S. citizen or permanent resident spouse. VAWA also requires that an applicant prove herself to be a person of good moral character. INA § 204(a)(1)(A)-(D). VAWA cancellation of removal is available for certain immigrant children in removal proceedings who meet the requirements for VAWA. VAWA cancellation of removal applicants must have also maintained continuous presence in the U.S. for three years prior to adjudication of the application – demonstrating “good moral character” throughout that period – and show that their removal would result in extreme hardship to the immigrant, the immigrant's child, or the immigrant's parent. INA § 240A(b)(2). VAWA protection is not a major form of relief for immigrant children, as many may otherwise qualify for SIJS. In addition, children may not be eligible because they may be abused by family members not listed in the VAWA statute, or abusive family members may not have the lawful immigration status required. Some immigrant children may be granted VAWA as derivatives on parents' applications for VAWA.

²⁸¹ Cancellation of Removal is available for certain children who have lived in the U.S. for at least ten years prior to being placed in removal proceedings, have shown “good moral character” throughout that time, and who have a U.S. citizen or lawful permanent resident child, spouse, or parent who would suffer extreme and unusual hardship if the child were removed. As with VAWA, children may not have the requisite family member with the needed legal status to qualify, and even if they do, Cancellation of Removal requires demonstrating extreme and unusual hardship. INA § 240A(b)(1).

²⁸² DACA is applicable to children who (1) were under the age of 16 upon arriving in the U.S., (2) entered the U.S. prior to June 15, 2007, and (3) continuously resided in the U.S. for five years since that date, (4) were present in the U.S. on June 15, 2012, and (5) are in school, have received a high school completion certificate, or have received a GED. Children in removal proceedings or with a final removal order or voluntary departure order may seek DACA while under the age of 15, but all others applying for DACA must be at least 15 years old at the time of filing. JANET NAPOLITANO, HEAD OF HOMELAND SECURITY, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012).

²⁸³ See Tara Barahmpour, *Study Tracks Deferred Action for Childhood Arrival Acceptance, application rates*, WASH. POST, Aug. 14, 2013.

²⁸⁴ For children who are eligible, DACA merely provides temporary relief; it does not provide a path to permanent residency.

Adequacy of Current U.S. Immigration Protections for Immigrant Children: Need for a Best Interests Standard

Available Immigration and Protection Options for Children

Current law does not provide sufficient immigration options for children. Existing humanitarian relief and family-based petitions benefit only a small percentage of children.²⁷⁹ Children who are deemed ineligible for relief face repatriation, even if return may be dangerous and/or otherwise contrary to their best interests. Most importantly, there is no permanent legal status available for children ineligible for immigration relief but for whom it is not in their best interests to be repatriated to their countries of origin.

Gaps in Humanitarian Relief

As discussed in depth above, child applicants face significant barriers to being granted the primary forms of humanitarian relief – asylum, withholding of removal, CAT protection, SIJS, U and T visas – that are available to children. Other forms of existing humanitarian relief, such as VAWA²⁸⁰ and cancellation of removal,²⁸¹ have strict eligibility requirements that children often cannot satisfy. Deferred Action for Childhood Arrivals (DACA),²⁸² a form of prosecutorial discretion, has benefitted thousands of immigrants,²⁸³ but because of DACA's age and entry date restrictions, many children do not qualify.²⁸⁴ Among those who do not qualify are the thousands of UACs who have arrived in the United States in the last five years.

Temporary Protected Status (TPS) is not available to the vast majority of Honduran, Salvadoran, and Nicaraguan child migrants, although a considerable number of them have a parent in the United States with TPS.²⁸⁵ There is no derivative TPS status for family members of those with TPS, and most children cannot on their own satisfy the eligibility requirements – to have entered and resided in the United States years ago when their country was initially designated for TPS.²⁸⁶ Thus, children who enter the United States to reunite with parents who have TPS may have no avenue for legal relief and risk continued separation from parents and siblings. At best, children in this situation may be granted prosecutorial discretion to administratively close or terminate removal proceedings, to defer action in their cases,²⁸⁷ or to stay a removal order. None of these temporary reprieves provides legal status, and none guarantees that children will not be separated from parents who have TPS and siblings,²⁸⁸ because ICE can decide to execute an outstanding removal order or to pursue prosecution at any point. More is needed to protect children from being torn from their parents after risking life and limb to reunite – sometimes after years of separation – and from being returned to the very circumstances they left behind.

²⁸⁵ The Secretary of Homeland Security may designate a foreign country for TPS because of conditions in the country that make return unsafe, such as armed conflict, an epidemic, an earthquake or flood or environmental disaster. INA § 244(b). A country must be designated for TPS by the Secretary of Homeland Security. An applicant for TPS must demonstrate that she was in the United States on the date her country was designated for TPS and has been residing in the United States since that date, and she must have registered before the deadline. INA § 244(c)(1)(A).

²⁸⁶ Honduras was designated for TPS in 2001 and El Salvador and Nicaragua were designated in 1999. Attorneys have argued that children of TPS holders who are in the U.S. when TPS is extended or redesignated should qualify for initial late registration TPS, even if they were not in the U.S. on the date of initial designation. USCIS and the BIA have a different view and have denied initial late registration applications when the child was not in the U.S. on the initial designation date. See, e.g., *Cervantes v. Holder*, 597 F.3d 229, 235-36 (4th Cir. 2010) (holding that TPS is only available to children in the U.S. on the date of the initial designation).

²⁸⁷ Deferred action is a form of prosecutorial discretion granted by ICE, a decision by ICE not to prosecute or remove an individual.

²⁸⁸ Often children whose parents have TPS have half-siblings born in the United States who have U.S. citizenship.

Marcia is a 14-year-old Salvadoran living in a happy home with two parents who have been granted TPS and a younger sister who was born in the United States. Marcia was first diagnosed with severe epilepsy at the age of two after suffering from seizures. She came to the United States at the age of nine in 2008 when her only living relative in El Salvador, her grandmother, became gravely ill. Marcia has a deportation order, but ICE has stayed the order annually for the last several years. In the care of her family, the stable environment of her new school and the care of her doctors, Marcia has flourished, making tremendous academic and social achievements. Her parents, informed school officials, and doctors all work in unison to help her. Marcia is very aware of her tentative legal status in the United States and worries that she could be forced to go back to El Salvador without her parents or siblings.²⁸⁹

Katerin is a 14-year-old girl who came to the United States because the elderly grandmother who cared for her in El Salvador had become ill. She also feared for her safety because gang members sometimes harassed her on her way to school. Katerin's mother holds valid TPS and has lived and worked lawfully in the United States for over ten years. Katerin was not eligible for SIJS or any other form of immigration status. Although the Office of Chief Counsel agreed to administratively close Katerin's removal proceedings, Katerin was left without any lawful immigration status and faces an uncertain future. She is a straight-A student and hopes to go to college, but she is not sure how that will be possible given her lack of immigration status. She also fears being sent back to El Salvador without her mother.

Comprehensive Immigration Reform Does Not Sufficiently Expand Remedies Available to Immigrant Children

In June 2013, the Senate passed a comprehensive immigration reform bill, S. 744. A similar bill was introduced in the House of Representatives in October 2013, HR 15.²⁹⁰ If enacted, CIR would expand immigration avenues for children. It would make certain children eligible for Registered Provisional Immigrant Status (RPI), placing them on an eventual path to permanent residence. While the additional status is welcome, it does not provide a sufficient safety net for immigrant children because of its eligibility limitations. An individual must have been physically present in the United States on December 31, 2011 and must have maintained continuous presence since that date, among other requirements for RPI status. As a result, any child who has entered since that date as well as future flows of migrant children are ineligible.

In addition to RPI status, the DREAM Act provision of S.744 and its companion House bill H.R. 15, would, if passed, give children who have been granted RPI status a faster route to lawful permanent residency than is otherwise available through RPI status.²⁹¹ The DREAM provision is critically important for immigrant children. However, because obtaining RPI status is a prerequisite, the DREAM Act does not cast a wider net of protection for immigrant children who have entered the United States since December 31, 2011 or for future flows of such children.

²⁸⁹ KIND Database Case DCR-66.

²⁹⁰ Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (introduced Oct. 2, 2013) (hereinafter House CIR).

²⁹¹ The DREAM Act provision in both bills provides that children who entered the U.S. while younger than 16 years of age, who have graduated from high school or earned a GED, have graduated from college or attend two years of college, and who obtain RPI status can apply for permanent residency after five years in RPI status instead of the ten-year wait for non-DREAMers in RPI status. Senate CIR, *supra* note 255, at § 245D(b); House CIR, *supra* note 290, at § 245D(b). Senators Blumenthal and Murkowski introduced the "Little DREAMER" amendment, amendment #1327, in June 2013, but the Senate closed the voting process before this amendment reached a vote. The Little Dreamer amendment would expand the DREAM Act's reach to cover children too young to have finished high school or earned a GED after five years in RPI status. See U.S. Senator Richard Blumenthal, *Blumenthal, Murkowski Sponsor Little Dreamers Amendment to Bipartisan Immigration Bill*, June 20, 2013.

²⁹² U.N. COMMITTEE ON THE RIGHTS OF THE CHILD, GENERAL COMMENT NUMBER 14 (2013) ON THE RIGHT OF THE CHILD TO HAVE HIS OR HER BEST INTERESTS TAKEN AS A PRIMARY CONSIDERATION (ART. 3, PARA. 1), 53 (2013).

²⁹³ See HHS, DETERMINING THE BEST INTERESTS OF THE CHILD, *supra* note 7.

²⁹⁴ See, e.g., DEPARTMENT OF STATE, REPORT TO CONGRESS ON THE PROVISION OF P.L. 110-457 REGARDING REPATRIATION OF UNACCOMPANIED ALIEN CHILDREN AND U.S. GOVERNMENT EFFORTS TO PROTECT THEM FROM HUMAN TRAFFICKING (2011) (on file with authors) (hereinafter 2011 DOS REPORT TO CONGRESS) (reporting that in FY 2010, 1,937 UACs were issued removal orders, 1,524 were granted voluntary departure, and 1,656 UACs were actually removed or repatriated). This does not include the many thousands of Mexican children returned directly from the border. See also APPLESEED, CHILDREN AT THE BORDER, *supra* note 4, at 17 (estimating that the U.S. repatriated 15,534 Mexican UACs in 2009). Children may elect to take voluntary departure after having been advised that they are ineligible for immigration relief.

The Need for a New Best Interests Form of Relief

Best Interests as Primary Consideration

The lack of a binding best interests standard for children in removal proceedings stands as a gaping hole in the U.S. immigration system and does not conform with domestic and international law and norms on child welfare and rights. Limited options for children to obtain legal status, combined with the absence of a mandatory consideration of children's best interests, leads thousands of children to return to their countries every year through removal or voluntary departure orders,²⁹⁴ without anyone investigating whether return is safe or will promote the child's welfare.²⁹⁵ Children may seek voluntary departure after being advised by an attorney that they do not qualify for immigration relief. However, some attorneys make this assessment based on what a child reports during one meeting with the attorney, which, given children's developmental issues and communication challenges and their lack of trust in adult strangers, may provide only one snapshot of the child's history and experiences. As a result, some children who may be eligible for relief receive advice that they have no immigration remedies available to them. Other children seek voluntary departure after being pressured by family members to return to their country of origin, even if they genuinely fear return and/or have a viable claim for legal relief.²⁹⁶ Still other children – whose circumstances do not qualify them for existing forms of immigration relief – nevertheless risk return to situations that are contrary to their best interests. Some of these children request voluntary departure because they are detained and have no family or sponsor to whom they can be released, and they feel desperate as a result.²⁹⁷

Best interests determinations are case-by-case inquiries that balance a range of factors. Although there is no universal definition of the best interests of the child, the United Nations Committee on the Rights of the Child recently issued a general comment that sets out elements to consider when assessing the best interests of a child, including:

- The child's views (in light of the child's age and maturity).
- The child's identity (cultural factors).
- Preservation of the family environment and maintaining ties (including family separation issues and capacity of caregivers).
- Care, protection, and safety of the child.
- Situation of vulnerability (both objectively and subjectively).
- The child's right to health.
- The child's right to education.²⁹²

When making best interests determinations, dependency, delinquency, and family courts consider factors such as the child's views as well as "a number of [other] factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern."²⁹³

It is important to note that a parent's economic circumstances cannot factor into consideration in best interests determinations, just as a parent's poverty cannot serve as a basis for finding neglect under state laws.

²⁹⁵ Some immigrant children who believe they do not qualify for immigration status choose to live in the shadows, without legal status or permanency. More than one million undocumented children live in the U.S. See PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANTS AND THEIR U.S. BORN CHILDREN (2010). These children lack adequate health care, access to higher education, and legal employment, making them vulnerable to exploitation, and they live with constant fear of deportation, which may result in separation from family. See, e.g., Cindy Chang, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U.L.Q. 1271 (2005); MARIA PABON LOPEZ & GERARDO R. LOPEZ, PERSISTENT INEQUALITY/CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINO/A STUDENTS (Routledge 2010).

²⁹⁶ CGRS Database Case 9901 (Guatemalan boy with SIJS claim based on abuse by parent sought voluntary departure after speaking with abusive parent by phone and being pressured to return to Guatemala).

²⁹⁷ Attorneys representing detained children reported that some children who have no family to whose care they can be released and who would be good candidates for federal foster care, cannot bear to wait in custody the amount of time it takes to get into the foster care program. Instead, they choose voluntary departure simply to get released from custody. One attorney reported that "these are the most vulnerable children." CGRS Survey, *supra* note 11.

Best interests determinations are specific to the needs and circumstances of the individual child. It is not always in the child's best interests to remain in the United States, particularly when the child wishes to return to his or her country of origin and it is safe for the child to do so. However, some children may be returning to dangerous conditions, or to conditions in which they have no food or shelter, a violation of internationally recognized rights. Unfortunately, for many children, return may mean separation from parents, siblings, or other close relatives in the United States and, in many cases, children may have no dedicated adult to care for them upon return. Regardless, under current immigration laws, the United States can repatriate children without conducting a thorough assessment of the situation and conditions to which they will return. Returning children without a best interests determination may explain why some immigrant children make the life-threatening journey to the United States multiple times after being repatriated at the border, removed, or returned through voluntary departure, in the hopes of eventually being able to remain in the United States.²⁹⁸

A young child under the age of 12 from Central America, David, arrived in the United States alone. His case demonstrates when it might be in a child's best interests to return home, but also that special care should be taken before making such a decision.

After the U.S. government apprehended David, David's biological father attempted to sponsor his release, but his father's new wife had a serious criminal record, thus preventing the placement. David expressed a desire to return to his mother and family in his home country, but his mother's stated reasons to the U.S. government for sending her young child to the United States in the first place raised red flags about his safety if he returned to her.

A Child Advocate was assigned to David from the Young Center for Immigrant Children's Rights to identify and advocate for his best interests. The Young Center conducted a home study in David's country, hiring a social worker in that country to meet with the mother, family, and community members and to produce a written report. During the social worker's visit, David's mother confided that her husband had threatened to harm her if she did not immediately send her son to the United States. The mother, who had a wall of her home dedicated to her son's pictures and report cards, demonstrated to the social worker that she desperately desired David's return. With this information, and a better understanding of the child's express wishes based on regular visits with him, the Young Center convened a Best Interests Determination (BID) panel applying UNHCR protocols modified for a BID in this context. The BID panel recommended that it was in David's best interests to return to his mother. After reviewing the Young Center BID recommendation, an immigration judge granted David's request for voluntary departure. Before he returned, the social worker engaged with local officials to put in place services to help David safely and successfully reintegrate upon his return.²⁹⁹

The tragic and well-known case of slain Guatemalan youth Edgar Chocoy illustrates the deficiency of U.S. immigration options and safeguards for children, and the deadly consequences that can flow from repatriating children without a best interests determination. Despite Edgar's credible testimony that gang members would kill him if he were sent back to Guatemala, an immigration judge denied his claim due to his activities as a former gang member. The IJ found that those same activities did not statutorily bar Edgar from asylum, but that he did not merit asylum, and ordered him removed.

²⁹⁸ See, e.g., Beth Caldwell, Erin Siegal McIntyre, & Joel Medina, *A Revolving Door for Deported Children*, FRONTERAS, Apr. 19, 2013, <http://www.fronterasdesk.org/news/2013/apr/19/revolving-door-deported-children/> ("Deportation alone doesn't stop many kids from trying to cross [into the U.S.] again – and again." "When they arrive [...] they have already tried crossing and returning again – 3, 4 and 5 times." "This is what we call their normal process, the vicious cycle of these young people. Coming, going, coming, going.").

²⁹⁹ Case on file with the Young Center for Immigrant Children's Rights.

³⁰⁰ HHS decides on a case-by-case basis who is an "other vulnerable child." TVPRA § 235(c)(6). HHS created and uses a "Child Advocate Recommendation and Appointment" Form to determine when to appoint a child advocate. The form identifies 17 categories of children considered to be "vulnerable." These categories include, for example, children between the ages of birth to 12, children in residential treatment or therapeutic centers, children with physical or mental disabilities, children from countries with children identified as potential trafficking victims, and detained children who cannot communicate with staff at the facility or home where they are placed and for whom there is no interpreter regularly available. See DIVISION OF UNACCOMPANIED CHILDREN'S SERVICES, OFFICE OF REFUGEE RESETTLEMENT, CHILD ADVOCATE RECOMMENDATION AND APPOINTMENT FORM, OFFICE OF REFUGEE RESETTLEMENT (on file with authors).

³⁰¹ The Young Center for Immigrant Children's Rights ("Young Center") at the University of Chicago runs the UAC child advocate program. The Young Center is a foremost authority in this area; its program served as the model for TVPRA's child advocate provision. Since 2003, the Young Center has assigned and supervised hundreds of child advocates assigned to UACs under the Homeland Security Act (which authorized a pilot child advocate program) and the TVPRA.

Seventeen days after he arrived in Guatemala, Edgar was murdered by the gang members he feared. Had the IJ been required to consider Edgar's best interests, Edgar's life may have been spared.

The TVPRA takes an important step toward incorporating the best interests of the child into the immigration system and into repatriation decisions by providing for child advocates in cases of trafficked UACs or "other vulnerable UAC."³⁰⁰ However, it falls short of requiring all decision makers to take into primary account a child's best interests. Under the supervision of attorneys with child welfare and immigration expertise,³⁰¹ child advocates meet with UACs, learn their stories, and advocate for their best interests according to the principles set forth in state, federal, and international child protection statutes.³⁰² They make best interests recommendations to decision makers, often after convening an individualized BID³⁰³ panel constructed to meet UNHCR's guidelines on BID and consistent with domestic and international child welfare principles.³⁰⁴ In some cases, the child advocate conducts an international home study to determine whether it is in the child's best interests to return to the home country. However, because current law does not require IJs, asylum officers, DHS officials, or other decision makers to consider best interests when ruling on a child's removal or other immigration decisions, best interests recommendations made by child advocates may have limited impact. While some IJs and asylum officers welcome best interests recommendations and consider them in exercising their discretion to grant or deny relief, other IJs have expressed confusion about how to use best interests recommendations made by child advocates given the absence of a statutory best interests standard.³⁰⁵ Still other IJs have stated that they "believe that without a statutory best interests standard, their hands are tied and they must order the child deported [when the child does not qualify for immigration status]," even if a child advocate has recommended that removal would not be in the child's best interests – meaning that removal is unsafe or threatens the child's well-being.³⁰⁶ In order to address this gap, Senator Mary Landrieu (D-LA) filed an amendment as part of the Senate CIR bill, S. 744. The Landrieu amendment was not brought to the floor for a vote, but it would have required that the "best interests of the child" be the "primary consideration" in all "procedures and decisions concerning unaccompanied alien children that are made by a Federal agency or a Federal court pursuant to the Immigration and Nationality Act" or regulations implementing the Act.³⁰⁷ A law such as this would not only help ensure that the best interests of the child are considered

³⁰² The majority of state and local child welfare systems provide a guardian ad litem. BHABHA, *SEEKING ASYLUM ALONE*, *supra* note 4, at 81-82 (discussing the federal Child Abuse Prevention and Treatment Act (CAPTA) in 1974, which "established the principle that an adult should have responsibility for ensuring that the best interests of the child are paramount in child welfare proceedings involving the child"). CAPTA required states seeking federal funding to help defray dependency-system costs to provide guardians ad litem to all children in the dependency system. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010). At the international level, in recognition of the extreme vulnerability of UACs, UNHCR has long called for the appointment of a child advocate "with the necessary expertise in the field of childcaring" for every unaccompanied child to "ensure that the [best] interests of the child are safeguarded and that his/her needs are appropriately met." 1997 UNHCR UNACCOMPANIED CHILDREN GUIDELINES, *supra* note 23, at 2, 7; see also ABA Standards, *supra* note 5 (recognizing that "the right of a Child to participate meaningfully in proceedings regarding his immigration status as well as in decisions affecting other aspects of his life is universally recognized," and calling for appointment of "advocate for child protection" for UACs to "ensure that the Child's best interests are identified, expressed, and advocated at all times," except in cases of children who request voluntary repatriation upon apprehension).

³⁰³ In the context of dependency, delinquency, and family courts, BIDs generally refer to "the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve a child as well as who is best suited to take care of the child. BIDs are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern." HHS, *DETERMINING THE BEST INTERESTS OF THE CHILD*, *supra* note 7, at 2.

³⁰⁴ Consistent with the recommendations for BID panels made in UNHCR's Guidelines on Determining the Best Interests of the Child, the BID panel convened by the Young Center, is a multidisciplinary, diverse group that includes "the child advocate appointed to the child's case, Young Center staff, an immigration attorney, a child protection specialist, and an expert on, or from, the child's country of origin," and typically includes other experts in "child development, juvenile justice, psychology, counseling, child maltreatment, domestic violence, or international human rights," depending on the specific issues involved in the case. When possible, panels include individuals from the child's ethnic or cultural background and of the same gender as the child. The Young Center has spent the last ten years developing and improving its protocol for BIDs and child advocates to protect children's rights while advocating for their best interests. Young Center, *Projects, Best Interests Determination Panels (BID Panels)*, <http://theyoungcenter.org/about/projects/> (last accessed Jan. 14, 2014); See also U.N. HIGH COMMISSIONER FOR REFUGEES, *FORMAL GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD* (2008) (hereinafter UNHCR FORMAL GUIDELINES).

³⁰⁵ EOIR provided a training session for Immigration Judges in the summer of 2013 titled the Role of the Child Advocate in Immigration Court. This training may clear up some of the confusion, but training alone is insufficient, and a statutory best interests standard is needed to ensure proper consideration of children's best interests.

³⁰⁶ See Young Center, *Substantive Best Interests Standard*, <http://theyoungcenter.org/about/projects/> (last accessed Jan 13, 2014).

³⁰⁷ S.A. 1340, 113th Cong., 159 Cong. Record 87 (amendment by Senator Landrieu to S. 744). Consistent with State duties under Article 3 of the CRC, the Landrieu amendment includes the following factors for consideration of best interests: the views of the child, his/her safety and security and mental and

A child advocate's advocacy and recommendation about the best interests of the child could have made a critical difference in these cases.

A 16-year-old boy from Honduras fled to the United States to escape violence at the hands of a street gang that had threatened to kill him for refusing to join their group. After being advised that he had a weak claim for asylum, he requested voluntary departure to Honduras. Shortly after his return, the gang that he feared targeted him again. This time, gang members shot at him when he refused to participate. The boy fled to the United States a second time and is now pursuing asylum. Had a child advocate been involved, or had best interests been a primary consideration, the boy may have pursued asylum or other relief the first time he was in the United States or may have been granted relief through prosecutorial discretion or deferred action, and thus avoided the danger he faced upon return.³⁰⁹

A Guatemalan boy came to the United States to escape abuse at the hands of his caretakers. The boy has repeatedly made clear that he wished to remain in the United States, and his attorney filed an application for SIJS. However, the boy recently spoke with family members in his country who told him that his siblings do not have food to eat and asked him to return to Guatemala to work immediately, rather than wait the time it would take for his application to be adjudicated. Despite his repeated expression of a desire to remain in the United States, the boy has instructed his lawyer to request voluntary departure as quickly as possible. Without a child advocate or consideration of his best interests, the boy is likely to be granted voluntary departure and will return to a situation where he is forced to work long hours, cannot attend school, and suffers abuse.³¹⁰

throughout every aspect of decisions in a UAC's removal case, but also that best interests become a primary consideration prior to ordering removal of, granting voluntary departure to, or repatriating a UAC.³⁰⁸ This would be a significant step forward in protecting unaccompanied children such as Edgar Chocoy from repatriation to harmful situations and could result in UACs being granted prosecutorial discretion or deferred action. A much better approach, however, would be to enact a statutory best interests standard for all actions and decisions regarding all principal child applicants given their vulnerability as children at risk of removal.

Creation of a "Best Interests" Form of Relief

In addition to giving primary consideration to the best interests of a child prior to returning the child to his or her home country, there must be a form of legal status available to protect children who are otherwise ineligible for immigration relief from repatriation when it is not in their best interests, and to provide them with a stable living situation in the United States. In other words, children in removal proceedings – including UACs and accompanied children who are principal applicants in removal proceedings³¹¹ – who are denied immigration relief or are ineligible for it, who establish that repatriation would be contrary to their best interests (their safety and well-being), should be eligible for formal legal status. Congress should enact a new form of discretionary relief for this subset of UACs and principal child applicants ineligible for other relief that allows immigration judges to take into account the best interests of the child as a primary consideration. If granted, this new form of relief should halt removal proceedings and provide immediate permanent residency to ensure that these children receive sufficient ongoing protection.³¹²

physical health; the child's well-being, including the need for education and support related to child development; the parent-child relationship and family unity; and the potential effect of separating the child from the child's parent or legal guardian, siblings, and other members of the child's extended biological family. These factors harmonize with the factors the U.N. Committee on the Rights of the Child advances for best interests considerations, as well as with best interests factors considered by state courts in other non-immigration matters. CRC art. 3, *supra* note 7.

³⁰⁸ Child advocates assigned in the immigration context "ensure that the due process rights of [unaccompanied immigrant] children are respected and that a determination of the case is based on a full consideration of the child's circumstances." *Unaccompanied Alien Child Protection Act: Hearing before the Subcommittee on Immigration of the Committee on the Judiciary*, 107th Cong. 57-58 (2002) (statement of Julianne Duncan). Guardians ad litem or child advocates play a distinct role from a child's attorney. The child's attorney represents the child's legal rights and interests, in particular advocating for the child's stated interests, whereas guardians ad litem or child advocates advocate for what is in the child's best interests. See, e.g., NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, GUARDIAN AD LITEM PROGRAM, http://www.nccourts.org/Citizens/JData/Documents/Guardian_ad_Litem_Facts.pdf (last visited Jan. 6, 2014).

³⁰⁹ CGRS Database Case 9899. Prosecutorial discretion or some other temporary status does not provide the type of durable solution called for in children's cases, but would be preferable to returning to the risk of persecution.

Independent child advocates who have training and expertise in child welfare, and receive close supervision by experts, make best interests recommendations in accordance with state and federal child protection statutes and international standards and best practices regarding BIDs.³¹³ These specialized advocates can play a critical role in the decision-making process for a “best interests” form of relief from removal.³¹⁴ Accompanied principal child applicants could also benefit from child advocates to assess and make recommendations regarding their best interests, because – like UACs – accompanied children who are ineligible for existing forms of immigration relief risk return to danger or to situations harmful to their welfare.

Recommendations

- 1) Congress should enact legislation requiring that the “best interests of the child” shall be “a primary consideration” in all procedures, actions, and decisions concerning unaccompanied immigrant children and principal child applicants that are made by a federal agency or court.
- 2) Congress should designate a new form of discretionary “best interests” relief to halt removal proceedings and grant immediate permanent residency to unaccompanied immigrant children and principal child applicants in removal proceedings who are ineligible for or have been denied other forms of relief and for whom repatriation to their native country or country of last habitual residence is deemed contrary to their best interests. IJ determinations should be guided by best interests recommendations that are provided by the child advocate appointed to the case and are made in accordance with state and federal child protection statutes, and international standards and best practices regarding best interests determinations.
- 3) Congress should enact legislation to require appointment of a child advocate for any principal child applicant seeking “best interests” relief.
- 4) In order to promote family unity and child welfare, Congress should amend INA§ 244 to provide for derivative TPS for children under the age of 18 whose parents have TPS.
- 5) Congress should pass comprehensive immigration reform legislation that includes an expedited path to permanent residency for DREAMers and Little DREAMers (children who meet the requirements of the DREAM Act and are under 18 upon completing five years of RPI status who would then be eligible to adjust to LPR status and be immediately eligible for citizenship).

³¹⁰ CGRS Database Case 9900.

³¹¹ In other words, these children are not in removal proceedings as derivatives on a parent’s application.

³¹² See Young & McKenna, *The Measure of a Society*, *supra* note 6 (recommending a “best interests visa”); Young Center, *Proposal for Best Interests of the Child Standard, Best Interests of the Child Visa*, <http://theyoungcenter.org/learn/best-interests-policy-advocacy/> (last accessed Jan. 16, 2014) (recommending a “best interests visa”). WRC has also advocated for statutory incorporation of the best interests of the child principle and immigration relief when it is not in a child’s best interests to return to his or her country. See, e.g., WRC, *FORCED FROM HOME*, *supra* note 4, at Appendix A.

³¹³ The UNHCR has developed guidelines on best interests determinations, see UNHCR FORMAL GUIDELINES, *supra* note 304, that call for a formal best interests determination by a multi-disciplinary panel in order to identify durable solutions for unaccompanied children. In the context of dependency, delinquency, and family courts, BIDs generally refer to “the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve a child as well as who is best suited to take care of the child.” HHS, *DETERMINING THE BEST INTERESTS OF THE CHILD*, *supra* note 7, at 2.

³¹⁴ Congress clearly recognized that IJs lack the child welfare expertise necessary to make a best interests determination when it made SIJS a bifurcated process that requires findings by a “juvenile court,” making a child advocate’s recommendations even more critical.

Section 2 Procedural Issues in Children's Immigration Cases

Best Interests Should Govern Procedures Used in Children's Cases

Recent years have seen positive advances in the procedural handling of children's immigration cases. Nevertheless, not all cases are handled in a manner consistent with the cornerstone principle of the Convention on the Rights of the Child that the best interests of the child should be a primary factor in any action or decision concerning children. This is true with respect to a number of aspects of EOIR and USCIS procedures, including the inherent adversarial structure of immigration court proceedings and the adversarial nature of questioning by some IJs, ICE Assistant Chief Counsel, and USCIS officers. In addition, the training that judges and USCIS officers receive on interviewing children, on child development, and on the impact of trauma on children could be significantly improved, as could the training that BIA members receive on child development and trauma.

The Treatment of Children's Cases in Immigration Court Proceedings

Positive Advances

EOIR should be commended for having taken several positive steps to address the way immigration judges handle children's cases. These steps include adopting Guidelines for Immigration Court Cases Involving Unaccompanied Children (hereinafter EOIR Guidelines),³¹⁵ active engagement in creating and promoting an orientation video for children regarding court proceedings,³¹⁶ establishing juvenile dockets in at least ten cities, and establishing the Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC).³¹⁷ More recently, EOIR appointed an Assistant Chief Immigration Judge with a particular mandate to ensure fair and effective procedures within EOIR for vulnerable populations such as UACs.

The EOIR Guidelines encourage all IJs to "employ child-sensitive procedures whenever a child respondent or witness is present in the courtroom."³¹⁸ They state that IJs can fulfill their duties under the immigration statute and federal regulations in a manner that "takes full account of the best interest of the unaccompanied alien child" and address a number of issues that arise in children's cases. The EOIR Guidelines strive to reduce risks of harm to child witnesses by recommending that: (1) IJs narrow the legal issues through pretrial conferences; (2) IJs limit the duration of a child's testimony; (3) IJs ensure age-appropriate, sensitive questioning; and (4) IJs modify the courtroom setting to make children comfortable and to enable them to "participate more fully in proceedings."³¹⁹

Despite these positive aspects of the EOIR Guidelines and EOIR's changes, there remains significant room for improvement. The EOIR Guidelines are not binding on all judges, nor do judges follow them consistently. They also do not go far enough to ensure children's cases are heard in a child-sensitive manner. In addition, immigration judges have not received adequate training on how to elicit information from children or on the unique needs of children.

³¹⁵ 2007 EOIR OPPM GUIDELINES FOR IMMIGRATION COURT, *supra* note 30. EOIR consulted UNHCR, U.S., and Canadian guidelines regarding children's asylum claims, as well as materials from family and juvenile courts to develop the guidelines. While the title of the guidance specifically lists unaccompanied children, the document applies to children more generally, as it refers to "children" and "child" throughout.

³¹⁶ The Women's Refugee Commission produced the video in 2006.

³¹⁷ Under this program, funding is provided to local non-profit legal services providers to provide legal orientation presentations to the adult caregivers of unaccompanied children in EOIR removal proceedings.

³¹⁸ 2007 EOIR OPPM GUIDELINES FOR IMMIGRATION COURT, *supra* note 30, at 3.

³¹⁹ For example, the guidelines suggest that children be permitted to testify from the benches in a courtroom instead of the witness stand, to sit next to a supportive adult while testifying, and to bring a stuffed animal or other toy to the courtroom. *Id.* at IV(C). In addition, the guidelines suggest that Judges wear regular attire rather than robes. *Id.* at IV(F).

In recognition of this need for better immigration procedures, the TVPRA mandated that applications from children seeking asylum and other forms of relief “shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.”³²⁰ However, to date, EOIR and USCIS have not proposed any regulations addressing this requirement.

Adversarial Nature of Removal Proceedings

Removal proceedings remain inherently adversarial in nature and intimidate children.³²¹ The EOIR Guidelines recommend that IJs ensure child-sensitive questioning with age-appropriate language and tone. However, some judges ask antagonistic questions and appear hostile toward child applicants or toward the children’s attorneys.³²² IJs also do not always use age-appropriate language or sensitive questioning, which confuses or intimidates child applicants. For example, in one case, an IJ gave an unrepresented eight-year-old boy formal advisals about his rights and the consequences of failure to appear in court using the standard language employed in adult cases. The child appeared baffled, but the IJ did not modify the language or otherwise make sure that the boy understood.³²³ It is important to ensure that officials use child-centered language to communicate information about proceedings, particularly when the child is unrepresented in an immigration court while attorneys represent the government’s interests.³²⁴ Practices adopted by juvenile, family, and criminal courts provide one model for this. For example, the Texas Code of Criminal Procedure requires judges to administer the oath in a manner that ensures children fully understand the duty to tell the truth, and to question children in a manner appropriate to their age and understanding.³²⁵

At times, ICE Assistant Chief Counsel also engage in antagonistic questioning of children or are hostile to them.³²⁶ In one asylum case involving a ten-year-old applicant, the ICE attorney stated during a hearing that she had a problem with the boy’s credibility and would focus on that during cross-examination. She also said that she would challenge the boy’s credibility all the way to the federal court of appeals if necessary. ICE has a right to appeal credibility or any other element of an IJ decision. In this case, however, ICE Assistant Chief Counsel made clear that she intended to challenge the boy’s credibility prior to cross-examination. This child-insensitive approach unnecessarily intimidated the boy and could have affected negatively his ability to testify on his own behalf.³²⁷

The Need for More Child Appropriate Settings for Removal Proceedings

The EOIR Guidelines also do not go far enough to ensure that the setting for children’s cases is appropriate. Child welfare experts have found that children are most likely to provide truthful testimony if they feel safe and if they trust their interviewer.³²⁸ As a basic starting point, the EOIR Guidelines do not require the establishment of juvenile dockets in all

³²⁰ TVPRA § 235(d)(8).

³²¹ In a survey of pro bono attorneys representing KIND child clients, out of the 80 respondents who answered the question, 52% indicated that their clients were always nervous about going to immigration court, 38.75% responded that their clients were sometimes nervous and only 8.75% responded their clients were never nervous. KIND Survey, *supra* note 11, at Question 3.

³²² See KIND Survey, *supra* note 11, at Question 18. Out of 66 attorneys who responded to this question, 1.52% indicated that the IJ was always hostile and 24.24% responded that the IJ was sometimes hostile.

³²³ CGRS Database Case 9893.

³²⁴ See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (NCJFCJ), TECHNICAL ASSISTANCE BRIEF: KEY PRINCIPLES FOR IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES, No. 5.

³²⁵ TEX. CODE CRIM. PROC. art. 38.074, subdv. 3 (a)(1) addresses the language used to administer an oath to a child; see also subdv. 3(a)(4) regarding judges’ ability to limit the duration and time of day of a child’s testimony, consistent with his/her best interests.

³²⁶ Of 64 attorneys who responded to Question 19 on the KIND Survey on whether and how often the ICE District Counsel employed antagonistic questioning, 4.69% answered “always” and 29.69% responded “some of the time.” KIND Survey, *supra* note 11.

³²⁷ CGRS Database Case 7072.

³²⁸ See *generally* LUTHERAN IMMIGRATION AND REFUGEE SERVICE, WORKING WITH REFUGEE CHILDREN: ISSUES OF CULTURE, LAW AND DEVELOPMENT (1998); HARBORVIEW CENTER FOR SEXUAL ASSAULT & TRAUMATIC STRESS & WA STATE CRIMINAL JUSTICE TRAINING COMMISSION, CHILD INTERVIEW GUIDE (revised Oct. 2009); National Children’s Advocacy Center, *Forensic Interview Services*, <http://www.nationalcac.org/intervention/forensic-services.html>.

cities. Consequently, not all courts have established them, and some courts require children to appear alongside adults. In some courts that do have juvenile dockets, increasing numbers and a lack of resources result in too few of these dockets. As a result, children have had to appear in front of non-juvenile docket judges who often do not understand the unique forms of relief or procedures applicable to children.³²⁹ Even in those jurisdictions with juvenile dockets, while some IJs are sympathetic and do their best to make children feel comfortable, the courtroom setting remains intimidating. In addition, while the EOIR Guidelines encourage IJs to dress in normal attire rather than formal robes and to allow children to testify from the benches rather than the witness stand, attorneys have reported that IJs do not always follow this guidance.³³⁰

The EOIR Guidelines also do not go far enough in suggesting courtroom modifications even when courts try to employ child-sensitive practices. For example, they do not require or suggest that children's hearings proceed outside of the courtroom, in a conference room or office space, or that children be permitted to testify *in camera* (i.e., in the IJ's office), as resources permit.³³¹

A Honduran boy fled brutal violence at the hands of gang members. He was apprehended at the border, placed in ORR custody, and put into removal proceedings. The boy was terrified of being deported, because he was convinced that gang members would kill him on sight. He was also so intimidated by the courtroom, immigration judge, and ICE Assistant Chief Counsel that appearing in court traumatized him. He could not sleep the nights before each court appearance. He also vomited before each court appearance and shook uncontrollably every time he entered the courtroom.³³² Despite the boy's visible terror, the IJ did not remove his robe and appear in normal attire, or make any other accommodations for him, such as waiving his appearance at master calendar hearings or providing an alternate space in which to hold his hearings.

The Need for a Consistent Practice of Narrowing the Scope of Legal Issues Prior to Merits Hearings and the Use of Prosecutorial Discretion

The EOIR Guidelines recommend that IJs schedule pretrial conferences to narrow the contested legal issues, but attorneys have reported that some IJs do not encourage this practice. When IJs do not actively encourage parties to narrow the scope of the issues, it is up to the parties to do so. However, ICE trial attorneys do not always agree to limit the contested issues in children's asylum cases, and sometimes they do not even return phone calls to discuss a case.³³³

In addition, ICE Assistant Chief Counsel have, but do not always use, the authority to exercise prosecutorial discretion throughout every stage and with respect to every decision in a child's case. For example, as discussed above, ICE attorneys have discretion to decide whether to take the case to trial or to settle, how to limit the contested issues, whether to cross-examine a child and if so, how to limit cross-examination, and whether to contest motions by the child.³³⁴

³²⁹ KIND Database Cases 13-7002919; 12-7002512; 12-7002511; 10-7000773.

³³⁰ Sixty-six attorneys responded to Question 5 of the KIND survey that judges wore normal attire rather than robes only 4.55% of the time. KIND Survey, *supra* note 11.

³³¹ Even though the guidelines do not prohibit *in camera* testimony, this option is rarely used. For instance, only two of the eighty-two KIND pro bono attorneys surveyed reported that IJs allowed children to testify *in camera*. *Id.*

³³² CGRS Database Case 9861.

³³³ CGRS Database Case 4266 (ICE attorney did not return phone calls and was unwilling to stipulate to any of the elements); CGRS Database Case 7072 (same).

³³⁴ Motions filed by the child might include motions to continue, to change venue, or for telephonic testimony of a witness.

³³⁵ Cal. Welf. & Inst. Code § 350, subdv. (a)(2) (2013).

³³⁶ Cal. Ct. R. 5.518(e).

³³⁷ THE PROTECTION PROJECT & INT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, CHILD PROTECTION MODEL LAW art. 61 subdv. 3 (2013).

Juvenile and family courts have successfully incorporated methods to limit contested issues in children's cases, such as adopting dispute resolution alternatives at various stages of the court process. In California, mediation in dependency cases is permitted at any stage in the proceeding at the request of anyone who has a direct interest in the case.³³⁵ Mediators contracted through the Family Court Services must be licensed marriage and family therapists, licensed clinical social workers, or licensed psychologists.³³⁶ Child-centered, culturally sensitive mediation or settlement conferences can narrow the issues for trial or avoid trial altogether, saving the court time and the child from the stress and trauma of testifying in a formal setting. Child advocates recommend dispute resolution alternatives to formal and traditional forums so long as they serve the best interests of the child and can guarantee the same level of legal protection.³³⁷

In 2011, Florida enacted a statewide program of model dependency courts dedicated to providing cutting edge court practice for abused and neglected children.³³⁸ One of the program's twelve guiding principles is a requirement that the court distinguish between cases that can be "diverted to non-judicial and quasi-judicial personnel for resolution, when appropriate and consistent with the ends of justice," and cases that should proceed in court.³³⁹ This approach of settling cases is common in other areas of civil and criminal law, but rarely occurs in the immigration context. Instead, nearly every child in removal proceedings goes to trial, except those whose cases include a request to use prosecutorial discretion to halt removal proceedings has been granted. The TVPRA provision granting the Asylum Office initial jurisdiction over unaccompanied children's cases aims, in part, to address this concern; however, it does not go far enough, because not all cases are decided at the Asylum Office stage.

Duration of Testimony and Repeated Interviews, Particularly in Asylum Cases

The EOIR Guidelines for the length and context of children's testimony are insufficiently implemented to protect children from potentially harmful experiences as witnesses. For example, although the EOIR Guidelines recommend that judges limit the duration of a child's testimony, some attorneys surveyed reported that child asylum applicants were subjected to lengthy cross-examination, in one case lasting two hours, following one or more hours of direct examination.

Moreover, the Guidelines do not provide guidance that reduces the number of times a child applicant must repeat his or her story, such as by recommending reliance on children's declarations or testimony taken by mental health experts or individuals with expertise in child welfare in lieu of in-court testimony. This is particularly troublesome in the context of children's asylum cases. By the time a child testifies in support of an asylum claim in court, s/he may have had to tell her story multiple times, to CBP or ICE officials, ORR caseworkers, attorneys and other legal staff, and an Asylum Officer. Repeated interviews place children at risk of re-traumatization and should be avoided at all costs.³⁴⁰ In addition, repeated interviews may confuse children and create potential credibility problems – exacerbated by the growing time gap between the child's experiences that form the basis of the asylum claim and his or her merits hearing.³⁴¹ Despite the risks that come with repeated testimony, only two of the written asylum decisions the authors reviewed accepted children's affidavits as their credible testimony.

³³⁸ For more information on Florida's statewide use of model courts, see NCJFCJ, *Florida Statewide Model Court*, <http://www.ncjfcj.org/florida-statewide-model-court> (last accessed Jan. 11, 2014).

³³⁹ OFFICE OF THE STATE COURTS ADM'R, *FLORIDA'S DEPENDENCY BENCHBOOK 2011*, at 9 (2011). Dependency mediators, the non-judicial and quasi-judicial personnel in Florida, are court certified, neutral third parties who assist the parties to identify issues and reach a mutually acceptable voluntary agreement in an informal and non-adversarial setting. The decision-making power rests with the parties. Mediators must possess a minimum of a bachelor's degree, court-certified training, and requisite experience. Alternatively, with judicial approval, the parties can agree to use a non-certified mediator. Florida Rules of Juvenile Procedure, rule 8.290; Florida Rules for Certified and Court Appointed Mediators, rule 10.100(d). For specific requirements for dependency mediators, see HOW TO BECOME A FLORIDA SUPREME COURT CERTIFIED MEDIATOR, STEP-BY-STEP GUIDE 2.

³⁴⁰ See *generally* NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, NAT'L DIST. ATTORNEYS ASS'N, *COMPILATION OF LEGISLATION LIMITING THE NUMBER OF INTERVIEWS WITH CHILD VICTIMS (2011)* (listing legislation by state that sets limits on the number of times children can be interviewed about abuse they have suffered to protect them from additional trauma).

³⁴¹ See CISOMB, *FAIR AND EFFECTIVE ASYLUM PROCESS*, *supra* note 143, at 6.

Literature on children’s developing brains shows that they do not think or store information linearly, they want to please interviewers, and they may be easily intimidated or confused during questioning – particularly questioning of a hostile nature.³⁴² The literature also shows that, as a result, children recount information best not through question and answer but through drawing, singing, playing, or storytelling, methods of communication that differ entirely from the direct and cross-examination used in immigration courts.³⁴³

Looking to approaches used in abuse and neglect cases in state courts can be instructive.³⁴⁴ For instance, some states permit a child’s testimony in such cases to be taken outside of the courtroom, either by videotape or *in camera*.³⁴⁵ Some states also permit prior statements made to child welfare experts, which shields children from the practice of irrelevant and intimidating cross-examination.³⁴⁶ The use of out-of-court testimony or of a prior interview can, in some cases, replace the need for live testimony entirely, and in other cases can reduce the duration and scope of testimony in court. Some jurisdictions utilize child advocacy centers to interview children and investigate allegations of abuse or neglect.³⁴⁷ These centers assign a multi-disciplinary team to each child that includes child welfare, law enforcement,³⁴⁸ medical and mental health, and other professionals, and the team conducts a single interview of the victimized child.³⁴⁹ Often advocacy center staff members go through extensive multi-day trainings on interviewing children and regularly work with and interview child survivors of physical and sexual abuse. Other states have statutes limiting the number of times a child can be interviewed regarding abuse, or neglect or restricting the intimidating questioning of children in order to prevent re-traumatization and other negative mental health consequences.³⁵⁰ Criminal statutes in a number of states allow for admitting videotaped testimony of children in physical and sexual abuse cases.

Importance of Procedural Protections in Cases of Past Trauma

The health impacts of trauma on children can be particularly grave and long lasting, thus making procedural protections critical in cases in which children have experienced physical, sexual, or emotional harm. Trauma-induced conditions suffered by children who have been persecuted in their home countries, including those threatened with harm, include persistent depression, general anxiety, and the development of PTSD and other emotional disturbances.³⁵¹ In extreme cases, traumatized children may attempt to take their own lives to escape abuse or reliving the abuse through nightmares and flashbacks.

One case involved a nine-year-old Ecuadoran boy who sought protection from repeated abuse by the uncle who had been his caretaker. From a young age, the boy’s uncle beat him daily with his hands and fists and various objects, including sticks, a plastic cord, a plant with sharp thorns, and a thick leather strap used to discipline animals. His uncle also psychologically tormented him, forcing him to do hard labor and berating him by calling him stupid and worthless. At the age of six, the boy attempted to commit suicide by holding a pillow over his face. A psychologist testified in his asylum proceedings that he had adjustment disorder with mixed disturbance of emotions and conduct as a result of this abuse.³⁵²

³⁴² Nicholas Scurich, *Questioning Child Witnesses*, 25 THE JURY EXPERT 1, 2-3 (2013) (describing children’s tendency to answer questions inaccurately if they are overly suggestive or closed-ended); Sindya N. Bhanoo, *Memory Process Takes Years to Fully Develop*, N.Y. TIMES, Sept. 5, 2011 (describing a scientific study on brain development finding that children were unable to recall the source of memories as well as adults can); Maggie Bruck et al., *Reliability and Credibility of Young Children’s Reports: From Research to Policy and Practice*, 53 AM. PSYCHOLOGIST 2, 136-151 (1998) (discussing psychological research about the suggestibility of children during questioning).

³⁴³ See 2009 UNHCR Guidelines *supra* note 32, at 26 (stating that “[u]seful non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing”); see also KAREN A. REITMAN, ATTORNEYS FOR CHILDREN GUIDE TO INTERVIEWING CHILD CLIENTS: INTEGRATING TRAUMA INFORMED CARE AND SOLUTION FOCUSED STRATEGIES (2011) (noting that use of activity such as playing reduces pressure on children and “allows more freedom of expression on the part of the child” than direct questioning).

³⁴⁴ Dependency, family, and juvenile justice courts share the goal of safeguarding the best interests of the child, in part because they recognize the special condition and vulnerabilities of children. Consequently, these courts put procedural protections into place and make special accommodations for children who are parties to or witnesses in the proceedings. Criminal courts also provide accommodations and protections for child witnesses testifying in criminal

In another case, a Honduran father treated his daughter like a slave and denied her an education, forcing her to work as well as beating her regularly. The girl also witnessed her father's extreme physical abuse of her mother – on one occasion he shot at her mother with a pistol. After her mother fled the country, the father's beatings of the girl intensified. He soaked porous building blocks with water to make them heavier and forced the girl to carry them on her shoulder for extended periods of time, and he struck her ankles with a cattle whip. While in ORR custody in the United States, the girl was hospitalized for attempted suicide and referred for psychiatric counseling and anti-depression medications. A year later, she attempted suicide again by overdosing on anti-depressant pills and was again admitted for care. Her psychologist submitted an affidavit in her asylum proceedings diagnosing the girl with Major Depressive Disorder and PTSD.³⁵³

The effects of trauma, including the risk of trauma associated with threats, compromise a child's ability to communicate, especially about the trauma itself and related fears. Experts have documented the specific deleterious effects trauma has on the adolescent brain that, left untreated, can cause irreversible damage, including an inability to regulate emotional states and manage stress. The process of applying for asylum can be particularly re-traumatizing for a child applicant, causing physical reactions (e.g., shortness of breath, chest pain, blurred vision) as well as emotional responses (e.g., disorientation, detachment, memory loss) when the child recounts past abuse. As such, procedural protections are important not only for ensuring an accurate recount of the child's story, but also for protecting the physical and emotional health of child asylum applicants.

proceedings. Some of the accommodations EOIR suggests for children in its 2007 OPPM, such as allowing children to bring a toy or comfort object to court and encouraging tours of the courtroom for children, come from practices adopted by juvenile and family courts.

³⁴⁵ See CAL. WELF. & INST. CODE § 350(b) regarding a child's testimony *in camera*.

³⁴⁶ See, e.g., FLA. STAT. § 90.803(23)(a).

³⁴⁷ See California's Child Advocacy Centers (CAC), <http://www.cnac.org/index.php?s=3108&cat=70>. For a discussion of child advocacy centers, including guidelines for a model child advocacy center, see National Children's Alliance, <http://www.nationalchildrensalliance.org/index.php?s=36>.

³⁴⁸ The inclusion of law enforcement officials is more appropriate in the context of abuse and neglect cases or cases in which the child has been the victim or witness to a crime. In those cases, law enforcement officials are involved because they are investigating the abuse or neglect in an effort to protect children and uphold the law. In the immigration context, however, law enforcement officials such as ICE and CBP authorities may have interests adverse to those of a child in removal proceedings and so should not be included in child advocacy center interviews of these children.

³⁴⁹ The primary goal of Children's Advocacy Centers (CACs) is to assure that children are not further victimized by the intervention system designed to protect them. For more details, see <http://www.nationalchildrensalliance.org/index.php?s=36>. Some sample jurisdictions are Merrimack County, New Hampshire at <http://www.merrimackcounty.net/administration/cac.html>, and Collin County, Texas at <http://www.caccollincounty.org/who-we-are-how-we-help/>. There are over 750 CACs nationwide, each one unique depending on the needs of the community. The Office of Juvenile Justice and Delinquency Prevention has funded the development of four regional CACs to aid states. The regional centers provide support and training for local CACs. CAC, <http://www.nationalchildrensalliance.org/index.php?s=63>; the Midwest Regional Center for Child Advocacy, <http://www.mrcac.org/about-mrcac/our-mission/>.

³⁵⁰ See S.C. CODE § 63-7-920(C) (2012), and subsequent protocol adopted by the South Carolina Supreme Court; TEX. CODE CRIM. PROC. § 38.074(3)(a)(4); see also 18 U.S.C. § 3509(b)(1)(B)(iv), (b)(1)(C).

³⁵¹ Several child asylum seekers whose cases are captured in the CGRS database were diagnosed with PTSD or depression as a result of their trauma. See, e.g., CGRS Cases 3507, 5377, 5500, 5775, 6687, 6840, 7072, 7083, 7571, 7655, 7817, 8083, 8602, 9053, 9537, 3242, 9734. Other disorders may also result from abuse suffered during childhood. In one case in the CGRS database, parents had abandoned a Honduran boy when he was five, and he went to live with his maternal aunt. The boy's aunt physically, sexually, and psychologically abused the boy during the two years he lived there. His aunt molested and raped him repeatedly and made him watch her perform sexual acts with other men as well as with her own son. In addition to PTSD and depression, once in the United States, the boy was diagnosed with hypersexuality, including sexual fascination and impulsiveness, due to his early exposure to a high level of sexual experience. CGRS Database Case 7083.

³⁵² CGRS Database Case 7463.

³⁵³ CGRS Database Case 9536. See also CGRS Database Case 7571 (case involving a Salvadoran girl who suffered abuse at the hands of her boyfriend and tried to take her own life after she became pregnant and her grandmother's attempts to protect her failed).

Judicial Leadership and Collaboration with Stakeholders to Improve Treatment of Children's Cases in All Types of Proceedings

The model used by the National Council for Juvenile and Family Court Judges (NCJFCJ) has been at the forefront of juvenile and family court reform throughout the United States and can inform the way in which IJs could lead similar reforms with regard to children's cases in removal proceedings.³⁵⁴ Consistent with the best practices identified by NCJFCJ, juvenile and family court judges have taken a leading role in bringing together system stakeholders and members of the community to improve the system through mutual respect and understanding as well as to foster accountability among all participants, including in the collection of data for system evaluation and review. System stakeholders include law enforcement, detention and court intake staff, prosecutors, public defenders and the defense bar, probation officers, detention workers, mental health providers, education administrators and teachers, child welfare workers, community agencies, legislators, and members of the community at large.³⁵⁵ These meetings create a forum for collaboration and provide an opportunity for meaningful partnership in addressing ongoing concerns and developing creative and effective solutions to safeguard the best interests of children as well as improve system efficiency.

Training of Immigration Judges, ICE Assistant Chief Counsel, and BIA Members

EOIR should be commended for increasing its initial training of new IJs from one week to six weeks and assigning a mentor IJ to assist new IJs during their first year.³⁵⁶ It should also be commended for creating a position focused on IJ training and for its increased training and support for new IJs. It is unclear, however, what portion of the six-week training addresses children's issues.

EOIR strives to provide ongoing training to IJs and BIA members through in-person training conferences. However, the government has not provided EOIR with adequate funds to hold in-person training conferences since 2010.³⁵⁷ It is also unclear how much of EOIR's ongoing trainings includes training on interviewing children, understanding the impact of trauma on children, and other relevant children's issues.

EOIR's Office of Legislative and Public Affairs provided the following general statement about training of BIA members: "All Board members, when they enter on duty, go through an orientation process that provides them with information regarding EOIR and BIA policies and procedures, as well as relevant information on pertinent areas of the law. Ongoing legal education training is routinely provided throughout the year on a wide variety of topics including, among other things, updates on changes in the law as well as special sessions highlighting unique concerns, including training regarding vulnerable populations."³⁵⁸ The office did not provide more detailed information, despite being asked specifically about how many hours of training BIA members receive on children's immigration claims, child development, and children's mental health issues. The lack of a child-sensitive analysis in BIA decisions reviewed for this report reflects the inadequate training of BIA members. The BIA has designated specialized panels for certain types of cases, such as a panel for cases involving national security issues. A specialized panel has not, however, been designated for cases of principal child applicants, despite the unique nature of and protection issues involved in their cases.

³⁵⁴ NCJFCJ started a model court project in 1992, which established key principles for reform. The model project has been tremendously successful in streamlining the processing of cases, providing services more effectively, developing data collection systems and tools for measuring outcomes, shortening the duration of individual cases, creating better outcomes for children (less time in foster care, more adoptions, quicker reunification with parents), and preserving resources for those cases that require it, while diverting appropriate cases using alternative mechanisms for resolution. See NCJFCJ, *JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES* (2005). The NCJFCJ issued guidelines, the result of a national effort to standardize and improve juvenile court practice, which then became the foundation for a national model court project and best practices in juvenile and family courts. See also OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (OJJDP), NCJFCJ, *RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* (1995); NCJFCJ, *MODEL COURT BROCHURE*, available at http://www.ncjfcj.org/sites/default/files/Model%20Courts%20Brochure_Effect.pdf (last accessed Jan 11, 2014); additional updates and improvements in procedure are developed in the more recent publication, NCJFCJ, *THE RESOURCE GUIDELINES: SUPPORTING BEST PRACTICES AND BUILDING FOUNDATIONS FOR INNOVATION IN CHILD ABUSE AND NEGLECT CASES* (2009).

Recommendations to DOJ and EOIR

- 1) DOJ, in coordination with DHS, should adopt mandatory regulations that are binding on all immigration judges and that – as required by the TVPRA – better ensure that the procedural aspects of unaccompanied children’s cases better serve the specialized needs of these children. The regulations should require the following:
 - a) IJs have a duty to protect child witnesses from questioning that may be harmful to them. IJs should not engage in or allow ICE counsel to engage in aggressive, hostile, or insensitive questioning of children.
 - b) There should be explicit permission for children to testify *in camera*, and IJs should accept children’s declarations as their testimony, when appropriate, and accept videotaped testimony taken by child welfare experts at child advocacy centers to limit the scope of courtroom testimony to issues not covered in their prior, videotaped testimony.
 - c) Judges should significantly limit the issues before the court, and pre-trial conferences must be scheduled in all cases proceeding to a merits hearing and involving significant substantive issues, such as asylum, withholding and Convention Against Torture cases.
 - d) In cases where the Asylum Office has referred a child to the Immigration Court, the child (and only the child) has the right to specify that his or her recorded testimony before the Asylum Office should be considered his or her testimony before the court. In such instances, any additional testimony should be taken only if necessary to the issues before the court. Whenever possible, outstanding issues should be addressed through means other than the child’s testimony – such as through an expert’s testimony, documentary evidence, or testimony of knowing adults.
 - e) Local immigration courts must designate an office or conference room for children’s hearings, particularly substantive merits hearings.
- 2) EOIR should designate IJs who specialize in children’s cases. Having IJs who specialize would promote child-sensitive asylum adjudications and analysis of other claims for relief, and would facilitate ongoing training. Specialization should be voluntary rather than assigned.
- 3) DOJ should develop a memorandum of understanding with HHS/ORR, establishing a procedure by which immigration judges can request the appointment of a child advocate pursuant to the TVPRA.
- 4) Because of children’s heightened vulnerability and special protection needs, and the need to promote consistent decision-making and to apply standards in children’s cases, the BIA should designate members who specialize in children’s cases and place those members on a panel of specialists who hear all appeals of children’s cases. Having BIA members who specialize would promote child-sensitive adjudication of asylum and other claims for relief and would facilitate ongoing training. Specialization should be voluntary rather than assigned.

³⁵⁵ See, e.g., ORANGE COUNTY PROBATION, JUVENILE DETENTION ALTERNATIVES INITIATIVE (JDAI) ACTIVITIES, available at www.cpoc.org/assets/General/jdaiocprob.doc (last accessed Jan. 11, 2014) (discussing juvenile court stakeholder meetings, including the court, law enforcement officers, attorneys, social services, and the county Juvenile Justice Commission).

³⁵⁶ See *Hearing on “improving efficiency and ensuring justice in the immigration court system,” Comm. On the Judiciary, U.S. Senate, 112th Cong.* (2011) (statement of Juan P. Osuna, Director, Executive Office for Imm. Review), available at <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf>. See also ABA STANDARDS, *supra* note 5.

³⁵⁷ *Id.* (noting that due to budgetary constraints EOIR is using training methods that are less costly than in-person training). In fact, in FY 2012 EOIR’s entire training budget for its 220 immigration judges was \$19, 995.06 (approximately \$90 per judge); in FY 2013 EOIR’s training budget dropped to \$0. EOIR has not yet determined how much money will be in its training budget for FY 2014. See Email from EOIR Legislative and Public Affairs Office, USDOJ, to author, Lisa Frydman (February 4, 2014) (on file with authors).

³⁵⁸ Email from EOIR Legislative and Public Affairs Office, USDOJ, to author, Lisa Frydman (Sept. 19, 2013) (on file with authors).

- 5) EOIR should provide IJs and BIA members³⁵⁹ who hear children's cases with extensive training on child development, childhood trauma and its effects, and how to communicate with and elicit information from children. IJs and BIA members should also be trained on children's rights generally, including the dynamics of domestic violence, gang violence, and other common harms children suffer. This training should be part of both the initial IJ and BIA training and annual IJ and BIA trainings, and should be conducted by experts in child development, mental health, and communications.
- 6) EOIR should be commended for appointing a new Assistant Chief Immigration Judge (ACIJ) with a focus on vulnerable populations. EOIR should give the ACIJ the following responsibilities, in addition to others EOIR identifies as priorities:
 - a) Play a significant role in developing substantive and procedural regulations mandated by TVPRA 2008.
 - b) Develop other child-sensitive procedures or policies – such as those recommended below.
 - c) Develop and oversee the IJ training recommended above.
 - d) Serve as a liaison for vulnerable populations – such as by continuing to hold quarterly meetings with stakeholders to discuss issues and challenges in children's cases and cases of other vulnerable populations.
- 7) The Regional Assistant Chief Immigration Judges should be authorized to hold IJs accountable for failure to implement the 1998 INS Children's Guidelines, EOIR's OPPM, and the DOJ regulations adopted pursuant to the TVPRA.
- 8) As currently happens in some jurisdictions, local immigration judges responsible for children's cases should host periodic roundtables in each jurisdiction. Representatives from each of the following stakeholders should be present: ICE trial attorneys, local USCIS officers, attorneys representing children, child advocates, and other professional service providers, "juvenile court" judges, community agencies working with unaccompanied children, and, when relevant, ORR field coordinator and shelter care staff, and consular officials.

Recommendations to ICE

- 1) ICE should mandate that its trial attorneys receive regular training on child development, child welfare, mental health, domestic violence, sexual abuse, and cultural competence conducted by individuals with expertise in these areas.
- 2) ICE should ensure that every Assistant Chief Counsel exercises prosecutorial discretion favorably throughout every stage of every child's case, and with respect to every decision made in a child's case, such as whether to take the case to trial or to settle, how to limit the contested issues, whether to cross-examine a child and if so how to limit cross-examination, whether to contest motions by the child to continue, to change venue, for telephonic testimony of a witness, and other requests.

³⁵⁹ Although the BIA is not the trial court and its members do not take testimony, training in child development and communication would still benefit BIA members because of their review of IJ decisions.

³⁶⁰ See KIND Survey, *supra* note 11, at Questions 25-33.

³⁶¹ See *id.* at Question 30.

³⁶² Nine out of twelve attorneys who responded to a question about children's experience at the Asylum Office as compared to the Immigration Courts stated that children are more comfortable before the AO than the immigration court. Three out of twelve attorneys noted no appreciable difference in children's experience before either agency.

USCIS Interview Procedures

With respect to the main forms of immigration relief or status available to unaccompanied children in removal proceedings, a USCIS interview may be conducted in a variety of instances. Unaccompanied children often have the opportunity to apply initially with the USCIS Asylum Office. SIJS applicants may be scheduled for an interview at the petition (Form I-360) or the adjustment (Form I-485) stage with a USCIS field office. Notably, USCIS typically has elected not to conduct field office interviews for T or U visas, however individuals granted T or U status may be scheduled for an interview when they seek lawful permanent residence.

In general, an interview setting is more appropriate for children than a courtroom setting for making the child feel safe and eliciting information. Still, many child applicants remain nervous about attending USCIS interviews and some seem adversarial in nature, even when they are not conducted in a traditional courtroom. For example, some USCIS officers do not employ child-friendly approaches to make children feel comfortable, and some employ antagonistic questioning.³⁶⁰ In addition, some officers do not allow children to rest on affidavits rather than testifying about traumatic events.³⁶¹

The Need to Improve and Make Asylum Interviews More Child-Sensitive

The USCIS Asylum Division should be commended for striving to ensure that Asylum Officers conduct child-sensitive asylum interviews.³⁶² Despite their training and the thoughtful interview techniques in the 1998 INS Children's Guidelines, there are still some officers who demonstrate a lack of sensitivity and engage in invasive questioning. As a result, a child's experience at the asylum interview depends significantly on which officer receives the assignment to hear her case.³⁶³

For instance, in one case, the eight-year-old applicant brought a claim based on family violence.³⁶⁴ The Asylum Officer, an adult male, told the child that she had the same name as his girlfriend. He also asked the child if she thought he should propose to his girlfriend, an inappropriate attempt at bonding with the child. In another case, the child applicant was 17 and pregnant from a rape by a narco-trafficker who kidnapped and tortured her for over a year. She told the officer that she had been kidnapped outside a bakery after making a purchase. The officer said that this assertion contradicted the applicant's previous sworn statement, taken when she was apprehended, that she had been entering the bread store when kidnapped. The officer repeatedly drilled the child on this small inconsistency, asking her: "What time of day was it, what did you buy in the store, was anyone else in the store, how far was this store from your family's home," etc. The child responded that while she was preparing the written declaration with her legal representative, she had to relive all the torture and trauma that she experienced and so she might have made some mistakes on details. Nevertheless, the officer continued to interrogate her.

Children whose asylum claims USCIS refers to the immigration court have an opportunity to apply again before an immigration judge. The IJ hearing can be onerous and traumatizing if a child must repeat his or her story. One approach to addressing this problem is to videotape the asylum interview and submit the tape in immigration court as testimony.

³⁶³ See CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143, at 9.

³⁶⁴ Case on file with KIND.

Recommendations

- 1) USCIS should update the 1998 INS Children's Guidelines to take into account the 2009 UNHCR Guidelines.
- 2) The Asylum Office should videotape or audiotape all children's interviews so that, in cases referred to immigration court, children and their attorneys can opt to provide the tapes to the court in lieu of providing testimony anew. The tapes should not be admissible if the child does not agree to allow them into evidence. Asylum Headquarters should adopt a policy of reviewing tapes in children's cases for quality assurance purposes and to ensure that interviews are conducted in a child-sensitive manner consistent with the 1998 INS Children's Guidelines.
- 3) Particularly in asylum cases, USCIS should revise its policies to accept videotaped testimony taken by child welfare experts at child advocacy centers, in lieu of interviewing children and/or encourage officers to rely on affidavits in lieu of oral testimony.
- 4) USCIS should develop a memorandum of understanding with HHS/ORR, establishing a procedure by which Asylum Officers can request the appointment of a child advocate pursuant to the TVPRA.

The Need for Improvement in Conducting Child-Sensitive SIJS Interviews

USCIS states in the preamble to its proposed SIJS rules that the agency "seeks to establish a nonthreatening interview environment that would promote an open, productive discussion about the SIJ petition" based on a recognition that "[j]uveniles seeking SIJ classification, unlike other juveniles, are under specific pressures and hardships relating to the loss of parental support and to juvenile court proceedings."³⁶⁵ However, some USCIS officers employ antagonistic questioning methods in interviews related to children's applications for SIJS or adjustment of status.³⁶⁶ For example, in a recent case, the USCIS officer asked the child unnecessarily personal, insensitive, and irrelevant questions during a SIJS applicant's adjustment of status interview. The child's mother had committed suicide, and the officer asked how she had killed herself. He also insulted the child for not having learned more English during his year in the United States and asked questions that showed that he did not understand the ORR custody system (for example, he demanded to know why the child wasn't in school while in ORR custody).

The CISOMB similarly found in its 2011 report on SIJS Adjudications that USCIS officers sometimes employ age-inappropriate interviewing techniques when questioning child SIJS petitioners.³⁶⁷

Unnecessary Interviews of SIJS Applicants

In addition to fielding inappropriate questioning during the interviews, SIJS applicants are subject to unnecessary interviewing. There are two stages at which an interview might be scheduled in SIJS cases: (1) the I-360 or SIJS petition stage in which the actual petition submitted on form I-360 is considered; and (2) the I-485 or adjustment of status stage in which the application submitted on form I-485 for adjustment of status to lawful permanent residency is considered. Neither stage requires these interviews.

³⁶⁵ 8 CFR §§ 204, 205, and 245. SIJ Petitions, 76 Fed. Reg. 54,982, *supra* note 213.

³⁶⁶ Of the attorneys who responded to KIND's survey regarding USCIS interviewing practices, 75% had represented children before USCIS in SIJS cases; thus, there is high likelihood that the responses in the survey section focused on USCIS interviewing practices related to practices in SIJS cases. KIND Survey, *supra* note 11.

³⁶⁷ CISOMB, BEST PRACTICES RECOMMENDATION, *supra* note 216, at 6.

³⁶⁸ See SIJ Petitions, 76 Fed. Reg. 54,982, *supra* note 213); see also *generally* 8 C.F.R. §§ 204, 205, and 245.

With regard to the I-360 petition stage, USCIS has discretion to determine whether an interview is needed to adjudicate the petition.³⁶⁸ Some offices routinely adjudicate I-360 petitions without interviews, while others virtually always require them. Some jurisdictions only require I-360 interviews when the child is over 14, and some vary by case on whether they require interviews.

With regard to the adjustment of status stage, the general rule is that all applicants for adjustment of status are to be interviewed.³⁶⁹ However, USCIS has discretion to waive this requirement for children under 14 or “when it is determined by the Service that an interview is unnecessary.”³⁷⁰ USCIS guidance encourages eliminating unnecessary interviews for SIJS petitioners.³⁷¹ Despite this guidance, some offices always require adjustment of status interviews, some only require them for children over 14, and some, at times, decide to waive interviews for children who are under 14 but often do not do so until the date of the scheduled interview, wasting attorney preparation time and unnecessarily causing the child anticipatory anxiety.

The proposed USCIS rules for SIJS simply state: “In accordance with 8 CFR 103.2(b) and 245.6, although an interview is not a prerequisite to the adjudication of a Special Immigrant Juvenile petition, USCIS may require an interview as a matter of discretion.”³⁷² The preamble does provide some guidance on when USCIS officers should require interviews, at least in the context of an SIJ petitioner who files Form I-360 alone, without an accompanying Form I-485. The preamble states that USCIS will consider such factors as “the age of the juvenile, the sensitive nature of issues of abuse, neglect, or abandonment involved in the case, and whether the USCIS officer expects to gather additional relevant evidence at an interview” when deciding whether to schedule an interview.³⁷³ “In some instances, an officer may require information that can only be provided by the juvenile or a person acting on the juvenile’s behalf, such as when a petition is missing information or the juvenile has a criminal record.”³⁷⁴ The preamble does not address factors USCIS will consider at the I-485 stage to waive an interview.

Requiring interviews at the I-360 stage or at the I-485 stage uses USCIS and pro bono attorney resource time inefficiently. The interviews also cause stress for child applicants.

Recommendations

- 1) USCIS should revise its proposed rule to specify, and in the interim issue guidance to clarify, that interviews generally are not necessary at either stage of a SIJS case. Interviews should be scheduled only when there is a specific issue regarding an eligibility requirement.
- 2) USCIS should issue additional guidance to its officers clarifying appropriate lines of inquiry in SIJS cases and appropriate interview questions.

³⁶⁹ 8 C.F.R. § 245.6; USCIS RESPONSES TO BEST PRACTICES RECOMMENDATION, *supra* note 196.

³⁷⁰ 8 C.F.R. § 245.6.

³⁷¹ DONALD NEUFELD, ACTING ASSOCIATE DIRECTOR OF DOMESTIC OPERATIONS, DHS, TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008: SPECIAL IMMIGRANT JUVENILE STATUS PROVISIONS 4 (2009).

³⁷² SIJ Petitions, 76 Fed. Reg. 54,986, *supra* note 213 (amending 8 C.F.R. § 204.11(e)).

³⁷³ *Id.* at 54,982.

³⁷⁴ *Id.*

Training of USCIS Field and Asylum Officers

No information is publicly available regarding whether USCIS field officers who adjudicate SIJS, T, and U visa petitions receive any training on children's claims for relief or on how to interview children in a child-sensitive manner.³⁷⁵ Asylum Officers receive approximately six weeks of adjudication training. About six-and-a-half hours of this training concerns children's claims, covering interviewing children, legal analysis of their claims applying the U.S. Guidelines, understanding procedural issues unique to their cases, and making initial jurisdiction determinations under the TVPRA.³⁷⁶ In addition to this initial six-week initial training, the Asylum Division Headquarters (Asylum Headquarters) directed local Asylum Offices to provide specialized training on the TVPRA and initial jurisdiction. In 2011, Asylum Headquarters required all Asylum Offices to conduct Headquarters-developed training on children's issues: this curriculum included capacity issues, issues relating to particular social groups, and adjudicating cases under TVPRA's initial jurisdiction provision. However, Asylum Headquarters does not generally mandate specific curricular topics and because local offices bear the responsibility to implement the four-hours-per-week training requirement for their Asylum Officers, there is no record of how many offices focus these hours on issues related to children's cases.³⁷⁷

The CISOMB for both SIJS and asylum cases recommends further mandatory training for all USCIS Field and Asylum Officers on how to interview children.³⁷⁸ The authors understand that USCIS is currently developing materials on this topic and improving its officer training. Moreover, the Ombudsman recommends that the agency should designate officers who specialize in children's cases to enhance the quality of interviews in these cases and to further sensitize interviewers to children's needs and abilities.³⁷⁹ In addition, the Ombudsman recommends that USCIS incorporate clinical experts into training of Asylum and Field Officers to ensure sensitivity and quality control, which USCIS has agreed to do.³⁸⁰

Recommendations

- 1) USCIS should designate specific Asylum and Field Officers to specialize in adjudication of children's cases (including by self-designation) and provide these officers with significant additional training regarding children.
- 2) USCIS should be commended for agreeing to the CISOMB recommendation to involve clinical experts in training of Asylum Officers and Field Officers and for quality assurance purposes, and should begin implementing this practice immediately.

³⁷⁵ The authors asked USCIS for this information, but USCIS did not provide it. However, the authors understand that USCIS is currently developing training material on child development and child-sensitive interviewing techniques.

³⁷⁶ Specifically: officers participate in both a combined training that includes refugee officers, asylum officers, and overseas adjudicators, as well as training just for asylum officers. The combined training includes a two-hour and fifteen minute self-study lesson plan and quiz on children's asylum claims, as well as a two-hour "face-to-face" training that includes lecture, discussion, and practical exercises on a range of aspects of children's claims. During the asylum officer-only training, asylum officers receive two additional hours of training on TVPRA initial jurisdiction determinations and procedural issues specific to asylum cases. Correspondence with Ted Kim, Acting Chief, Asylum Division, USCIS, and Kimberly Sicard, Program Manager, Asylum Operations, USCIS (on file with authors).

³⁷⁷ *Id.*

³⁷⁸ The CISOMB has recommended that USCIS provide specialized training to officers adjudicating SIJS petitions. CISOMB, BEST PRACTICES RECOMMENDATION, *supra* note 216. USCIS has responded that it has already provided extensive training; however, the training does not cover how to interview children, the impact of trauma on children, or the specialized needs of children. USCIS RESPONSES TO BEST PRACTICES RECOMMENDATION, *supra* note 196, at 2. The Ombudsman has also recommended that USCIS enlist clinical experts for quality assurance and training. CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143. USCIS agreed to this recommendation. USCIS RESPONSES TO FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 147, at 4.

³⁷⁹ The CISOMB recommended that USCIS establish dedicated SIJ units or points of contact at local offices. CISOMB, BEST PRACTICES RECOMMENDATION, *supra* note 216. USCIS rejected this recommendation, citing the low number of SIJ petitions it receives. USCIS RESPONSES TO BEST PRACTICES RECOMMENDATION, *supra* note 196, at 3. Similarly, the CISOMB recommended that USCIS should pre-assign UAC asylum cases to officers with specialized knowledge and skills. CISOMB, FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 143. USCIS rejected this recommendation on the basis that all asylum officers are trained in sensitive questioning and TVPRA issues. USCIS RESPONSES TO FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 147, at 4.

³⁸⁰ USCIS RESPONSES TO FAIR AND EFFECTIVE ASYLUM PROCESS, *supra* note 147.

Section 3 Providing Comprehensive Services for Unaccompanied Children at Immigration Court

Know Your Rights Orientation, Legal Counsel, and Child Advocates Provided to Unaccompanied Children

Congress has not yet enacted legislation mandating the appointment of counsel for unaccompanied children, a critical step to ensure that these most vulnerable immigrants have a meaningful opportunity to seek the protections for which they qualify and to enhance their access to due process. However, there have been some other positive developments in this arena.

Based on provisions in the Homeland Security Act, ORR created a pilot infrastructure to undergird the provision of pro bono legal services to unaccompanied children.³⁸¹ In 2005, ORR contracted with the Vera Institute of Justice to manage the Unaccompanied Children Pro Bono Program, designed to develop and test ways to meet the legal needs of unaccompanied children.³⁸² Administered in partnership with 22 NGOs, the pilot project made notable strides in ensuring that unaccompanied children have increased access to legal services.³⁸³ The TVPRA also advanced this cause by directing HHS to guarantee “to the greatest extent practicable” that all unaccompanied alien children who have been in DHS custody have counsel to represent them in immigration proceedings.³⁸⁴

The TVPRA provides that “[t]o the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”³⁸⁵ This directive has helped support an innovative public-private partnership model in which pro bono attorneys from law firms, corporations, and law schools represent unaccompanied children in immigration proceedings. The model has been increasingly effective, establishing hundreds of partnerships that have resulted in the representation of well more than 2,300 children in their removal proceedings, and creating a nationwide pool of thousands of attorneys trained to represent unaccompanied children.³⁸⁶ Also as a result of provisions in the TVPRA, HHS now appoints child advocates for vulnerable immigrant children in some cases.³⁸⁷

³⁸¹ The Homeland Security Act included language that charged ORR with “developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on the date of the enactment of this Act.” HSA § 462(b)(1)(A) (codified as amended at 6 U.S.C. § 279(b)(1)(A)). See also ABA STANDARDS, *supra* note 5.

³⁸² Vera Inst. of Justice, *Unaccompanied Children Program*, <http://www.vera.org/project/unaccompanied-children-program> (last accessed Jan. 11, 2014).

³⁸³ *Id.*

³⁸⁴ TVPRA § 235(c)(5).

³⁸⁵ *Id.*

³⁸⁶ The model implemented by KIND, which matches children with private pro counsel mentored by experienced immigration lawyers, has demonstrated the effectiveness of a private-public partnership. As a business analysis performed by Brody, Weiser, Burns (on file with authors) illustrates, the ideal model is to provide private pro bono counsel to two-thirds of unaccompanied children in removal proceedings and direct representation to one-third. If the government provided funding for representation of all unaccompanied children, the private sector would undoubtedly continue to be willing to participate in providing pro bono representation to children. Law firms still provide significant amounts of pro bono representation in death penalty cases, other compelling criminal defense cases and poverty law cases, despite the provision of government funding for counsel. Law firms, corporations and private practitioners find children’s immigration cases extremely compelling and that the cases provide them with opportunities to enhance litigation and courtroom advocacy skills. As of November 2013, KIND had been referred more than 5,500 children, trained over 6,100 attorneys, and partnered with more than 190 law firms, corporation, and law schools that have agreed to represent unaccompanied children. Information about specific cases can be found here <http://supportkind.org/en/kind-in-action/success-stories/attorneys-of-the-month>.

³⁸⁷ TVPRA § 235(c)(5)-(6). See above for more information on the child advocate program.

These steps are positive and have resulted in Know Your Rights (KYR) presentations and legal screening for most children in custody. They have undoubtedly also resulted in greater numbers of represented children. However, the resources that ORR provides for legal services remain insufficient to meet the legal representation needs of UACs. As the number of UACs has increased substantially, children spend much less time in ORR custody, yet ORR funding focuses on the delivery of legal services for children in its custody.

The FY 2014 Omnibus appropriations bill passed on January 13, 2014 (“Consolidated Appropriations Act, 2014”) includes language in support of efforts to improve unaccompanied children’s access to legal service and child advocates. The language is a big step forward towards ensuring the protection of unaccompanied children. But, with the number of these children coming to the United States continuing to rise to record levels, it is important that these efforts are scaled to meet the growing need.

Service Delivery System Based on Outdated Model

The recent unprecedented and continuing rise in the number of unaccompanied children coming to the United States has brought into sharp focus the current system’s inability to address the basic needs and protections of UACs. In light of the “new normal” of many thousands more UACs in HHS custody each year – 24,668 in FY 2013 and 60,000 or more projected for FY2014 – the system must be wholly reworked to meet the needs of the large majority of children released from custody and in need of pro bono attorneys, child advocates, and post-release services.

The legacy INS developed the current system for providing services to unaccompanied children when it had responsibility for their care, custody, and placement. At that time, children remained in custody for an average of two to three months, with some children staying much longer.³⁸⁸ The services – KYR presentations, legal screenings, and follow-up services – attached to the children at the front end while the children were in immigration custody, as many children’s entire cases were heard while they were in custody.

However, immigration custody of children has decreased for several reasons. First, as a result of the recent unexpected surges in numbers, ORR has at times been overwhelmed, and has been forced for several months to house children in temporary facilities. For example, at the beginning of the unprecedented increase, ORR temporarily housed children on a U.S. air force base.³⁸⁹ In addition, there has been intense pressure to free bed space in response to the growing numbers, leading to the rapid release of children. While previously children were held in federal custody for an average of just over 70 days, they are currently being released on average within 30 days, and in some cases as soon as two to three days.³⁹⁰ Based on unofficial reports, children are also being released from custody at a much higher rate. Whereas in the past, we understand that approximately 65% of children were released, this rate has jumped to more than 90%. In other words, more than twice as many children are moving through the system more than twice as fast. As a result, there is little time for KYRs, legal screenings, or screening of sponsors to whom children are released.

This also means that the large majority of these children’s cases are being adjudicated after they are released from ORR custody. The Vera Institute of Justice reported that from August 1, 2012 to July 31, 2013, only 18% of unaccompanied children appeared in immigration court while they were in federal custody.³⁹¹

³⁸⁸ The story of Malik Jarno illustrates how long a child might have been held in custody. He was detained for three years while his asylum claim was litigated. David Cho, *Immigrant’s Troubles Continue: Mentally Disabled Guinean Man Held in Limbo for 3 Years*, WASH. POST, July 29, 2004, at A08.

³⁸⁹ Susan Carroll, *Influx of Immigrant Kids Sends Feds Scrambling*, HOUSTON CHRONICLE, May 1, 2012.

³⁹⁰ This information is based on unofficial reports. While it is generally better for children not to be in custody for long periods, there is a concern that releases within three days provide little time for adequate screening for trafficking victims, or for conducting background checks on sponsors.

³⁹¹ Vera Institute of Justice, DCS Legal Access Program, Option Year III, 55 (2013) (on file with KIND).

³⁹² For a detailed discussion of the need for a new approach to providing comprehensive services to unaccompanied children in removal proceedings, see KIND & Young Center, *Proposal to EOIR to provide services to growing population of unaccompanied children more efficiently and effectively*, July 11, 2012 (on file with KIND).

Despite the surge in numbers and the little time most children spend in federal custody, as well as the fact that fewer detained children appear in court, the service delivery model has not changed. The majority of government funding for UAC services still focuses on services at the front end when the children are in ORR custody. There are comparatively few resources for legal counsel for released children, as compared to those in custody. The result is that the number of children who lack legal counsel to assist them in pursuing their claims for protection is growing significantly.

Particularly vulnerable children also may not be identified and therefore not referred for the appointment of child advocates.

Opportunity to Develop a Child Appropriate System

Given the shorter lengths of stay in custody resulting from the influx, there is an opportunity to look at the process anew and develop an immigration system for children that takes into account their status as minors, facilitates their appearance and representation in immigration court, and helps ensure their safety after they are released.³⁹² The following unofficial statistics illuminate the issues: at present, more than 90% of children appear for their first immigration hearing, while 30% are ordered removed in absentia. However, of the 30% of in absentia cases, 23% of the children went to court one or two times before failing to appear. This means there is an opportunity to serve these children at immigration court when they appear for the first time, which would likely increase their appearance rates.

Providing immigrant children with access to legal services providers, child advocates, and social service providers at the immigration court would go a long way to improving the system. It would help ensure that more children have access to legal counsel, and give vulnerable children access to child advocates to ensure that their best interests are identified and addressed.

For children, the domestic juvenile/family court model – providing services at the court site – is most efficient, making attorneys, guardians ad litem, court-appointed special advocates, and counselors available to the child at the court building instead of requiring the child to go to multiple locations. Judges familiar with children’s issues preside over children’s cases, and attorneys who specialize in children’s cases (e.g., SJS) are available to represent the children. Stakeholders are connected by virtue of having offices in the same building, thus increasing efficiencies and providing added protections for vulnerable children. It cannot be emphasized enough that the recommendation to furnish all unaccompanied children in need with free legal counsel is critical to ensuring that removal procedures for unaccompanied children are efficient and that children have a meaningful opportunity to seek available protection.

In addition, scheduling children’s cases and establishing venue should take into account the specialized needs of children. For instance, children may need a long continuance to find legal counsel. In addition, unaccompanied children may have difficulty filing the necessary paperwork to change court venue. EOIR should be commended for initiating a pilot project to test the efficiencies and benefits of keeping venue in the city in which a child is released. ICE should also be commended for working with EOIR on the pilot program.

In another important step forward, the Senate comprehensive immigration reform bill, S.744, mandates the transfer of the unaccompanied child legal services program from HHS to DOJ.³⁹³ This transfer makes sense, given that DOJ oversees the immigration courts and has a significant interest in ensuring that children are represented by counsel. Assigning counsel helps to make certain that children appear for hearings and creates efficiencies in the courtroom process. In addition, this approach has been used in other government-funded counsel programs. For instance, the Administrative Office of the United States Courts oversees the expenditure of funds appropriated by Congress for government-funded public defenders and administers the federal defender and panel attorney program on a national basis.

³⁹³ Senate CIR, *supra* note 255, at §§ 3502(c), 3507.

Recommendations

Access to Comprehensive Services

As it has done for detained children, EOIR should develop juvenile court dockets for released children in all cities to facilitate their access to attorneys and child advocates. EOIR should consolidate children represented by a particular non-governmental organization into one docket to increase efficiency.

Access to Legal Counsel

- 1) Congress and relevant government agencies should allocate resources appropriate to children's legal and social service needs. Resources for legal services needs should support not only Know Your Rights orientations and screenings in custody, but also legal representation all the way through a child's case. Resources should be increased for the infrastructure to support children after release, including placement with a pro bono attorney and child advocate as rapidly as possible, at the site where the child's case will be adjudicated. This recommendation is particularly urgent in light of the increasing number of UACs arriving in the United States and being released from ORR custody.
- 2) The unaccompanied child legal services program should be transferred from HHS to DOJ.
- 3) On court dates for released children, EOIR should establish an office in the court building for legal services providers to enable children to meet with legal services organizations' staff on site for a brief orientation and to schedule an intake, meet with pro bono attorneys, and receive Know Your Rights presentations and legal screenings. EOIR should establish a second office in the same building, staffed by organizations that provide child advocacy services for vulnerable unaccompanied children. There should be established mechanisms for attorneys, judges, and ICE officials to refer vulnerable children for the appointment of a child advocate. The Legal Orientation Program for Custodians (LOPC) should also be included in these services.

Scheduling Cases to Ensure Efficiencies and Access to Counsel

- 1) EOIR should adopt regulations that facilitate pro bono representation by, for example, encouraging judges to provide adequate time for pro bono attorneys to prepare a child's case through the appropriate use of continuances.
- 2) Until such regulations are issued, EOIR should hold immigration judges accountable for failure to follow the agency's Guidelines for Facilitating Pro Bono Legal Services, which encourages immigration judges to accommodate requests to continue or advance hearings and to give pro bono attorneys priority when scheduling cases, and which "strongly encourages" judges to facilitate pro bono representation in children's cases.³⁹⁴
- 3) Rather than filing the Notice to Appear with EOIR while a child is detained – which starts the legal case at the site where the child is detained – ICE should file the NTA with the immigration court in the city to which the child is being released, thereby establishing venue at the outset with that court in order to avoid the need to file change of venue requests.

³⁹⁴ DAVID L. NEAL, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OPERATING POLICIES AND PROCEDURES MEMORANDUM 08-01: GUIDELINES FOR FACILITATING PRO BONO LEGAL SERVICES 4, 6 (2008).

Section 4 Ensuring that Unaccompanied Children Return Home Safely

Children Who Choose or are Ordered to Return to Their Home Country

Of the thousands of children who are placed in removal proceedings each year, a number have viable claims for U.S. protection, while many others are found ineligible to stay and must return to their home country. Some take voluntary departure, others choose to leave the United States because they do not want to remain in custody while their claim is being adjudicated, or because they miss their home.³⁹⁵ Regardless of why they leave, these children do not receive support or assistance to ensure that they return safely to their home communities, or that the home they are returning to is safe, a place where the children's well-being will be protected, and where a caregiver is available for them.

The U.S. government often returns unaccompanied children to the custody of their respective country's government in a capital city in their country of origin, which may be far from the child's home community.³⁹⁶ For example, Guatemalan children who come to the United States often are from the remote and impoverished Western Highlands of the country, which can be at least a seven-hour journey from the city.³⁹⁷ Families must find a way, without any assistance, to meet the child at the Guatemala City airport and bring him home, which can be expensive and very difficult to arrange for a deeply impoverished household that cannot afford to lose work time and cannot pay for transportation.

In addition, the factors that drove the child to migrate alone to the United States most likely remain unchanged. Some children come to the United States to earn money to support their desperately poor family in the home country. The following story illustrates this point:

At age 14, Josue constantly worried that his adobe home, located near the river, would collapse during the rainy season in Guatemala. Josue's family includes his mother and younger sisters; they live in extreme poverty. He recalls how his mother struggled to provide for the family after Josue's father passed away when he was 10 years old. He said, "[his] family did not know when they would be lucky to eat again." Believing that the only way to help the family survive was to migrate to the United States, Josue started his journey without thinking twice about the dangers of traveling to the United States alone. After reaching northern Mexico, where human smugglers hid Josue in a warehouse, he woke up one night trembling and with a high fever caused by a spider bite. Josue was taken to the hospital by two migrants in his group who feared for his life. He spent a month recuperating before he could decide whether to continue his journey north or go back home to Guatemala. But the thought of owing about \$5,700 USD to a smuggler forced Josue to continue north. He was apprehended by U.S. Border Patrol, and subsequently transferred to an ORR facility, where he waited for an immigration judge to grant him voluntary departure. After four months in U.S. custody, Josue returned to his community with an enormous debt, his dream of supporting his family shattered, and to a family with no prospects to ensure their survival in Guatemala.³⁹⁸

³⁹⁵ Since the transfer of custody and care of UACs to the Office of Refugee Resettlement under the Homeland Security Act, more children in federal custody are placed in shelter-like facilities and foster care. However, ORR places some children in staff-secure facilities and contracts with juvenile detention centers to hold certain UACs in cases where it believes less restrictive placement is inappropriate. In its 2009 report on custody conditions for UACs, the Women's Refugee Commission reported that secure facilities "are run like correctional institutions," and that staff in staff-secure and secure facilities

In addition to the adversity that children face in their home countries, the child welfare systems of the top sending countries to the United States are often unable to address the basic needs and protection of these children. As a result, returning children like Josue remain vulnerable unless they can access comprehensive return and reintegration services that both protect them and provide alternatives to their future re-migration through assistance that supports family reunification and children's safety and well-being.

Implementing Effective Reintegration Programs that Promote Alternatives to Re-Migration

The TVPRA of 2008 addresses the safe and sustainable repatriation and reintegration of unaccompanied children within the context of protecting them from trafficking and exploitation. It mandates that DOS create and implement a pilot program in collaboration with HHS, DHS, NGOs, and other national and international agencies and experts. It also mandates the U.S. government to assess country conditions before repatriating minors and to submit annual reports detailing, among other information, policies and procedures for removing children.³⁹⁹

In response to the TVPRA mandate, in 2010, DOS' Bureau of Population, Refugees, and Migration (PRM) funded the International Organization for Migration (IOM) to pilot a project supporting the return and reintegration of unaccompanied children to El Salvador. According to a DOS report submitted to Congress on July 21, 2011,⁴⁰⁰ the project's goal was to build the capacity of the Salvadoran government to reintegrate returned youth. The program assisted children and their families with transportation back to their communities and with family reunification, and facilitated the child's reintegration through education, vocational training, and medical and psychological care. It ended after 18 months and no public report was made available detailing the working of the program, its successes and challenges, or best practices developed.

In 2010, KIND launched the Guatemalan Child Return and Reintegration Project (GCRRP) in partnership with The Global Fund for Children as a pilot project to identify best practices and lessons learned in order to inform a comprehensive approach to reintegration services for children returning home to Guatemala. The GCRRP is a unique initiative that ensures that Guatemalan children, who come to the United States alone and leave because they are voluntarily returning home or because they have been ordered removed from the United States, return safely to their homes and can access vital services in their communities.

Guatemalan children referred to KIND or who are in ORR shelters can choose to participate in the program; it is entirely voluntary. Once a child chooses to participate, a KIND social worker conducts an assessment of the child's needs before he returns home and develops a case management plan. KIND then contacts one of its local non-governmental organization partners in Guatemala to prepare services for the child upon return, including family reunification, access to education, job and life skills training, health care, and other critical needs.

"expressed deep concern that many children placed with them were there because of mental health issues." ORRICK HERRINGTON & SUTCLIFFE LLP & WOMEN'S REFUGEE COMMISSION, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 16-18* (2009).

³⁹⁶ Note that repatriation programs should be made available to any child who is "unaccompanied" at the time of removal, in other words, to all children returning to their home country alone.

³⁹⁷ Data from KIND's Guatemalan Repatriation and Reintegration Program demonstrates that of the 111 unaccompanied children who returned to Guatemala through the project from October 2010 to September 2013, approximately 74% returned to states (referred to as "departments" in Guatemala) located up to 124 miles and at least a seven-hour drive over poor roads from the capital city of Guatemala, where children repatriated from the U.S. arrive. KIND's Guatemalan Child Return and Reintegration Project, December 2013 (on file with KIND). This data includes the states of San Marcos (approximately 124 miles west of Guatemala City), Huehuetenango (approximately 79 miles northwest of Guatemala City), Quetzaltenango (approximately 68 miles west of Guatemala City), and Totonicapán (approximately 60 miles northwest of Guatemala City). *Id.* To meet their returning children, families may also travel an additional two hours on local transportation or by foot to reach the town square where they catch the first of several buses to Guatemala City.

³⁹⁸ KIND Database Case 12-8003266.

³⁹⁹ TVPRA § 235(a)(5).

⁴⁰⁰ 2011 DOS REPORT TO CONGRESS, *supra* note 294.

From October 2010 to September 2013, KIND helped 111 children return safely to Guatemala, and KIND continues to provide return and reintegration services to Guatemalan children who choose to participate in the project. Elias, a 17-year-old boy from San Marcos, a region approximately 124 miles west of Guatemala City, is one of these children:

Fleeing severe poverty and lack of opportunity in his hometown, Elias set out north, seeking a path to a hopeful future. However, he was detained in March 2013 by U.S. Border Patrol and, after spending almost six months in a U.S. government shelter, his only option was to return to Guatemala. KIND's GCRRP began working with him before he left the United States, and referred his case to one of its NGO partner organizations in Guatemala, which contacted Elias' family. His parents and grandfather, who had never before left their village, traveled fifteen hours on foot and by bus to Guatemala City to reunite with Elias and bring him home safely. In addition to providing food, lodging, and bus fare back home, KIND's partner organization began discussions about possible vocational training and youth group opportunities to help Elias build a future. In accordance with the GCRRP model, KIND will continue working with the local partner to make sure that Elias, a smart and resilient child, has the resources he needs to remain safely and sustainably in Guatemala.

Providing a comprehensive return and reintegration service model such as KIND's GCRRP is critical for ensuring the safe repatriation of children. KIND begins working with the child before he/she leaves the United States, coordinates with their families in Guatemala to ensure that they have the support they need to travel to the capital city to meet their child, and provides follow-up services and connections to vital resources in their communities. This program demonstrates that return and reintegration can succeed with relatively modest inputs and collaboration.

As a significant source of foreign assistance and a major destination country responsible for the repatriation of thousands of unaccompanied children, the United States can and should play a significant role in supporting regional efforts to enhance the protection of migrant children through long-term and comprehensive programming, and should address the root causes of their migration as well.

The U.S. government has taken a positive step forward towards addressing immigrant children's issues by creating an Interagency Working Group on Unaccompanied and Separated Children to which it has invited NGOs and other stakeholders. The forum enables participants to share information about their work and concerns about these particularly vulnerable populations. However, orienting these meetings more toward problem-solving among all stakeholders would increase their effectiveness.

Enacting U.S. Legislation and Government Protocols that Enable the Safe Return and Sustainable Reintegration of Unaccompanied Children

The TVPRA of 2008 mandates that the Secretary of State, jointly with the Secretary of Health and Human Services and Secretary of Homeland Security, submit an annual report on their Departments' efforts to ensure the safe repatriation of unaccompanied children ordered removed. The report should include "a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence."⁴⁰¹ In addition, the report "shall include" biographical and other data on children ordered removed and types of immigration relief sought and denied, as well as broad data on all unaccompanied children in ORR custody, such as biographical data, forms of relief sought, and disposition of cases.⁴⁰²

DOS issued two reports to Congress, in 2010 and 2011, which provided basic statistical information about the agencies' work addressing the mandates put forth in TVPRA 2008.⁴⁰³ However, these reports lack substance. They lack biographic or other data on children in ORR custody not removed, despite TVPRA's mandate.⁴⁰⁴ They also do not include information about the specific steps taken to ensure that children were safely and humanely repatriated, nor do they offer information about the impact of the 18-month program or about any best practices they identified to inform future programming. According to the reports, a Manual of Reintegration specific to El Salvador was created as a product of the project. Neither the reports nor the manual are publicly available, but should be made so to provide best practices for reintegration services or data to inform future programming.

In June 2013, the U.S. Senate passed S. 744, a wide-ranging bill dealing with immigration. The bill includes a provision requiring the U.S. Agency for International Development (USAID), in conjunction with DHS, HHS, DOJ, international organizations, and NGOs in the United States with expertise in repatriation and reintegration, to create "a multi-year program to develop and implement best practices and sustainable programs in the United States and within the country of return to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies."⁴⁰⁵ The language is more directive than that of the TVPRA and creates programming within USAID to help address the needs of children returning alone from the United States.

Members of the U.S. House of Representatives have introduced additional bills following U.S. Senate approval of S. 744. Representative Lucille Roybal-Allard (D-CA) introduced a bill in July 2013 that includes similar repatriation and reintegration language as S. 744. The bill, H.R. 2624, the Child Trafficking Victims Protection Act, was co-sponsored by Representative Ileana Ros-Lehtinen (R-FL). Representative Joe Garcia (D-TX) introduced a comprehensive immigration reform bill on October 2, 2013, H.R. 15,⁴⁰⁶ that is nearly identical to S. 744 and includes the Senate language on return and reintegration.

⁴⁰¹ TVPRA § 235(a)(5)(C)(iii).

⁴⁰² *Id.* at § 235(a)(5)(C)(i)-(vi) (referencing HSA § 462 (b)(1)(J)).

⁴⁰³ See 2011 DOS REPORT TO CONGRESS, *supra* note 294; Report to Congress on the Provision of P.L. 110-457 Regarding Repatriation of Unaccompanied Alien Children and U.S. Government Efforts to Protect Them from Human Trafficking December 23, 2008 – June 4, 2010 (2010) (on file with authors).

⁴⁰⁴ TVPRA § 235(a)(5)(C)(i)-(vi) (requiring Secretary of State and Secretary of Health and Human Services with assistance from Secretary of Homeland Security to submit annual report to Congress with (i) "the number of unaccompanied alien children ordered removed and the number of such children actually removed from United States," (ii) "...nationalities, ages, and gender of such children," (iii) a description of the policies and procedures to ensure safe repatriation, (iv) "...type of immigration relief sought and denied to such children," (v) country conditions assessments gathered, and (vi) statistical information on such children required under [HSA § 462(b)(1)(J), (K)]" (mandating that HHS maintain statistical information on unaccompanied children in its care including (i) biographical information such as name, gender, date of birth, country of birth, country of residence, (ii) date child came into custody, (iii) information relating to "child's placement, removal, or release from each facility" held, (iv) explanation of why child was detained or released, (v) "disposition of any actions in which the child is the subject;" (K) (mandating that HHS collect and compile statistical information from the Departments of Justice, Homeland Security, and State "on each department's actions relating to unaccompanied alien children"))).

⁴⁰⁵ Senate CIR, *supra* note 255, at § 3612(j)(1).

⁴⁰⁶ See House CIR, *supra* note 290, at § 3612(j)(1).

Recommendations

- 1) The Administrator of USAID, in conjunction with the Secretary of State, the Secretary of HHS, the Attorney General, international organizations, and NGOs in the United States with expertise in return and reintegration, should create a program to develop and implement best practices and sustainable programs in the United States and within the countries of return to ensure the safe and sustainable repatriation and reintegration of unaccompanied children into their country of nationality. Creation of these programs must include collaboration with a wide range of expert partners, as called for under the TVPRA of 2008.
- 2) U.S. government return and reintegration programs should provide services that help youth find alternatives to re-migration and address the root causes of migration. Programs should support family reunification, education, skills building, and other development needs to enhance opportunities for children in their home countries. They should not be limited in timeframe.
- 3) The United States and countries of origin should enter into and maintain regular dialogue about the return and reintegration of child migrants to ensure that programming to help these children is effective and complementary. In addition, the United States, Mexico, Guatemala, Honduras, and El Salvador should develop a coordinated, regional approach to address issues related to child migration.
- 4) U.S. government reporting on return and reintegration programs should be robust and include detailed information about the workings of the program, comprehensive data, and best practices, and be publicly available.
- 5) DHS and ORR should commit to establishing policies and procedures that help facilitate the safe return and reintegration of unaccompanied children in U.S. government custody, including timely communications about the child's departure date to ensure family reunification. DHS and ORR should make those policies and procedures readily and publicly available.
- 6) In addition to making public the data recommended above, the U.S. government should collect and make publicly available an annual report with comprehensive data and information on unaccompanied children including: (a) the number, nationalities, and ages of all unaccompanied children in federal custody in the United States, the types of immigration relief sought by those children and the outcomes, as well as whether the children have legal representation, and whether they have been assigned a child advocate; (b) the number, nationalities, and ages of all children ordered removed and all children granted voluntary departure orders; and (c) comprehensive data on children repatriated including: the number, nationalities, ages, and gender of all children repatriated to their home country, the region the child is returning to, the reason for migrating, and whether the child was represented in his/her immigration case. This type of comprehensive data and information is critical to inform programming.

Conclusion

Despite significant advances in the last decade in the treatment and protection of unaccompanied children and principal child applicants in the U.S. immigration system, including enactment of the Homeland Security Act of 2002 and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, substantial gaps remain. With no right to government-appointed counsel or a child advocate, unaccompanied children are forced to wade through a highly complex system without anyone to defend their legal interests or advocate for their best interests as children. Children further experience difficulties in the immigration system due to the adversarial nature of removal proceedings designed for adults and insufficient training of immigration judges and USCIS adjudicators on child development and related issues.

Existing forms of immigration relief do not adequately take into account the protection needs that caused these children to leave their communities, and current policies permit the United States to repatriate children without considering their best interests and the harm that may come to them if they are returned. In short, the U.S. immigration system fails vulnerable immigrant children and violates our domestic and international obligations to them.

Finally, U.S. repatriation practices lack effective reintegration programs to keep children safe and provide them with opportunities to develop and thrive in their countries. The escalating number of unaccompanied children coming to the United States in recent years and the challenges they face throughout the immigration system highlight the pressing need for legal and policy reform to ensure an immigration system in which children's rights and welfare are paramount. The surge in unaccompanied children makes it urgent that we address the root causes of this unprecedented child migration. This should be a priority of the U.S. government and of the children's countries of origin.

Appendix

Recommendations

The United States has taken significant steps towards improving protections for unaccompanied children and should be commended for these actions. However, as the numbers of arriving children continue to rise to historic levels, the situation's urgency calls for further legal and policy reforms to ensure the rights and basic protections of this most vulnerable population.

Detailed recommendations for reform appear at the end of each report section. We provide a list of condensed recommendations here for easy reference.

Overarching

Counsel

No child should appear in immigration proceedings without legal representation. Congress should enact legislation mandating appointment of legal counsel by the Attorney General for unaccompanied children in removal proceedings through a program that includes a mix of private pro bono representation and direct representation by appointed lawyers trained in immigration law pertaining to children.

Best Interests

Congress should enact legislation requiring that the "best interests of the child" shall be "a primary consideration" in all procedures, actions, and decisions concerning unaccompanied immigrant children and principal child applicants that are made by a federal agency or court.

Child advocates

Congress should amend the TVPRA to mandate that an independent child advocate shall be appointed for all unaccompanied children as soon as they are identified, excluding children seeking voluntary return or withdrawal of their applications for admission at the border. In the interim, pursuant to its current authority under the TVPRA, HHS should appoint child advocates for all unaccompanied children who come into its custody and are placed in removal proceedings, as they are all "vulnerable children."

Data

The U.S. government should make publicly available an annual report with comprehensive statistical information and other data on unaccompanied children including data on apprehension, screening of children from contiguous countries, demographic data, legal representation, appointment of child advocates, forms of relief sought, outcomes of cases, and repatriation.

Funding for Reforms

Congress should appropriate all funds necessary to implement the recommendations provided for in this report.

Substantive Protection

Asylum, Withholding of Removal, and Convention Against Torture

Child-Centered Regulations: DHS and DOJ should issue draft asylum regulations as expeditiously as possible that "take into account the specialized needs of unaccompanied alien children," as required by the TVPRA, and provide adjudicators with guidance on how to assess children's claims in a child-centered manner – taking into account age, development, maturity, mental health, and cultural factors, and granting each child the liberal benefit of the doubt.

Refugee Protection Act: Congress should enact Section 5 of the Refugee Protection Act of 2013, S. 645, which clarifies the definition of a particular social group and the evidentiary standard for proving nexus.

Until regulations are issued, EOIR and USCIS should make the 2009 UNHCR, Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees (hereinafter 2009 UNHCR Guidelines) binding on IJs, the BIA, and the USCIS Asylum Office (AO). DHS and DOJ should clarify that the 1998 legacy Immigration and Naturalization Service (INS) Guidelines for Children's Asylum Claims (hereinafter 1998 INS Children's Guidelines or U.S. Guidelines) are binding on Asylum Officers, and DOJ should make the 1998 INS Children's Guidelines binding on EOIR adjudicators.

The BIA should sua sponte reopen and vacate its decision in *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008), based on its failure to consider or apply the U.S. or UNHCR children's guidelines. In the alternative, the U.S. Attorney General should certify and vacate the decision.

Convention Against Torture Claims: DHS and DOJ should draft regulations setting out a child-sensitive framework for evaluating each element of CAT.

Office of Chief Counsel's Litigation of Children's Protection Cases

- ICE Assistant Chief Counsel should be guided by, and adopt positions consistent with the 1998 INS Children's Guidelines and the 2009 UNHCR Guidelines in every child's asylum case. The Office of the Principal Legal Advisor for ICE should hold local Offices of the Chief Counsel accountable for lack of compliance.
- ICE should amend its June 17, 2011 memorandum on prosecutorial discretion to explicitly state that being an unaccompanied child is a positive factor for consideration of prosecutorial discretion, and that ICE should exercise prosecutorial discretion favorably in unaccompanied children's cases at every point of decision making.
- ICE Office of the Principal Legal Advisor should provide guidance to ICE Assistant Chief Counsel clarifying that it is not appropriate to offer settlement deals that restrict children to limited relief and benefits (e.g., CAT), when they may be eligible for more generous forms of relief that afford greater access to benefits (i.e., asylum), and encouraging agreements in advance of hearings to the most permanent, protective form of relief for which the child is eligible.

Initial Jurisdiction

- Congress should expand the TVPRA of 2008's initial jurisdiction provision to grant USCIS jurisdiction over all principal child asylum applicants, regardless of unaccompanied status.
- USCIS should make its updated procedures regarding initial jurisdiction over unaccompanied children's asylum claims retroactive to children who USCIS previously determined were not UACs under its prior procedures, but who would otherwise qualify as UACs under the updated procedures.
- USCIS should further clarify in its updated procedures regarding which children qualify as UACs under the new policy, and should establish a specific procedure for transferring asylum claims pending before the immigration courts, the BIA, or the federal Courts of Appeals to USCIS.
- EOIR should revise its March 2009 Memorandum on implementation of the TVPRA to incorporate USCIS' updated procedures and to clarify that IJs should grant continuances or administratively close cases of children claiming UAC status. EOIR should also provide training to immigration judges on implementation of USCIS' updated procedures.

Work Authorization

- The asylum regulations required under the TVPRA of 2008 should exempt children who are principal asylum applicants from the 180-day asylum adjudication (or case completion) deadline and from stoppages to the asylum clock.

- Until the issuance of TVPRA regulations, EOIR should update its OPPM 13-02, The Asylum Clock, to clarify that because children are not subject to case completion requirements, children should not be asked to proceed with an expedited hearing in order to keep the asylum clock running. The OPPM should also clarify that a child's request for a continuance for good cause should not be considered a delay and should not stop the asylum clock.
- USCIS should produce internal guidance on calculating the asylum clock in cases of principal child applicants, clarifying that when adjudicating work authorization applications, any discrepancy between agency asylum clocks should be resolved in the child's favor.

One-Year Filing Deadline: Congress should pass legislation eliminating the one-year filing deadline.

Special Immigrant Juvenile Status

Identification of Children in the U.S. Foster Care System

- Congress should pass the Foster Children Opportunity Act, H.R. 2036, introduced in May 2013 by Representative Beto O'Rourke (D-TX), which would help ensure undocumented children in the child welfare system are identified and have a meaningful opportunity to apply for SIJS or other available forms of immigration protection.
- USCIS should enhance its outreach to and training of state court judges and local entities that encounter children who are potentially SIJS eligible. USCIS should permanently institutionalize and fund a position dedicated to state outreach and training on SIJS.

State Court Issuance of Predicate Orders for SIJS

- USCIS should issue guidance concerning the role of state courts in Special Immigrant Juvenile Status cases similar to the guidance issued to law enforcement agencies regarding T and U visa certification.
- States should create standard forms for the required factual findings for Special Immigrant Juvenile Status in order to emphasize the legitimacy of SIJS and the authority of state court judges to issue the special findings.

State Court Records: USCIS should adopt regulations, consistent with the TVPRA, and, in the interim, issue guidance clarifying (1) that in cases in which a predicate order contains the requisite special findings, officers are not authorized to request copies of state court records or additional evidence regarding the abuse, abandonment or neglect; and (2) that it is no longer the SIJS petitioner's burden to establish that SIJS was not sought primarily for immigration purposes.

Birth Records: USCIS should revise its proposed rules, and in the interim issue guidance to its adjudications officers, to clarify that SIJS petitioners may have difficulty obtaining desired documentation regarding their birth, and that USCIS will consider any credible relevant evidence to establish age and parentage in SIJS cases.

T and U Visas

Screening

- Congress should pass Representative Lucille Roybal-Allard's (D-CA) Child Trafficking Victims Protection Act, H.R. 2624, requiring enhanced training of CBP officers and the hiring of child welfare professionals to assist CBP with its screening function to identify children with protection concerns at the border.
- In the interim, the Administration should mandate participation of NGOs or persons with child welfare expertise in screening children encountered by Border Patrol and identified as UACs from contiguous countries.

- As mandated by the TVPRA of 2013, the GAO should promptly conduct a study on whether CBP screening and repatriation of UACs conforms to the requirements of the TVPRA of 2008.

Training: Federal, state, and local law enforcement officers, including employees in the child welfare system, should receive additional training to ensure that officers understand how to identify victims and the nuanced aspects of victimization.

Law Enforcement Certification: Congress should enact legislation to exempt U visa applicants under the age of 18 from the law enforcement certification requirement.

- In the interim, DHS should issue guidance to ICE and CBP officers encouraging them to provide law enforcement certification in cases in which individuals, and in particular children, have been the victims of crimes of which the officer has observed or received credible reports.
- In the interim, DOJ should issue similar guidance to U.S. attorneys and law enforcement officials.

Adjudication Delays and Eligibility for Permanent Residence

- Congress should enact legislation allowing children under 18 who are granted T and U visas, to be considered eligible for permanent residency immediately.
- Congress should enact legislation mandating that T and U visa applications, similar to SIJS petitions, be adjudicated within 180 days of the date of the application.

Creation of a “Best Interests” Form of Relief

Congress should designate a new form of discretionary “best interests” relief that would halt removal proceedings and grant immediate permanent residency to unaccompanied immigrant children and principal child applicants in removal proceedings who are ineligible for or have been denied other forms of relief and for whom repatriation to their native country or country of last habitual residence is deemed contrary to their best interests. Immigration judge determinations should be guided by best interests recommendations that are provided by the child advocate appointed to the case.

Congress should enact legislation to require appointment of a child advocate for any principal child applicant seeking “best interests” relief.

Congress should amend INA § 244 to provide for derivative TPS for children under the age of 18 whose parents have TPS.

Congress should pass comprehensive immigration reform legislation that includes an expedited path to permanent residency for DREAMers and Little DREAMers, individuals who entered the United States as children and attended school.

Procedural Issues

Immigration Court Proceedings

Child-Sensitive Regulations: DOJ, in coordination with DHS, should adopt mandatory regulations that are binding on all immigration judges and which - as required by the TVPRA - better ensure that the specialized needs of unaccompanied alien children are taken into account in the procedural aspects of handling unaccompanied children’s cases. The regulations should require provisions for mandatory pre-trial conferences to limit contested issues in children’s cases, protections for children testifying, and a designated office or conference room for children testifying.

Specialization

- EOIR should designate IJs who specialize in children's cases. Specialization should be voluntary rather than assigned.
- EOIR should assign the following responsibilities to the newly appointed Assistant Chief Immigration Judge with a focus on vulnerable populations: play a significant role in the development of substantive and procedural regulations mandated by TVPRA 2008; develop other child-sensitive procedures or policies; develop and oversee the IJ training recommended below; and serve as a liaison for vulnerable populations – such as by holding quarterly meetings with stakeholders.
- The BIA should designate members who specialize in children's cases and place those members on a panel of specialists who hear all appeals of children's cases. Having BIA members who specialize would promote child-sensitive adjudication of asylum and other claims for relief and would facilitate ongoing training. Specialization should be voluntary rather than assigned.

Training

- EOIR should provide IJs and BIA members who hear children's cases with extensive ongoing training on child development, childhood trauma and its effects, and how to communicate with and elicit information from children. IJs and BIA members should also be trained on children's rights, and common harms affecting children.
- ICE should mandate that all Assistant Chief Counsel receive regular training by experts on child development, child welfare, mental health, domestic violence, sexual abuse, gang violence, and cultural competence, as well as on common harms affecting children.

Accountability: The Regional Assistant Chief Immigration Judges should be authorized to hold IJs accountable for failure to implement the 1998 INS Children's Guidelines, EOIR's OPPM, and the DOJ regulations proposed pursuant to the TVPRA.

Prosecutorial Discretion: ICE Assistant Chief Counsel should exercise prosecutorial discretion favorably throughout every stage of a child's case and with respect to every decision made in a child's case.

Appointment of Child Advocates: DOJ should develop a memorandum of understanding with HHS/ORR, establishing a procedure by which immigration judges can request the appointment of a child advocate pursuant to the TVPRA.

Local Stakeholder Meetings: As currently happens in some jurisdictions, immigration judges responsible for children's cases should host periodic roundtables in each jurisdiction with a broad range of stakeholders working with immigrant children.

USCIS Interview Procedures

Asylum

- USCIS should update the 1998 INS Children's Guidelines to take into account the 2009 UNHCR Guidelines.
- The Asylum Office should record all children's interviews so that, in cases referred to the immigration court, children and their attorneys can decide to provide the tapes to the immigration court in lieu of providing testimony anew. The tapes should not be admissible if the child does not agree to allow them into evidence. Asylum Headquarters should adopt a policy of reviewing tapes in children's cases for quality assurance purposes and to ensure that interviews are conducted in a child-sensitive manner.
- USCIS should revise its policies to accept videotaped testimony taken by child welfare experts at child advocacy centers, in lieu of interviewing children and/or encourage officers to rely on affidavits in lieu of oral testimony.

SJS

- USCIS should revise its proposed rule to specify, and, in the interim, issue interim guidance clarifying that interviews generally are not necessary at either stage of a SIJ case. Interviews should only be scheduled when there is a specific issue regarding an eligibility requirement.
- USCIS should issue additional guidance to its officers clarifying appropriate lines of inquiry in SJS cases and appropriate interview questions.

Training, Specialization, and Interviewing

- USCIS should designate specific asylum and field officers to specialize in adjudication of children's cases (including by self-designation) and provide those officers with significant additional training regarding children.
- USCIS should be commended for agreeing to the CISOMB recommendation to involve clinical experts in training of Asylum Officers and Field Officers and for quality assurance purposes, and should begin implementing this practice immediately.

Child Advocates: USCIS should develop a memorandum of understanding with HHS/ORR, establishing a procedure by which USCIS asylum and field officers can request the appointment of a child advocate pursuant to the TVPRA.

Comprehensive Services Before EOIR

Access to Comprehensive Services

- As it has done for detained children in many courts, EOIR should develop juvenile court dockets for released children in all cities to facilitate access to attorneys and child advocates for released children.
- EOIR should make comprehensive services available to UACs at juvenile dockets, including the facilitation of pro bono legal services and the appointment of child advocates.

Access to Legal Counsel

- Congress and relevant government agencies should allocate resources appropriate to children's legal and social service needs. Resources should be increased for the infrastructure to support children after release including placement with a pro bono attorney and child advocate as rapidly as possible, at the site where the child's case will be adjudicated.
- The unaccompanied child legal services program should be transferred from HHS to DOJ.
- On court dates for released children, EOIR should establish an office in the court building for legal services providers to enable children to meet with legal services organizations' staff on site, meet with pro bono attorneys, and receive Know Your Rights presentations and legal screenings. EOIR should establish a second office in the same building, staffed by organizations that provide child advocacy services for vulnerable unaccompanied children. The Legal Orientation Program for Custodians (LOPC) should also be included in these services.

Scheduling of Cases to Ensure Efficiencies and Access to Counsel

EOIR should adopt regulations that facilitate pro bono representation by, for example, encouraging judges to provide adequate time for pro bono attorneys to prepare a child's case through the appropriate use of continuances.

Until such regulations appear, EOIR should hold immigration judges accountable for failure to follow the agency's Guidelines for Facilitating Pro Bono Legal Services, which encourages immigration judges to accommodate requests to continue or advance hearings and to give pro bono attorneys priority when scheduling cases, especially in children's cases.

Rather than filing the Notice to Appear with EOIR while a child is detained - which starts the legal case at the site where the child is detained - ICE should file the NTA with the immigration court in the city to which the child is being released, thereby establishing venue at the outset with that court and avoiding the need to file change of venue requests.

Return and Reintegration

The Administrator of USAID, in conjunction with the Secretary of State, the Secretary of HHS, the Attorney General, international organizations, and NGOs in the United States with expertise in repatriation and reintegration, should create a program to develop and implement best practices and sustainable programs in the United States and within the country of return to ensure the safe and sustainable repatriation and reintegration of unaccompanied children into their country of nationality. Creation of these programs must be collaborative with a wide range of expert partners, as called for under the TVPRA of 2008.

U.S. government return and reintegration programs should provide services that help youth find alternatives to re-migration and address the root causes of migration.

DHS and ORR should commit to establishing policies and procedures that help facilitate the safe return and reintegration of unaccompanied children in U.S. government custody, including timely communications about the child's departure date to ensure family reunification. DHS and ORR should make those policies and procedures readily and publicly available.

The United States and countries of origin should enter into and maintain regular dialogue about the return and reintegration of child migrants to ensure programming to help these children is effective and complementary. In addition, the United States, Mexico, Guatemala, Honduras, and El Salvador should develop a coordinated, regional approach to address issues related to child migration.

U.S. government reporting on return and reintegration programs should be robust and include detailed information about the workings of the program, comprehensive data, and best practices, as mandated in the TVPRA of 2008.

The U.S. government should collect and make publicly available comprehensive data and information about the children being removed from the United States to inform programming, including the region the child is returning to in the home country, the reason for migrating, and whether the child was represented in his/her immigration case.

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