



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

PRACTICE ADVISORY ON STRATEGIES TO COMBAT GOVERNMENT EFFORTS TO TERMINATE “UNACCOMPANIED CHILD” DETERMINATIONS¹

Table of Contents

I.	Introduction.....	1
II.	Background on the TVPRA and Protections Afforded to UCs.....	2
A.	Definition of “Unaccompanied Alien Child” Under the Homeland Security Act of 2002.....	2
B.	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008	3
C.	How and When Is the UC Determination Made?	4
III.	UCs in Removal Proceedings	7
A.	General Overview of Procedures and Common Forms of Relief	7
B.	Specific Procedures Governing Asylum Application Adjudications for UCs	9
C.	Detention of Children in Removal Proceedings and the <i>Flores</i> Settlement	13
D.	UCs with Removal Orders.....	14
IV.	Government Arguments to Anticipate Regarding Termination of UC Determinations and Proposed Counter-Arguments.....	16
A.	Anticipated Issue #1: The ICE Trial Attorney May Oppose, or the Immigration Judge May Deny, Administrative Closure or a Continuance to File the Asylum Application with the USCIS, Taking the Position That the Child Is No Longer a UC.....	16
1.	Initial Considerations: Strategy and Goals.....	16

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2.	File the Asylum Application with the USCIS and Argue in Immigration Court That Deference Is Owed to the USCIS’s Determination of Its Own Jurisdiction.	17
3.	If the Practitioner Is Forced to Proceed in Immigration Court while the Asylum Application Is Pending with the USCIS, the Practitioner Can Nonetheless Argue That the Client Is a UC for Initial Asylum Jurisdiction Purposes.	20
B.	Anticipated Issue #2: The USCIS Will Not Take Jurisdiction over the Application, Based on the Conclusion That the Child Is No Longer a UC.....	26
1.	Strategies for Obtaining USCIS Asylum Office Jurisdiction Where There Is an Allegation That ICE Has Taken an Affirmative Act To Terminate the Prior UC Determination	26
2.	Strategies for Filing with the USCIS If a New Policy Is Issued	28
C.	Anticipated Issue #3: The DHS or the Immigration Judge Says the Child Is No Longer a UC and Is Thus Subject to the One-Year Filing Deadline and/or the Safe Third Country Bar.	30
1.	Strategies for Overcoming One-Year Filing Deadline Issues.....	30
2.	Strategies Regarding the Safe Third Country Bar.....	31
D.	Anticipated Issue #4: The DHS Detains Children It Alleges Are No Longer UCs.	32
1.	Strategies for Preventing Detention in the First Place	32
2.	Strategies for Children Detained by the DHS While in Removal Proceedings	33
3.	Note on Children Detained by the DHS Who Have Final Orders of Removal.....	36
E.	Anticipated Issue #5: The DHS Places the Child in Expedited Removal Proceedings Based on Its Determination That the Child Is No Longer a UC.....	37
1.	Strategies for Scenario in Which Expedited Removal Proceedings Are Commenced	38
2.	Other Considerations To Mitigate Risk of DHS Efforts To Commence Expedited Removal Proceedings	40
V.	Conclusion	40

I. Introduction

Among many other provisions, President Trump’s January 25, 2017 Executive Order entitled “Border Security and Immigration Enforcement Improvements” instructed the Secretary of the Department of Homeland Security (DHS) to “take appropriate action” to ensure the proper processing of “unaccompanied alien children” [hereinafter “UC”].² Following that directive, on February 20, 2017 DHS Secretary John Kelly issued a memorandum titled “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” [hereinafter “Kelly Memo”].³ Section L of the Kelly Memo is entitled “Proper Processing and Treatment of Unaccompanied Alien Minors Encountered at the Border.” That section states that many children who have been apprehended by the DHS, determined to be unaccompanied, and placed in the custody of the Department of Health and Human Services’ Office of Refugee Resettlement (ORR) actually have a parent in the United States. The Kelly Memo states that once these children are released from ORR custody to the parent, they may no longer fall within the definition of “unaccompanied alien child.” The memo claims this has led to “abuses” and “significant administrative delays in adjudications by immigration courts and USCIS.” It calls for U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) to issue “uniform written guidance” and conduct training, including “standardized review procedures,” to confirm that children initially determined to be UCs “continue to fall within the statutory definition when being considered for the legal protections afforded to such children as they go through the removal process.”⁴

As of the date of this practice advisory’s issuance, the DHS has yet to provide the “uniform written guidance” called for in the Kelly Memo, and it remains to be seen how the agency will interpret and implement the memo’s broad and general language. However, advocates who represent children are concerned that forthcoming agency policies and practices could negatively impact vulnerable youth fleeing persecution and harm in their home countries. Advocates in some jurisdictions have already reported instances in which the DHS has departed from established past practice.⁵ It is anticipated that additional written policy guidance will soon be issued by various immigration agencies, and the authors hope to update this practice advisory as necessary to address changing agency policy and practice. This practice advisory is intended

² *Executive Order: Border Security and Immigration Enforcement Improvements* § 11(e) (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>. This advisory will use the term “UC” throughout; however, the government often uses the abbreviation “UAC” to denote the statutory term “unaccompanied alien child.”

³ <https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies>.

⁴ *Id.* § L at 11.

⁵ For example, in jurisdictions including Michigan, Ohio, Texas, and New York, there have been reports of ICE trial attorneys and/or immigration judges instructing children previously determined to be unaccompanied who have since reunified with a parent that they must file their asylum applications with the immigration court rather than with USCIS, and ICE trial attorneys filing “Notices of Termination of UAC Status” with the immigration court. A redacted example of one such notice is attached to this practice advisory.

to provide advocates with strategies for combatting agency efforts to strip children of protections afforded to them as unaccompanied children. It is not intended as legal advice and does not purport to be comprehensive. Rather, we hope that it will provide advocates with a starting point for identifying issues and developing strategies to protect the rights of vulnerable children.

Section II provides background information about the definition of an unaccompanied child under federal immigration law and the protections afforded such children. Section III discusses aspects of removal proceedings as they relate to unaccompanied children, including an overview of the special asylum procedures afforded to unaccompanied children. Section IV anticipates possible ways that the government may try to terminate UC determinations, discusses the legality of such efforts, and provides arguments and strategies to combat them. Section V concludes with other steps advocates and communities can take to ensure that vulnerable children's rights are protected.

II. Background on the TVPRA and Protections Afforded to UCs

Various provisions of the immigration statutes, immigration regulations, and agency policy guidance provide specific protections and procedures for UCs. This section will provide an explanation of the statutory definition of “unaccompanied alien child” and describe some of the special provisions and protections provided to UCs by statute, regulation, and policy.

A. Definition of “Unaccompanied Alien Child” Under the Homeland Security Act of 2002

The term “unaccompanied alien child” was codified into law through the Homeland Security Act of 2002. The statute defines an “unaccompanied alien child” as a child under the age of 18 with no lawful status in the United States, and “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.” 6 U.S.C. § 279(g)(2). The Homeland Security Act of 2002 also transferred responsibility for detained UCs from the former Immigration and Naturalization Service (INS) to ORR. In contrast, detained *accompanied* children are confined in the custody of the DHS and for-profit prison companies, not ORR.⁶

There is no further definition or interpretation of “unaccompanied alien child” within the immigration law or its implementing regulations. Thus, there is no statutory or regulatory explanation of what it means, for example, to have a parent or legal guardian in the United States “available to provide care and physical custody.” 6 U.S.C. § 279(g)(2)(C)(ii). The DHS has developed practices regarding its interpretation of this language, and those practices have

⁶ Children apprehended with their mothers are typically deemed “accompanied” and placed in the custody of the DHS, sometimes housed in family detention facilities. However, under current agency practice, a child apprehended with his or her father may be separated from the father and deemed a UC (and then transferred to ORR custody while the father is sent to adult DHS detention) or may be paroled into the United States with the father. For information on DHS detention of accompanied children in the family detention context, see, for example, <https://www.dhs.gov/news/2015/07/21/written-testimony-ice-director-senate-committee-judiciary-hearing-titled-%E2%80%9Coversight>; <https://www.ice.gov/detention-facility/south-texas-family-residential-center>; <https://www.ice.gov/detention-facility/karnes-county-residential-center>.

evolved over time. The recent directives from the Trump Administration and reports from advocates on the ground suggest that those practices are in the process of changing again.

B. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

In 2008, Congress signed into law the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), P.L. 110-457, 122 Stat. 5044. That statute enacted a number of protections for UCs.⁷ Among other things, the TVPRA exempts UCs from non-contiguous countries⁸ from being summarily removed through the expedited removal process and affords them the right to have their cases heard before an immigration judge in removal proceedings under Section 240 of the INA, 8 U.S.C. § 1229a.⁹ The TVPRA also provides for child-sensitive processing of asylum applications of UCs who are in removal proceedings. Unlike other respondents who must present their asylum claim before the immigration court in the first instance, UCs in removal proceedings are entitled to file their asylum applications initially with the USCIS, and the USCIS’s Asylum Office adjudicates the claims in a non-adversarial setting.¹⁰ UCs are exempt from the one-year filing deadline in asylum cases, and the prohibition on receiving asylum for persons who could have sought protection in a safe third country does not apply to UCs.¹¹ They are eligible for voluntary departure at government expense.¹² The TVPRA also directs that UCs should have access to counsel “to the greatest extent practicable,” and provides for the appointment of child advocates in some situations.¹³

The TVPRA calls for the implementation of “regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and

⁷ For an overview of these changes, see Deborah Lee, Manoj Govindaiah, Angela Morrison & David Thronson, *Practice Advisory, Update on Legal Relief Options for Unaccompanied Alien Children Following the Enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (Feb. 19, 2009), available at https://www.ilrc.org/sites/default/files/resources/235_tvpra_practice_advisory.infonet.pdf.

⁸ It also exempts UCs from contiguous countries who may have been trafficked, have a credible fear of persecution, or are unable to make an independent decision to withdraw an application for admission. TVPRA § 235(a)(2)(A). Mexican UCs who do not fall within those exemptions may be permitted to withdraw their applications for admission. TVPRA § 235(a)(2)(B). For further discussion of the treatment of UCs from Mexico at the border, see Betsy Cavendish & Maru Cortazar, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors* (Appleseed 2011), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

⁹ TVPRA § 235(a)(5)(D).

¹⁰ TVPRA § 235(d)(7)(B); *see infra* Section III.B.

¹¹ TVPRA § 235(d)(7)(A).

¹² TVPRA § 235(a)(5)(D).

¹³ TVPRA § 235(c)(5) & (6).

substantive aspects of handling unaccompanied alien children’s cases.”¹⁴ No such regulations have ever been issued. Instead, the agencies have implemented the TVPRA’s provisions piecemeal through policy guidance, memoranda, contracts, and informal agency practices.

Although it is recognized that all children share many of the same limitations and vulnerabilities, immigration law does not provide all of the same protections to children determined to be “accompanied.” Accompanied children who are detained are held in the custody of the DHS, rather than ORR. Accompanied children are not exempt from expedited removal if they fall within the requirements for that procedure.¹⁵ Children placed in removal proceedings as “accompanied” have not been entitled as of right to file their asylum applications with the USCIS. They must instead file directly with the immigration court and pursue their claims as part of their parent’s claim¹⁶ or as independent claims in an adversarial process. Thus, the UC determination affects how immigration authorities may apply enforcement procedures against a child and what protections a child is entitled to.

C. How and When Is the UC Determination¹⁷ Made?

The TVPRA does not state explicitly how an agency makes the initial determination that a child is unaccompanied. Instead, the statute provides that each “department or agency of the Federal Government” must notify the Department of Health and Human Services (HHS) within 48 hours of its “apprehension or discovery” of a UC,¹⁸ or within 48 hours of “any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.”¹⁹ Additionally, the federal department or agency must transfer any UC in its custody to HHS/ORR within 72 hours after determining that the child is a UC.²⁰ The DHS’s subcomponents CBP and ICE are subject to these requirements, as both agencies apprehend and/or detain children. The authors could find no current agency policy directing how a CBP or ICE officer is to determine whether a child under 18 years old is “unaccompanied” if encountered without a parent or legal

¹⁴ TVPRA § 235(d)(8) (“Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant 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.”).

¹⁵ Expedited removal allows for rapid deportation without a hearing. See INA § 235(b)(1) and discussion at Section IV.E *infra*. Even before the TVPRA’s enactment, agency policy guidance counseled against subjecting “unaccompanied minors” to expedited removal, and gave officers discretion to permit accompanied minors to withdraw applications for admission where appropriate. See Memorandum from Paul Virtue, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997), AILA Doc. No. 97082191.

¹⁶ See 8 C.F.R. § 1208.21.

¹⁷ This practice advisory will primarily use the term “determination” for consistency and accuracy. Note, however, that other sources may use other terminology, including “finding” and “status.”

¹⁸ TVPRA § 235(b)(2)(A).

¹⁹ TVPRA § 235(b)(2)(B).

²⁰ TVPRA § 235(b)(3).

guardian.²¹ It appears that in the past, the DHS and its subcomponents have generally considered any child apprehended at or near the border who was not physically accompanied by a parent or legal guardian to be “unaccompanied” and transferred him or her to ORR custody.²² While this may be the general practice, it appears that at times the DHS has reached the determination of whether a child is “unaccompanied” in other ways.²³

It remains to be seen whether, under the Trump Administration, new policies and practices for determining whether a child is unaccompanied will emerge, particularly where a child has a parent or legal guardian in the United States at the time of initial apprehension. If the DHS or any of its sub-components were to take the position that children who have a parent or legal guardian somewhere in the United States are in fact “accompanied,” irrespective of whether that parent is “available to provide care and physical custody,” in theory it could also subject such children to expedited removal procedures or other summary removal short of initiation of INA § 240 proceedings, and it could detain them in DHS detention facilities instead of transferring them to ORR custody. Such action would likely be met with litigation from groups dedicated to the protection of immigrant children’s rights.

Even in the absence of any change in practice, arguments could be made that neither ICE nor CBP has the authority under the TVPRA to conclude that a child under 18 apprehended without a parent or legal guardian is “accompanied” (*i.e.*, that he or she has a parent or legal guardian in the United States “available to provide care and physical custody”). This argument would be based on the TVPRA’s text requiring all federal agencies, including CBP and ICE, to either find that a child is “unaccompanied” and transfer him or her to ORR custody within 72

²¹ A pre-TVPRA report cites a November 2003 Juvenile Protocol Manual for the statement that an accompanied child is one who has a “parent, legal guardian, or other immediate adult relative who is with the juvenile when he or she is apprehended.” DHS Office of Inspector General, *A Review of DHS’s Responsibilities for Juvenile Aliens* OIG 05-45, at 3 n.5 (Sept. 2005), available at https://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf. A pre-TVPRA ICE memorandum discusses how to make age determinations for persons in DHS custody, but does not discuss how to make a determination as to whether a child is accompanied or not. ICE Memorandum, *Age Determination Procedures for Custody Decisions* (Aug. 20, 2004), available at https://www.ice.gov/doclib/foia/dro_policy_memos/agedeterminationproceduresforcustodydecisionsaug202004.pdf.

²² See Immigrant Legal Resource Center, *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth* (4th Ed. 2015) § 18-5 (“[I]f neither a parent or a legal guardian (the latter requires a court order) is with the juvenile at the time of apprehension, geographically close enough to quickly come forward and care for the child, or willing to come forward before immigration authorities to pick up the child, then the minor may be classified as ‘unaccompanied.’”); see also Congressional Research Service, *Unaccompanied Alien Children: Policies and Issues*, at 5 (Mar. 1, 2007), available at <http://trac.syr.edu/immigration/library/P1642.pdf> (“If neither a parent or a legal guardian (with a court-order to that effect) is with the juvenile at the time of apprehension, or within a geographical proximity to quickly provide care for the juvenile, the juvenile alien is classified as ‘unaccompanied.’”) [hereinafter “CRS Report”].

²³ See Women’s Refugee Comm. & Orrick, Herrington, & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody*, at 6, 7 (Feb. 2009) [hereinafter “Halfway Home”], available at <https://www.womensrefugeecommission.org/resources/download/196> (noting that “[t]hese determinations can be plagued with problems related to disagreement and confusion over the definition of ‘unaccompanied child’” and that “at times, ICE classifies children who have family members in the United States as ‘accompanied’ even if they are not willing to release the child to that family”); see also CRS Report, *supra* note 22, at 30-31.

hours, or notify ORR of any child under 18 in its custody within 48 hours.²⁴ This text suggests that Congress intended to provide only ORR (and not other federal agencies) with the authority to make the determination that, for custody purposes, a child under 18 has a parent or legal guardian in the United States “available to provide care and physical custody.” In other words, the TVPRA’s language authorizes any federal agency that encounters or apprehends a child without a parent or legal guardian to either determine that the child is unaccompanied and transfer him or her to ORR, or to notify ORR within 48 hours of discovering a child under 18 in its custody, but it impliedly only authorizes ORR to determine that a given child has a parent or legal guardian in the United States “available to provide care and physical custody.” Such an interpretation would be consistent with ORR’s comparative institutional expertise in making child welfare-related determinations (as is required in deciding whether a parent or legal guardian is available to provide care for a child), in contrast to the lack of such expertise in other federal agencies.

In the past, once a child was determined to be a UC and transferred to ORR custody, usually DHS did not re-assess the child’s UC determination.²⁵ That is, a child could subsequently be released from ORR custody and reunify with a parent or legal guardian or turn 18, and the DHS typically took no affirmative action to remove the UC determination and reclassify the child.²⁶ This provided for a consistent position as the child progressed through the legal process, which not only furthers the best interests of the child but also requires fewer government resources. However, the Kelly Memo appears to contemplate routine re-evaluation and re-classification, calling for the issuance of written guidance and training, including “standardized review procedures” to confirm that children initially determined to be UCs “continue to fall within the statutory definition.”²⁷ Advocates in some jurisdictions have further reported instances in which ICE trial attorneys have asserted to the immigration court that children previously determined to be UCs no longer meet that definition.²⁸ At this time, it

²⁴ TVPRA § 235(b)(2).

²⁵ However, prior to June 2013, USCIS would independently assess whether a child was a UC at the time of filing the asylum application for purposes of determining asylum jurisdiction. *See infra* III.B.

²⁶ The 2013 USCIS memo governing asylum jurisdiction (still effective as of the date of this practice advisory’s issuance), allows for the USCIS to independently assess whether a child was a UC despite a prior UC determination in the asylum jurisdiction context, only if there was “an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum.” USCIS Memorandum, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf> [hereinafter “2013 USCIS Asylum Jurisdiction Memo”]. One common instance where the DHS might seek to remove a prior UC classification was where a child turned 18 while in ORR custody. In these cases, ICE sometimes takes the child into DHS custody upon the child’s 18th birthday.

²⁷ *See supra* at 1 & note 3.

²⁸ *See supra* note 5.

remains to be seen how the new administration will implement its directives pertaining to classification of UCs.

Practice Tip: Proof of UC Determinations. Children who have been determined to be UCs will often have received some documentation from the time they spent in ORR custody. UCs in removal proceedings filing asylum applications with USCIS will need to submit documentation with the asylum application as proof of the UC determination.²⁹ One document that UCs often have is an ORR Verification of Release form, which usually has the child's photograph on it. Indications that a child has been determined to be a UC may also be found on Form I-213 Record of Deportable/Inadmissible Alien (made at the time of the child's initial encounter with CBP or ICE) or in other federal government documentation.

III. UCs in Removal Proceedings

A. General Overview of Procedures and Common Forms of Relief

As discussed above, under the TVPRA most unaccompanied children apprehended by the DHS³⁰ are entitled to have their cases heard in removal proceedings before an immigration judge under INA § 240. This is the case even if the child would otherwise be subject to expedited removal, by which a person can be rapidly deported with extremely limited ability to pursue immigration relief.³¹ During removal proceedings, UCs are entitled to pursue any forms of immigration relief for which they might qualify. Common forms of relief available to noncitizen children may include asylum, Special Immigrant Juvenile Status, U and T Nonimmigrant Status, relief under the Violence Against Women Act, and family based options.³² Because many forms of immigration relief for which UCs may qualify are adjudicated in front of the USCIS and not the immigration court, often it will be appropriate to ask the immigration court to grant the UC's request for a continuance, administrative closure, or even termination so that the child can pursue that relief before USCIS.³³

²⁹ See USCIS Memorandum, *Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien Children*, HQRAIO 120/12a, at 2 (June 4, 2013); available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/service-ctr-ops-proced-accepting-form-i589-unaccompanied-alien-children.pdf> (noting that the ORR Verification of Release Form is one form of proof accepted by USCIS that an asylum applicant is a UC).

³⁰ Except for those from contiguous countries where it is determined that there are no trafficking or persecution concerns and that the child can withdraw the request for admission. TVPRA § 235(a)(2)(B).

³¹ See INA § 235(b)(1).

³² This list is not comprehensive. A discussion of immigration relief for children is beyond the scope of this advisory. For more information about immigration relief for children, see Immigrant Legal Resource Center, *Immigration Options for Undocumented Immigrant Children*, <https://www.ilrc.org/immigration-options-undocumented-immigrant-children>.

³³ See EOIR, Operating Policies and Procedures Manual 13-01, *Continuances and Administrative Closure* (Mar. 7, 2013), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf> (discussing, *inter alia*, *Matter of Hashmi*, 24 I. & N. Dec. 785 (BIA 2009), and *Matter of Avetisyan*, 25 I. & N. Dec. 688 (BIA 2012)); see also *Matter of W-Y-U-*, 27 I. & N. Dec. 17 (BIA 2017) (“[T]he primary consideration for an Immigration Judge

Other legal issues and forms of relief from removal for UCs are adjudicated in immigration court. These include contesting the allegations and charges in the NTA, moving for suppression and termination,³⁴ applying for adjustment of status (for those who are not “arriving” noncitizens),³⁵ and pursuing asylum and related relief if the USCIS does not grant the child asylum and instead returns the child’s asylum case to the court.

Like most other respondents in immigration court, unaccompanied children are not guaranteed a government-paid attorney, and those who cannot find or afford an attorney must proceed *pro se*.³⁶ Nevertheless, the Executive Office for Immigration Review (EOIR) has implemented specialized guidance governing how immigration judges should conduct hearings involving UCs. That guidance suggests special procedures in UC cases that take into account their unique vulnerabilities, including the need to consider the child’s best interest in conducting proceedings. The EOIR guidance clarifies that the “best interest of the child” principle “is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a ‘child appropriate’ hearing environment is established, allowing a child to discuss freely the elements

in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.”). For unpublished BIA cases on this subject, see, for example, *Jhosimbher Holar Rodas-Mazariegos*, A206 512 862 (BIA Sept. 7, 2016), unpublished decision available at <https://www.scribd.com/document/324926826/Jhosimbher-Holar-Rodas-Mazariegos-A206-512-862-BIA-Sept-7-2016> (reversing denial of continuance for UC to apply for asylum); *S-G-P-G-*, AXXX XXX 389 (BIA Oct. 20, 2016), unpublished decision available at <https://www.scribd.com/document/330537673/S-G-P-G-AXXX-XXX-389-BIA-Oct-20-2016> (dismissing DHS’s interlocutory appeal challenging administrative closure to allow USCIS to adjudicate asylum application); *C-E-M-M-*, AXXX XXX 189 (BIA March 15, 2017), unpublished decision available at <https://www.scribd.com/document/342626967/C-E-M-M-AXXX-XXX-189-BIA-March-15-2017> (reversing denial of an additional continuance to pursue SIJS where record showed that respondent was actively pursuing the state court action); *A-L-M-D-*, AXXX XXX 671 (BIA Oct. 26, 2016), unpublished decision available at <https://www.scribd.com/document/330541273/A-L-M-D-AXXX-XXX-671-BIA-Oct-26-2016> (dismissing DHS’s interlocutory appeal challenging administrative closure where SIJS petition had been granted but child was awaiting visa availability).

³⁴ For more information on suppression and termination for children in immigration court, see Helen Lawrence, Kristen Jackson, Rex Chen & Kathleen Glynn, *Practice Advisory: Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients* (Mar. 2015), available at https://cliniclegal.org/sites/default/files/strategies_for_suppressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf. See *infra* Section III.B for more information on the asylum process for unaccompanied children.

³⁵ See 8 C.F.R. §§ 1.2, 1001.1(q), 245.2(a)(1), 1245.2(a)(1); American Immigration Council, *Practice Advisory: “Arriving Aliens” and Adjustment of Status* (Nov. 2015), available at https://www.americanimmigrationcouncil.org/practice_advisory/arriving-aliens-and-adjustment-status.

³⁶ Even though the TVPRA states that UCs should be afforded counsel “to the greatest extent practicable,” TVPRA § 235(c)(5), to date courts have not recognized a statutory or constitutional right to a government-provided attorney for children in removal proceedings, unaccompanied or otherwise. See *JEFM et al. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/flb_v_lynch_9th_circuit_opinion.pdf (dismissing class action lawsuit asserting children’s right to government-appointed legal representation in removal proceedings on jurisdictional grounds without reaching the merits of the case).

and details of his or her claim.”³⁷ While the EOIR memo is geared toward UCs, it expressly recognizes that some of its provisions should apply to all child respondents.³⁸ Practitioners representing children should familiarize themselves with this guidance and advocate for specific and tailored accommodations in immigration court to meet the individual needs of the child respondent.

Starting in 2014, the EOIR implemented nationwide “priority dockets” for UCs, designating them as the top priority for immigration court dockets.³⁹ These dockets were characterized by many as “surge dockets” or “rocket dockets.” They were widely criticized by children’s advocates for pushing children’s cases through immigration court without providing the child adequate time to obtain an attorney or prepare the case, creating serious due process problems.⁴⁰ On January 31, 2017, the EOIR announced new priorities in which adult detained cases are the highest priority and most UC cases are no longer a priority.⁴¹ The only UCs who remain a priority are those in ORR custody who do not have a sponsor identified. Given these new priorities, there may be an opportunity for children to obtain longer continuances than were previously available by arguing that their cases have been de-prioritized and should be treated just like any other non-priority case.⁴² Longer continuances could benefit UCs by allowing them more time to find an attorney and to prepare and file for asylum or other relief with USCIS. These changes could also produce negative consequences in some situations; for example, the hearing date could be forgotten because it is scheduled far into the future or the court could advance the hearing date without the child receiving notice of this change.

B. Specific Procedures Governing Asylum Application Adjudications for UCs

Under the statutory changes enacted by the TVPRA, the USCIS Asylum Office has “initial jurisdiction over any asylum application filed by an unaccompanied alien child,” even where the child is in removal proceedings and would otherwise have to file his or her asylum

³⁷ EOIR, Operating Policies and Procedures Memorandum 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, at 4 (May 22, 2007), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf> [hereinafter “EOIR Children’s Memo”].

³⁸ *Id.* (“While these guidelines are written for cases involving unaccompanied alien children, some provisions will apply in other cases where children are accompanied by a parent or guardian or where children testify as witnesses.”).

³⁹ EOIR, *Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.*, <https://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

⁴⁰ See Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration “Rocket Docket”: Understanding the Due Process Implications* (Aug. 15, 2014), available at <https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/>.

⁴¹ EOIR Memorandum, *Case Processing Priorities* (Jan. 31, 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/01/31/caseprocessingpriorities.pdf>.

⁴² For a sample *pro se* request to the court that a case be re-scheduled consistent with non-priority practices, see <https://cliniclegal.org/sites/default/files/resources/asylum/EOIR-Memo-Cover-Letter-to-IJ-or-ICE-ERO-Final.pdf>.

application with the immigration court.⁴³ From the time the TVPRA first went into effect until June of 2013, the USCIS conducted an independent assessment at the child’s asylum interview of whether the asylum applicant was in fact an “unaccompanied alien child” at the time the application was filed.⁴⁴ After much criticism from advocates, in June of 2013 the USCIS implemented new guidance whereby it adopts a prior UC determination made by the DHS without conducting its own separate factual redetermination.⁴⁵ Since it appears that the DHS may intend to revoke the current guidance and perhaps revert to some version of the prior policy,⁴⁶ it is instructive to briefly summarize the agency’s previous practices.

When the TVPRA first went into effect, the USCIS issued guidance instructing asylum officers to conduct an independent determination of whether an asylum applicant was a UC at the time of filing.⁴⁷ The USCIS would make an initial assessment at the service center, accepting filings if the date of birth listed on the asylum application confirmed that the applicant was under 18 at the time of filing, or where the filing included a “UAC Instruction Sheet.”⁴⁸ Asylum officers were instructed to make another determination at the asylum interview regarding whether a child was a UC, asking the child a series of questions to determine whether or not the child was a UC at the time the asylum application was filed.⁴⁹ Stakeholders reported that UC asylum interviews “shifted in focus from the merits of a claim to queries on jurisdiction that absorb up to half of the entire interview.”⁵⁰ The asylum officer would ask questions related to parental behavior and whether the parent was meeting the child’s physical, mental, and emotional needs, a process which was criticized because asylum officers lack the expertise to evaluate a home and assess a parent’s fitness, a determination “more appropriately within the purview of a trained clinician.”⁵¹

⁴³ 8 U.S.C. § 1158(b)(3)(C); TVPRA § 235(d)(7)(B).

⁴⁴ See USCIS Memorandum, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (Mar. 25, 2009), available at https://preview.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/uac_filings_5f25mar09.pdf [hereinafter “2009 USCIS Asylum Memo”].

⁴⁵ See 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26.

⁴⁶ See Kelly Memo discussed on page 1 and at note 3.

⁴⁷ 2009 USCIS Asylum Memo, *supra* note 44, at 4-5.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 4-5.

⁵⁰ USCIS Ombudsman, *Ensuring a Fair and Effective Asylum Process for Unaccompanied Children*, at 6 (Sept. 20, 2012), available at <https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf> [hereinafter “2012 Ombudsman Asylum Recommendations”].

⁵¹ *Id.* at 8.

This policy created confusion and inconsistency in how similarly situated children were treated.⁵² It also subjected children to multiple UC determinations, which led to their being intimidated and unnecessarily required to testify to the basis of their asylum claim. Then it was determined after the interview that they were not UCs and they were required to repeat their testimony in court.⁵³ By 2012, USCIS was finding a lack of jurisdiction in 45 percent of the cases.⁵⁴ After the interview, USCIS would issue a conclusory memo stating that it lacked jurisdiction and would send the case back to the immigration court.⁵⁵

In 2013 the USCIS changed its policy regarding making UC determinations for purposes of initial asylum jurisdiction.⁵⁶ Under the 2013 guidance, USCIS officers are instructed not to make a separate UC determination for a child who has previously been determined to be a UC by CBP or ICE, and instead to rely on that prior determination unless the HHS/ORR, ICE, or CBP has taken an “affirmative act” to terminate the UC finding before the child filed the asylum application.⁵⁷ In cases of UC asylum applicants where no prior UC determination has been made, the policy instructs USCIS officers to conduct a factual inquiry to determine whether the child was a UC at the time of filing the asylum application.⁵⁸ In practice, this means that children released from ORR custody who subsequently reunified with a parent or legal guardian or turned 18 are still UCs for asylum jurisdiction purposes and can file their asylum applications in the first instance with the USCIS.

⁵² *Id.* at 2, 4, 6.

⁵³ Center for Gender and Refugee Studies & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System*, at 28 (Feb. 2014), available at http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf; see 2012 Ombudsman Asylum Recommendations, *supra* note 50, at 7.

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 4 (noting that “[s]takeholders report that while a few ‘lack of jurisdiction’ redeterminations provide details, most are form letters without specific explanations and deemed final”).

⁵⁶ 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26; USCIS Memorandum, *Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien Children*, HQRAIO 120/12a (June 4, 2013); available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/service-ctr-ops-proced-accepting-form-i589-unaccompanied-alien-children.pdf>; USCIS, *Questions and Answers: Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (June 10, 2013), available at <https://www.uscis.gov/sites/default/files/USCIS/Refugee,%20Asylum,%20and%20Int'l%20Ops/Asylum/ra-qanda-determine-jurisdiction-uac.pdf>.

⁵⁷ 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26; see discussion *infra* Section IV.B.1 regarding lack of definition of “affirmative act.”

⁵⁸ 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26; see USCIS, *Affirmative Asylum Procedures Manual*, at 35-36 (Nov. 2013), available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

As of the date of the issuance of this practice advisory, the 2013 policy remains in effect and has not been rescinded, and the authors know of no USCIS Asylum Office acting contrary to this policy. However, the Kelly Memo’s language suggests that the DHS may be planning to revoke the 2013 guidance and return to a more restrictive and fact-intensive UC determination procedure. At the time of this writing, it is unclear how the agency will implement any new guidance, and therefore it is difficult to anticipate what specific strategies might be most applicable. Certain key questions to consider will include:

- at what junctures the UC determination can be re-examined;
- what agency has authority to re-examine and re-determine;
- what factors govern whether a child is re-classified;
- what process is followed (including whether the child has any opportunity to seek legal assistance, present evidence, and/or contest a decision); and
- how a child may seek review of that determination.

In addition to having the right to file for asylum with USCIS in the first instance, UCs, as noted *supra*, are statutorily exempt from the one-year filing deadline and the safe third country bar.⁵⁹ In addition to these UC-specific protections, agency and UNHCR guidance provide additional child-sensitive directives that apply to all children applying for asylum, not just UCs.⁶⁰ Children’s asylum claims should be viewed through a child-sensitive lens, which often means applying a more generous and flexible standard for evaluating the asylum case.⁶¹ These sources provide for a child-sensitive analysis of the elements in an asylum case, including evaluating a child’s testimony, evidence, and claims of persecution, establishing a well-founded fear, establishing nexus, and analyzing social group. If the government implements changes to its guidance governing children’s asylum claims without following notice-and-comment procedures and publishing regulations, an APA challenge might be possible given the TVPRA’s directive that UC asylum cases be governed by regulations that “take into account the specialized needs of

⁵⁹ 8 U.S.C. §1158(a)(2)(E); see discussion of one-year filing deadline for youth *infra* Section IV.C.1.

⁶⁰ See, e.g., U.S. Dep’t of Justice, Guidelines for Children’s Asylum Claims, File 120/11.26 (Dec. 10, 1998) available at <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>; *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*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), available at <http://www.unhcr.org/50ae46309.html>; USCIS, *Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims* (Mar. 21, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf [hereinafter “AOBTC Children’s Guidelines”]; see also UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997), available at <http://www.unhcr.org/3d4f91cf4.html> [specific to unaccompanied children]. For a comprehensive discussion of children’s asylum claims, contact the Center for Gender and Refugee Studies for a current version of their excellent guide on this issue, <https://cgrs.uchastings.edu/assistance/request>.

⁶¹ See, e.g., *Kholyavskiy v. Mukasey*, 540 F.3d 555, 569-71 (7th Cir. 2008); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); see also Deborah Anker, Nancy Kelly, John Willshire Carrera & Sabi Ardanian, *Mejilla-Romero: A New Era for Child Asylum*, 12-09 Immigr. Briefings 1 (Sept. 2012), available at <https://harvardimmigrationclinic.files.wordpress.com/2013/02/mejilla-romero-a-new-era-for-child-asylum.pdf> (resource for practitioners on child-centered approach in asylum cases).

unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied children's cases."⁶²

C. Detention of Children in Removal Proceedings and the *Flores* Settlement

Some children are detained during part or all of their removal proceedings. It is important for advocates to understand the legal framework governing children in immigration detention, as it can inform strategies to fight attempts to remove UC determinations and to protect children who have been detained after the UC determination is removed. Detained immigrant children are covered by the protections of the *Flores* Settlement Agreement, which went into effect in 1997.⁶³ The *Flores* Settlement Agreement arose out of a class action lawsuit challenging the treatment of children detained by the former INS. The *Flores* Settlement Agreement, which is still in effect today, "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS."⁶⁴ It sets forth a number of requirements, including a presumption that detained children should be released "without unnecessary delay" to specified categories of family and care-providers, and that children who cannot be released must be placed in licensed facilities that meet certain standards.

After the Obama Administration in 2014 began to detain large numbers of mothers and children arriving at the southern border from Central America, *Flores* class counsel brought an enforcement motion in 2015 in federal court in the Central District of California. They argued that the DHS's detention of children in family detention centers violated *Flores*. The DHS argued, among other things, that *Flores* did not apply to accompanied children. Federal District Court Judge Dolly M. Gee ruled that *Flores* applied to accompanied as well as unaccompanied children, and ordered the DHS to take specific steps to comply with *Flores*, including making efforts to release children with the parent. The government appealed and in July 2016 the Ninth Circuit reversed in part and affirmed in part.⁶⁵ It upheld the district court's ruling that *Flores*

⁶² TVPRA § 235(d)(8). The Administrative Procedure Act directs that an individual is entitled to judicial review when he or she "suffer[s] legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702; see 5 U.S.C. § 701 *et seq.*; Mary Kenney, American Immigration Council, *Practice Advisory: Immigration Lawsuits and the APA: The Basics of a District Court Action* (June 20, 2013), available at <https://www.americanimmigrationcouncil.org/practice-advisories>.

⁶³ *Flores v. Meese*, CV 85-4544-RJK, Stipulated Settlement Agreement (C.D. Cal. Jan. 17, 1997), available at <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement> [hereinafter "*Flores* Settlement Agreement"]. In addition to the protections afforded to detained children under *Flores*, a separate nationwide lawsuit called *Orantes-Hernandez v. Gonzales* resulted in a permanent injunction upholding the rights of all Salvadorans detained by the DHS who are eligible to apply for asylum. *Orantes* is not limited to children but would include Salvadoran children. The injunction requires the DHS to comply with a number of requirements, including permitting access to counsel, placing limits on the transfer of unrepresented detainees, and providing access to legal materials. If an advocate believes an *Orantes* violation has occurred, he or she can contact class counsel, the National Immigration Law Center. See <https://www.nilc.org/issues/immigration-enforcement/orantesinjunction/>.

⁶⁴ *Flores* Settlement Agreement, *supra* note 63, ¶ 9.

⁶⁵ *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf>.

applies to both unaccompanied and accompanied children, but held that *Flores* does not create a release right for parents. The case was remanded to the district court for further proceedings.

As of the date of this advisory's publication, another *Flores* enforcement action is pending in the Ninth Circuit, which addresses whether children detained in the custody of ORR have the right to seek review of their custody in a bond hearing before an immigration judge. In that action, the *Flores* plaintiffs argued that the government's refusal to afford a bond hearing to such children violates the *Flores* Settlement Agreement, which states that a "minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing."⁶⁶ The government argued that, as to unaccompanied children in ORR custody, this part of the *Flores* Settlement Agreement had been superseded by the TVPRA of 2008. The federal district court held that the bond hearing provision of the *Flores* Settlement Agreement had not been superseded and that the government was in violation of *Flores*, and ordered the government to comply with the bond hearing provision. The government has appealed that decision to the Ninth Circuit, where the case is pending as of this advisory's date.⁶⁷

D. UCs with Removal Orders

UCs with removal orders are a particularly vulnerable population, subject to arrest and deportation without a hearing at any time, just as an adult would be. It is important to understand the legal framework for UCs with removal orders in order to assess options in cases where the government attempts to remove the UC determination. Many UCs end up with *in absentia* removal orders because of, *inter alia*, deficient notice or because they had no means by which to travel to the court hearing. Many children with removal orders may have a legal basis to reopen the removal proceedings, as well as legal relief available, such as asylum or SIJS.⁶⁸ Some UCs

⁶⁶ *Flores* Settlement Agreement, *supra* note 63, ¶ 24A.

⁶⁷ *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR, Dkt. 239 (C.D. Cal. filed August 12, 2016), *appeal docketed*, No. 17-55208 (9th Cir. Feb. 17, 2017).

⁶⁸ For detailed information on how to file a motion to rescind and reopen an *in absentia* order, see Asylum Seeker Advocacy Project & CLINIC, *A Guide to Assisting Asylum Seekers with In Absentia Removal Orders* (2016), available at <https://cliniclegal.org/sites/default/files/resources/asylum/A-Guide-to-Assisting-Asylum-Seekers.pdf>; see also American Immigration Council, *Practice Advisory: Rescinding an In Absentia Order of Removal* (Mar. 2010), available at https://www.americanimmigrationcouncil.org/practice_advisory/rescinding-absentia-order-removal. Note that many children released from ORR custody in the Ninth Circuit may be entitled to reopening of *in absentia* orders for lack of proper NTA service under *Flores-Chavez v. Ashcroft*, 362 F.3d 1150 (9th Cir. 2004). For a non *in absentia* removal order, it may be necessary to file a motion to reopen with the immigration court under 8 C.F.R. § 1003.23 as well as a request for a stay of removal. If the child became subject to a removal order after being granted voluntary departure and failing to depart, it may be necessary to deal with the 10-year bar to certain immigration relief under INA § 240B(d). Practitioners should consider arguments that given the child's age, lack of understanding, mental capacity at the time, dependency on adults, and other factors in the case, the child's failure to depart was not "voluntary" as required by the statute's plain language, and thus the bar is inapplicable. See *Matter of Zmijewska*, 24 I. & N. Dec. 87 (BIA 2007); *Matter of E-R-*, AXXX XXX 571 (BIA Dec. 21, 2016) (concluding that the bar did not apply to a 9 year old who did not understand the consequences of failure to depart due to her age and was likely unable to leave on her own), unpublished decision available at <https://www.scribd.com/document/337535116/E-R-AXXX-XXX-571-BIA-Dec-21-2016>; see also American

with removal orders have filed their asylum applications with USCIS and in some cases USCIS has accepted jurisdiction in these circumstances. If a child is otherwise eligible to apply for asylum, advocates should consider filing the asylum application with the USCIS in conjunction with other strategies for preventing the child's removal, such as appropriate motions to reopen or stay applications. Children with removal orders should promptly consult with an experienced and qualified immigration attorney who can advise them of their options and the risks and benefits of various strategies.

In practice, under the Obama Administration the DHS generally did not take enforcement action against children with removal orders previously determined to be UCs who were still under the age of 18. Instead, the Obama Administration, through an enforcement action it called "Operation Border Guardian," targeted UCs with removal orders after they had turned 18.⁶⁹ Then-DHS Secretary Jeh Johnson stated that "[t]he focus of this operation are [sic] those who came here illegally as unaccompanied children after January 1, 2014, and are now over 18, have been ordered removed by an immigration court, and have no pending appeal or claim of asylum or other relief."⁷⁰ But in fact, some children targeted had not truly exhausted their remedies and instead had asylum claims they had not been able to meaningfully pursue.⁷¹ "Operation Border Guardian" drew wide criticism from immigrant rights advocacy groups for targeting vulnerable populations our laws intend to protect, where removal orders were often entered with serious due process concerns.⁷² In some cases, the DHS took the position that the UC determination had been terminated when the child was taken into DHS custody to try to block children from having their asylum claims heard by USCIS.⁷³

It remains to be seen whether and in what ways the Trump Administration will target UCs with removal orders. Prompt identification, screening, and access to counsel are crucial for this extremely vulnerable population of UCs with removal orders.

Immigration Council, Practice Advisory, *Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart* (July 2009), available at https://www.americanimmigrationcouncil.org/practice_advisory/voluntary-departure-automatic-termination-and-harsh-consequences-failing-depart.

⁶⁹ See <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security>; <https://www.nytimes.com/2016/03/10/us/us-continues-to-deport-central-american-migrants.html>.

⁷⁰ <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security>.

⁷¹ See, e.g., <https://rewire.news/article/2016/08/24/protected-class-high-priority-target-system-rigged-unaccompanied-children/>; <http://www.aila.org/infonet/tell-ice-to-stay-kimberlys-deportation>; <https://www.nytimes.com/2016/03/10/us/us-continues-to-deport-central-american-migrants.html> (noting lack of legal representation in immigration court).

⁷² See Sign-On Letter to President Obama re: "Operation Border Guardian," available at <https://www.aclu.org/letter/sign-letter-president-obama-re-operation-border-guardian>.

⁷³ Cf. <https://rewire.news/article/2016/08/24/protected-class-high-priority-target-system-rigged-unaccompanied-children/> ("If while in the care of their family or a sponsor they miss a court date, detainment or deportation can be triggered once they turn 18 and no longer qualify for protections afforded to unaccompanied children."). One advocate informed the authors that the DHS took this position in an "Operation Border Guardian" case the advocate handled.

IV. Government Arguments to Anticipate Regarding Termination of UC Determinations and Proposed Counter-Arguments

This section discusses five scenarios by which the government may argue that a child is no longer a UC: (1) the ICE trial attorney may oppose, or the immigration judge may deny, administrative closure or a continuance to file the asylum application with the USCIS, taking the position that the child is no longer a UC; (2) the USCIS may not take jurisdiction over the asylum application of a child previously determined to be a UC, concluding that child is no longer a UC; (3) the government may apply the one-year or safe third country bar to a child's case, having determined that the child is no longer a UC; (4) a child may be incarcerated in DHS rather than ORR detention based on the government's determination that he or she is not, or is no longer, a UC; and (5) the DHS may place a child in expedited removal proceedings based on its determination that the child is not, or is no longer, a UC.

These scenarios are at this point only ideas of what the Trump Administration may do. It may be that none of them comes to pass, and it may be that other scenarios not envisioned here materialize. It is also possible that there may not be uniform implementation of any new policies or practices, and that different scenarios will play out in different jurisdictions. The intention of this section is to provide suggested starting-point strategies and ideas for combatting government efforts to remove UC determinations. It is also important to carefully analyze each case and make an informed decision about the best strategy for the particular client. In some cases, advocates may decide that fighting the removal of UC determination does not ultimately help achieve the client's goals. In other cases, however, asserting the client's rights as a child previously determined to be a UC may achieve both short- and long-term goals. It is important to keep in mind that by making these arguments, practitioners are potentially building a record for appeal. Practitioners should raise these arguments at every stage in order to preserve them down the road.

A. Anticipated Issue #1: The ICE Trial Attorney May Oppose, or the Immigration Judge May Deny, Administrative Closure or a Continuance to File the Asylum Application with the USCIS, Taking the Position That the Child Is No Longer a UC.

Under the June 2013 policy as discussed above, children initially classified as UCs are entitled to file their asylum applications with the USCIS and are granted continuances or administrative closure in immigration court while they pursue that filing. If the ICE trial attorney or the immigration judge take the position that certain children are no longer UCs, those children may be directed to file any asylum application with the immigration court in the first instance. This has occurred recently in certain jurisdictions.⁷⁴

1. Initial Considerations: Strategy and Goals

Strategy Considerations. If the ICE trial attorney or the immigration judge indicates that he or she believes a child is no longer a UC and must file her asylum application in immigration

⁷⁴ See *supra* Section I and note 5.

court, advocates will want to take time to consider the best strategy for the particular case. First, it will be necessary to consider whether it benefits the client to file with the USCIS instead of the immigration court. It probably does, given the child-sensitive procedures discussed above, but there may be situations where it does not, considering the particularities of the specific jurisdiction, the nature of the claim, comparative backlogs in the court and the USCIS Asylum Office, etc. It is a good idea to consider these factors and talk through the options with the child client before deciding on a strategy. If, in a particular case, an advocate chooses to go forward with the asylum application in immigration court (and not fight back against government efforts to block the child from a USCIS Asylum Office adjudication), it is important to be careful not to concede too much about the jurisdictional issue.⁷⁵ This is because in future cases, an advocate may want to oppose the immigration judge or ICE trial attorney's attempts to block a child client from USCIS adjudication.

Considering the Goals. Assuming the practitioner decides it is beneficial to fight in immigration court for USCIS adjudication, he or she should also be mindful of the goal of these strategies to push back against the immigration court or the ICE trial attorney's efforts to block the client from USCIS adjudication. One goal, of course, would be to have the client's asylum case heard through the non-adversarial, more child-friendly USCIS adjudication process and to have the asylum case approved before the child is made to proceed before the immigration judge, or at the very least before the immigration judge issues a removal order. There is no guarantee, however, that this goal will be accomplished; the child may instead be required to proceed in immigration court despite having an asylum application pending with the USCIS. A secondary goal is to preserve all of the client's legal arguments for appeal at the BIA and court of appeals, and to challenge the immigration judge's refusal to allow the proper process and decision to play out with USCIS.

2. *File the Asylum Application with the USCIS and Argue in Immigration Court That Deference Is Owed to the USCIS's Determination of Its Own Jurisdiction.*

Assuming a practitioner has dealt with the preliminary matters discussed above and has decided to pursue asylum with the USCIS Asylum Office, the next step will be to file the asylum application with the USCIS following its UC asylum filing procedures, regardless of what the ICE trial attorney and the immigration court may have said about asylum jurisdiction.⁷⁶

Preventative Measures – Filing Strategies. Advocates should consider whether the timing of the filing of an asylum application with USCIS could prevent child clients from being vulnerable to ICE trial attorney or immigration judge arguments that they have lost their UC determination for asylum filing purposes. For example:

⁷⁵ For example, the advocate could state on the record that he or she does not waive the objections to the immigration court's jurisdiction over the asylum application based upon the contention that the child is a UC and that USCIS has exclusive initial jurisdiction over the application.

⁷⁶ A copy of the instruction sheet given to UCs by ICE trial attorneys in immigration court can be found here: https://www.nationalservice.gov/sites/default/files/resource/UAC_Instruction_Sheet_Handout.pdf.

- Is it possible to file the asylum application before the child is reunified with a parent or before he or she turns 18? This might mean filing while the child is in ORR custody, or before ORR has determined that there is a parent or legal guardian “available.” For many advocates who work with released children, this option will no longer be present when the representation begins, but those who work with children in ORR custody might consider such action. If an advocate is considering helping a child file the asylum application before being released from ORR custody, there are important caveats to consider. For one, given wide recognition that a compressed time frame may not permit effective development of a child’s legal claim, this strategy requires managing and minimizing the risk that the statements in the filing may later need substantial revision, which could be detrimental to the child’s claim. Note that the USCIS will accept skeletal filings and it is not necessary to include a declaration with the initial filing. Further, this strategy works best where the child will have counsel upon release who can help the child navigate the rest of the asylum process. Coordination between organizations that work with children in ORR custody and organizations providing legal services to released children will be essential.
- Even if the asylum application is not filed before the child is released from ORR custody, it may make sense to file the asylum application with USCIS before the child’s first master calendar hearing, and if possible, prior to any communication from the DHS regarding its position about whether the child continues to meet the UC definition. That way, the application will be on file with USCIS before the ICE trial attorney makes any arguments about a removal of the UC determination and before he or she makes any efforts to “terminate” the UC determination in open court. In such a scenario, an advocate could argue that the child filed his or her asylum application while the UC determination was still in place, regardless of what happens afterward.

Finally, it may be possible to decrease the likelihood of government attempts to remove the UC determination by considering the order in which a child files for relief. This is particularly true if a child not living with either parent plans to pursue both SIJS and asylum. If the client is under 18 and without a parent or legal guardian, and the plan is to pursue a guardianship-type action in state court where SIJS findings will be requested, it may be safest to file the asylum application with the USCIS before any guardian or custodian is appointed in state court. If the child has already obtained a guardian or custodian at the time he or she files the asylum application, the ICE trial attorney or the immigration court might take the position that the child is now accompanied and not eligible to file an asylum application as a UC with the USCIS. While such an argument could be challenged on the grounds that TVPRA § 235(d)(5) expressly protects such children from losing their UC determination when they seek state court protection, it might take federal court litigation for the ICE trial attorney or the immigration court to accept this argument.⁷⁷ It would be wise to preserve this argument before the immigration court and with the USCIS, in order to be able to raise it on appeal to the BIA and through a

⁷⁷ In its Policy Manual and in unpublished Administrative Appeals Office (AAO) decisions, USCIS has taken a different interpretation of TVPRA § 235(d)(5), arguing that it instead prohibits temporary state court orders from serving as the basis for SIJS. *See* USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.1, *available at* <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#S-D>.

subsequent Petition for Review if necessary. In many cases, it may be safer and simpler to file the asylum application before any guardian is appointed in state court.

Practice Tips for Presenting USCIS Asylum Jurisdiction Arguments

- In the USCIS asylum filing, it may be wise to provide evidence and legal arguments citing to the TVPRA and current guidance as to why USCIS jurisdiction is proper in the child’s case.⁷⁸ Once the USCIS accepts the application,⁷⁹ practitioners should provide proof to the immigration court and the ICE trial attorney that the asylum application has been filed and is pending with the USCIS Asylum Office.
- Once the I-589 is filed with the USCIS, the practitioner should seek a continuance or administrative closure of the removal proceedings so that the USCIS can adjudicate the asylum application, and should follow all of the rules for those motions.⁸⁰ In the motion, the practitioner could argue that the immigration court must defer to the USCIS’s determination of its jurisdiction, as the TVPRA vests the USCIS Asylum Office with authority to make UC determinations for purposes of initial asylum jurisdiction.⁸¹ The practitioner could note that the TVPRA grants USCIS exclusive initial jurisdiction over “any asylum application filed by an unaccompanied alien child.”⁸² This grant of

⁷⁸ See *infra* § IV.A.3.

⁷⁹ The immigration judge or ICE trial attorney may say that the asylum application receipt is not proof that USCIS has determined that it has jurisdiction since that determination happens at the interview at least under the pre 2013 policy. However, under that policy, the Nebraska Service Center *did* make an initial determination at the time of filing and would reject the filing if the date of birth on the asylum application showed that the child was over 18 and there was no UAC Instruction Sheet included. See 2009 USCIS Asylum Memo, *supra* note 44. So it could be argued that at least an initial determination of jurisdiction has been made when the Nebraska Service Center accepts the filing and issues a receipt notice. Practitioners also could argue that the immigration court must at a minimum continue the case to allow the USCIS to go through its process to adjudicate the asylum claim including making a final jurisdiction determination.

⁸⁰ See *supra* note 33 and cases cited; Immigration Court Practice Manual, <https://www.justice.gov/eoir/office-chief-immigration-judge-0>. The practitioner might also cite to BIA case law emphasizing the separate jurisdiction of USCIS and the immigration court. See, e.g., *Matter of Yauri*, 24 I. & N. Dec. 103, 110 (BIA 2009) (“As a practical matter, Immigration Judges and the Board have limited and finite adjudicative and administrative resources, and those resources are best allocated to matters over which we do have jurisdiction.”). Practitioners should include circuit court precedents in their jurisdiction, if available, finding that the immigration court abused its discretion by not granting a continuance to allow for USCIS to adjudicate a pending application. See, e.g., *Flores v. Holder*, 779 F.3d 159 (2d Cir. 2015).

⁸¹ The TVPRA states that an “asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.” TVPRA § 235(d)(7)(B); see also 2009 USCIS Asylum Memo, *supra* note 44, at 4 (“Because section 235(d)(7)(B) of the TVPRA places initial jurisdiction of asylum applications filed by UACs with USCIS, even for those UACs in removal proceedings, USCIS will need to determine whether an applicant in removal proceedings is a UAC at the time of filing such that USCIS has initial jurisdiction” and “[w]here the Asylum Office receives a direct filing from an applicant in removal proceedings, it must make the determination that the applicant is a UAC.”). Note that if a practitioner makes this argument, it will not work to make the contrary argument if USCIS refuses jurisdiction but the immigration court thinks USCIS should have jurisdiction.

⁸² TVPRA § 235(d)(7)(B).

jurisdiction necessarily must include a determination that the predicates for exercising its jurisdiction are met – namely that the applicant was a UC at the time of filing.⁸³ In unpublished opinions, the Board of Immigration Appeals (BIA) has recognized the USCIS’s authority to make a determination about its own asylum jurisdiction.⁸⁴ In contrast, there is no language in the TVPRA granting an immigration court or ICE authority to determine whether a child is a UC for asylum filing purposes or to override the USCIS’s determination of its own jurisdiction over a UC asylum applicant.⁸⁵

- If the immigration judge denies the motion for a continuance or for administrative closure, a practitioner should consider filing an interlocutory appeal of the denial of the motion.⁸⁶ While the interlocutory appeal is pending, the practitioner can seek a continuance or administrative closure with the immigration judge to allow the jurisdictional question to be answered before proceeding. If the immigration judge insists on moving the case forward while the jurisdictional issue is being considered by the BIA, the practitioner will have to follow the other strategies laid out in this section for preserving the arguments as he or she continues to litigate the case.
3. *If the Practitioner Is Forced to Proceed in Immigration Court while the Asylum Application Is Pending with the USCIS, the Practitioner Can Nonetheless Argue That the Client Is a UC for Initial Asylum Jurisdiction Purposes.*

In the situation where the child’s asylum filing is pending with the USCIS, but the immigration court will not continue or administratively close the case, it will be necessary to make arguments about the client’s UC determination with the immigration court. By doing this, the practitioner may be able to avoid having to litigate the asylum case in two fora at once thereby conserving limited government resources and those of the child’s support system, and will be preserving the record for appeal regardless of whether the immigration judge ultimately agrees with the arguments. When presenting arguments to the immigration court that the client is a UC for asylum filing purposes, the practitioner may not want to concede that the immigration court has the authority or the expertise delegated to it under the TVPRA to make such a determination. The practitioner will already have argued (see above Section IV.A.2) that

⁸³ See, e.g., 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26, at 1 (noting that because the TVPRA places initial jurisdiction over asylum applications of UCs in removal proceedings with USCIS, “USCIS must determine whether an applicant in removal proceedings is a UAC”).

⁸⁴ In one unpublished decision, the Board stated that while immigration judges and the BIA are not bound by USCIS policies, “as USCIS is the agency vested with initial jurisdiction over UAC asylum applications, we would defer to USCIS’s determination of whether it retains jurisdiction over the initial adjudication of an unaccompanied minor’s asylum application.” CGRS Database Case No. 12567 (BIA Nov. 25, 2015).

⁸⁵ TVPRA § 235(d)(7)(B). The TVPRA vests the immigration court with jurisdiction over UCs’ removal proceedings under INA § 240. If a UC’s asylum application is returned to the immigration court by the USCIS after being found ineligible, the immigration court then has jurisdiction to consider the asylum claim.

⁸⁶ See BIA Practice Manual § 4.14(c), *available at* <https://www.justice.gov/eoir/file/431306/download> (“The Board does not normally entertain interlocutory appeals and generally limits interlocutory appeals to instances involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges.”).

the TVPRA contemplates that the USCIS – not the immigration court – is the entity vested by Congress with this authority. Thus, the practitioner may want to frame the arguments as persuading the immigration court that the USCIS approach is correct and that its jurisdiction policy has been properly applied to the facts of the child’s case, rather than seeking a separate legal determination from the immigration court.

Depending on the individual circumstances of the case, the practitioner might make various factual and legal arguments as to why the client is properly a UC for asylum filing purposes. These arguments will necessarily vary, and this practice advisory discusses only the general contours of such arguments. To fully build the record, it may be wise to submit briefing and documentation in support of these arguments and request an evidentiary hearing, arguing that such a hearing is necessary as a matter of fundamental fairness before termination of UC determination can take place.⁸⁷

The practitioner may want to analyze first whether there are arguments based upon the client’s specific facts that the child is indeed a UC,⁸⁸ or has returned to being a UC after a period of being accompanied. These arguments hinge on the UC definition, which includes children who do not have a parent or legal guardian in the United States “available to provide care and physical custody.” In light of this, a practitioner could argue, for example, that a child living with an informal guardian is a UC because the adult is not a “legal guardian.” Similarly, if a child was living with a parent for a time, but that relationship deteriorated and the child was subsequently kicked out of the parent’s house, a practitioner could argue that the child satisfies the UC definition because there is no parent available to provide care and physical custody.

Even if the client is living with a parent, practitioners can consider whether the facts in the case support an argument that the parent is not “available to provide care and physical custody” under 6 U.S.C. § 279(g)(2)(C)(ii). This may be particularly relevant where there is abuse or neglect, but the child faces obstacles in accessing state child welfare protections, or where the parent is unable or unwilling to guide the child through the immigration proceedings.⁸⁹

⁸⁷ In requesting an evidentiary hearing, practitioners can argue that such a hearing is necessary to resolve a jurisdictional issue before going forward with the case. Practitioners might also argue that due process requires an evidentiary hearing before a UC determination can be terminated. Children have a right to due process and fundamental fairness in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”). Note that the government may try to argue that children apprehended at the border do not have due process rights.

⁸⁸ Remember that the relevant time frame for the UC determination for asylum filing purposes is the time the asylum application is filed, *see* 8 U.S.C. § 1158(b)(3)(C), so if the application has already been filed, the arguments should consider the facts as they were when the client filed his or her asylum application.

⁸⁹ The legislative history of the TVPRA suggests that the purpose of its protections including having asylum officers adjudicate UCs’ asylum claims is so that they need not “fend for themselves in a complex legal and sometimes punitive system, without knowledge of the English language, with no adult guidance, and with no legal counsel.” 149 Cong. Rec. E2106 (daily ed. Oct. 21, 2003) (statement of Rep. Lofgren regarding the Unaccompanied Alien Child Protection Act of 2003). In evaluating, then, whether a parent or legal guardian is “available to provide care and physical custody” such that UC asylum protections are triggered, the analysis should inquire as to whether the child has a parent or legal guardian in the United States who is able and willing to help the child navigate the immigration proceedings.

Particularly in situations where the child’s parent or legal guardian is in removal proceedings or otherwise subject to ICE enforcement, the practitioner could consider arguments that the adult is not “available” to provide care and custody of the child because the adult may be removed from the United States. Practitioners can also consider presenting evidence about why there is no parent or legal guardian capable of sufficiently providing for the child’s well-being. This might be in the form of expert affidavits or testimony from child welfare professionals, such as social workers, therapists, or homeless youth advocates. Practitioners should include a textual analysis of the words “available,” “provide,” and “care and physical custody” to argue that this involves more than merely living in the same household. In a 2016 case, the U.S. Court of Appeals for the Fourth Circuit explained that “the word ‘care’ generally means ‘[t]he provision of what is necessary for the health, welfare, maintenance, and protection of someone or something’” and that “to be ‘available to provide care’ for a child, a parent must be available to provide what is necessary for the child's health, welfare, maintenance, and protection.”⁹⁰

Note that there is historical support for an inquiry that goes beyond merely whether the child is residing with the parent in determining whether he or she is unaccompanied, as defined by 6 U.S.C. § 279(g)(2). As noted in Section III.B above, prior to its 2013 asylum jurisdiction guidance, the USCIS engaged in a similar fact-based inquiry to determine whether a child living with a parent was nevertheless “unaccompanied” due to the parent’s unavailability to provide appropriate care.⁹¹ Where useful, advocates could also draw analytical comparisons to the inquiry into parental custody applied in the derivative citizenship context to argue that unless the USCIS has conclusive documentation that the parent or legal guardian is available to provide care and physical custody, it must classify the child as a UC.⁹²

Note that the arguments discussed in the previous paragraphs should be considered very carefully, as there could be adverse consequences in introducing such evidence. For example, if considering arguments about a parent’s inability to care for the child, it is necessary to be mindful of conflict issues. The parent should have separate counsel to advise him or her, particularly before any mental health evaluation is undertaken.⁹³ This kind of argument could expose the parent to further ICE or immigration court scrutiny and could also put him or her at risk of child protective services involvement. A practitioner will of course need to pursue the strategy that best serves the client’s goals. Part of the decision-making process is talking through

⁹⁰ *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (citations omitted).

⁹¹ See *supra* § III.B. This practice was confirmed to the authors by Jennifer Bibby-Gerth of Catholic Charities of the Archdiocese of Washington, who was formerly an Asylum Officer with USCIS Arlington Asylum Office from December 2007 to September 2013, including serving as a training officer from October 2012 to September 2013.

⁹² INA § 320(a). Legal custody refers to the responsibility for and authority over a child. 8 C.F.R. § 320.1. For purposes of INA § 320, USCIS presumes that a U.S. citizen parent has legal custody of a child and recognizes that the parent has lawful authority over the child, absent evidence to the contrary, in certain limited scenarios. See 8 C.F.R. § 320.1.

⁹³ On a separate note, an evaluation might be used as a defense or mitigating factor to a smuggling charge, which parents of reunified children may be increasingly susceptible to under the new administration’s enforcement priorities. See Kelly Memo, *supra* Section I and note 3, § M.

with the client the risks, benefits, and likely consequences of such a strategy so that he or she can make an informed decision.

In addition to any factual arguments that might be available in the client's case, the practitioner should prepare a brief making legal arguments as to why the USCIS properly accepted jurisdiction over the pending asylum application based on the prior UC determination. Advocates might research and examine the following points to determine whether a viable argument can be presented in a given case. Note that these points are merely ideas that have not been fully tested and require further evaluation based on the specific case.

- The plain language of the TVPRA and its purpose to provide timely, appropriate relief for vulnerable children contemplates that once the government has determined that a child is a UC, there is no subsequent stripping of that determination.⁹⁴ As the USCIS Ombudsman noted, the TVPRA framework is designed to provide “procedural and substantive protections” that should “remain available to UACs throughout removal proceedings, housing placement, and the pursuit of any available relief.”⁹⁵ The TVPRA’s protections attach starting from the initial moment of the child’s encounter with the DHS, which require prompt transfer to ORR custody and placement in § 240 removal proceedings.⁹⁶ The TVPRA contains no provision allowing ICE or the immigration court to subsequently terminate a previous UC determination.
- Other provisions of the TVPRA support a reading that neither the immigration court nor the ICE trial attorney has the congressionally delegated authority to conclude that a child previously determined to be a UC is in fact “accompanied” and thus block the child’s ability to file her asylum application with USCIS. The TVPRA directs that all federal agencies that have “any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age” must notify ORR within 48 hours.⁹⁷ Because the TVPRA requires federal agencies like the DHS to notify ORR of *any child under 18* within 48 hours, the statute impliedly recognizes that agencies such as ICE do not have the expertise to determine that a child has a parent or legal guardian “available to provide care and physical custody.” The statutory framework recognizes ORR’s institutional expertise in matters of child welfare, expertise which ICE and the immigration court lack. While the above-referenced provision deals with children in federal custody and not UC asylum filings, it could be invoked as support for the argument that the TVPRA statutory scheme gives authority to specified agencies at specified junctures to make UC determinations. While the TVPRA provision on UC asylum procedures gives asylum officers the authority to make UC determinations for purposes of asylum jurisdiction (and

⁹⁴ See, e.g., TVPRA § 235(d) titled “Permanent Protection for Certain At-Risk Children” and provisions throughout designed to protect vulnerable children; 2012 Ombudsman Asylum Recommendations, *supra* note 50, at 4 (“Subjecting a child seeking asylum to multiple UAC determinations . . . appears at odds with the TVPRA’s express purpose, namely, to provide timely, appropriate relief for vulnerable children.”).

⁹⁵ 2012 Ombudsman Asylum Recommendations, *supra* note 50, at 4.

⁹⁶ TVPRA § 235(a).

⁹⁷ TVPRA § 235(b)(2)(B).

the above-noted provision allows ICE to determine that a child *is* unaccompanied at the time of the encounter), no TVPRA text authorizes ICE or the immigration court to determine that a given child has a parent or legal guardian “available to provide care and physical custody” in order to terminate a UC determination and prevent USCIS asylum jurisdiction.

- If a new policy is issued regarding asylum jurisdiction for children previously determined to be UCs and the government attempts to apply it retroactively to a client’s case to block USCIS jurisdiction, practitioners could consider challenges to the policy as *ultra vires* or based on other administrative law principles. If a new policy is issued in the absence of notice-and-comment rulemaking, practitioners could consider arguments that the policy is not authorized by the TVPRA, which requires that regulations be promulgated regarding the procedural and substantive treatment of UC asylum cases.⁹⁸ Practitioners could also consider arguments that any new agency policy restricting USCIS asylum jurisdiction should not be applied retroactively to children already deemed eligible for TVPRA protections.⁹⁹ They could argue that retroactive application of a new agency policy which would terminate a given child’s UC determination for asylum filing purposes, midway through the child’s proceedings, would subject the child to contradictory procedures at the government’s whim, against rule-of-law principles.¹⁰⁰ Practitioners should consider whether case law discussing retroactivity of agency rules supports the

⁹⁸ The TVPRA mandated the government to promulgate regulations which “take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied children’s cases.” TVPRA § 235(d)(8). The government has not promulgated any such regulations, although in its 2009 UC asylum jurisdiction memo the USCIS stated that “[f]ederal regulations will ultimately be promulgated in order to reflect the procedures established for USCIS initial jurisdiction.” 2009 USCIS Asylum Memo, *supra* note 44, at 1. *See also* Administrative Procedure Act, 5 U.S.C. § 551(4) (defining “rule” as “the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy. . .”) (emphasis added); <https://www.regulations.gov/?tab=learn> (noting that “[r]ules are also referred to as ‘regulations’”).

⁹⁹ *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169–80 (10th Cir. 2015) (Gorsuch, J.) (concluding that for due process and other reasons, a presumption of prospectivity attaches “when Congress’s delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application”); *Judulang v. Holder*, 565 U.S. 42, 58 (2011) (invalidating a BIA interpretation of a statute as arbitrary and capricious and noting, *inter alia*, that it rested on an individual DHS officer’s decision, that high stakes of removal proceedings should not depend on “fortuitous and capricious” circumstances, the history of agency vacillation in how it applied the statute, and that cost alone as justification cannot save arbitrary agency action).

¹⁰⁰ *Cf. Retail, Wholesale & Dep’t Store Union, AFL-CIO v. N. L. R. B.*, 466 F.2d 380, 387–93 (D.C. Cir. 1972) (establishing five-factor test for assessing retroactivity of agency rulings and stating that “[u]nless the burden of imposing the new standard is *de minimis*, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect. . .”).

argument that any new agency policy regarding UC determination procedures should not be applied to children midway through the course of the removal proceedings.¹⁰¹

- Practitioners might also present policy arguments for why the immigration court should defer to USCIS’s determination of its own jurisdiction. Practitioners could argue that the immigration judge has authority take appropriate action to maintain its docket.¹⁰² Questioning USCIS’s jurisdiction and subjecting children to resource-intensive evidentiary hearings in immigration court about the validity of their prior UC determinations unnecessarily clogs already burdened immigration judge dockets. Further, allowing the USCIS to adjudicate the child’s asylum case means fewer asylum hearings in immigration court. This relieves the immigration court’s docket and also makes sense given that the USCIS Asylum Office is more institutionally equipped to adjudicate the asylum claims of vulnerable children through a non-adversarial process.

Finally, in the unlikely circumstance that the immigration judge is the only obstacle, since the ICE trial attorney agrees that the USCIS has jurisdiction, perhaps the ICE trial attorney would agree to join in a motion to terminate to allow the child to have her asylum case adjudicated with the USCIS Asylum Office. Of course, if there are no removal proceedings, then there is no question that the USCIS has jurisdiction over the asylum application.

If the immigration court rejects all arguments for USCIS Asylum Office jurisdiction and requires that the child file the asylum application in immigration court, the practitioner could still file the asylum application with the USCIS, in addition to filing with the court, if he or she has not already done so as advised above. Given the distinct case priority systems in immigration court versus the USCIS Asylum Office, it is quite possible that the USCIS will adjudicate the child’s asylum case before the individual hearing date arrives.¹⁰³

¹⁰¹ Among other considerations, practitioners will need to analyze whether the new policy has a retroactive effect in a given case. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994) (conducting statutory retroactivity analysis, noting the presumption against statutory retroactivity in the absence of clear congressional intent, and noting that to determine whether a new statute has retroactive effect the court examines “whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed”).

¹⁰² *See* 8 C.F.R. §§ 1240.1(a)(1)(iv), (c), 1003.10(b); *Matter of Avetisyan*, 25 I. & N. Dec. 688, 691 (BIA 2012) (“An Immigration Judge has the authority to regulate the course of the hearing and to take any action consistent with applicable law and regulations as may be appropriate. 8 C.F.R. §§ 1240.1(a)(1)(iv), (c). In deciding individual cases, an Immigration Judge must exercise his or her independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases.”). Note that in *Matter of W-Y-U-*, 27 I. & N. Dec. 17, 20 (BIA 2017), the BIA held that the “the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits” and noted that a court’s interest in efficient use of resources was secondary to parties’ desire to resolve the case on the merits. *See also Matter of Yauri*, 24 I. & N. Dec. 103, 110 (BIA 2009) (“As a practical matter, Immigration Judges and the Board have limited and finite adjudicative and administrative resources, and those resources are best allocated to matters over which we do have jurisdiction.”).

¹⁰³ The USCIS Asylum Office has its own priority system in which children’s cases are a higher scheduling priority than many other types of cases. *See* <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative->

B. Anticipated Issue #2: The USCIS Will Not Take Jurisdiction over the Application,¹⁰⁴ Based on the Conclusion That the Child Is No Longer a UC.

Most of this section contemplates the scenario in which there is a formal policy change issued by USCIS Headquarters revoking the 2013 memo and issuing new guidance. As of the date of this advisory's publication, no such policy change has yet occurred. Until such policy change does occur, practitioners should argue that the USCIS should take jurisdiction over cases according to the 2013 guidance and elevate any errant behavior to headquarters.

While the strategies discussed below focus on the administrative context, there might also be ways to challenge improper agency action (such as retroactive application of a new policy to pending cases) in federal district court. An in-depth analysis of federal court litigation is beyond the scope of this practice advisory, but practitioners may wish to become familiar with federal court vehicles to challenge arbitrary and capricious agency action, such as a suit under the Administrative Procedure Act.¹⁰⁵ It would be necessary to consult with experienced practitioners to further evaluate the merits of such an action in a particular case. If a practitioner decides to pursue federal court action to challenge the USCIS's refusal of jurisdiction, he or she could file a motion to continue with the immigration court to allow the pursuit of the federal court action.

1. Strategies for Obtaining USCIS Asylum Office Jurisdiction Where There Is an Allegation That ICE Has Taken an Affirmative Act To Terminate the Prior UC Determination

Even if USCIS does not formally change its 2013 policy regarding asylum filings by UCs, there could be changes in the way the administration applies the current guidance. In particular, ICE or another agency could make efforts to terminate a child's prior UC determination. In at least one jurisdiction, the ICE trial attorney has filed a document in court titled "Notice of Termination of UAC Status."¹⁰⁶ Under the current USCIS Asylum Office

asylum-scheduling-bulletin. In contrast, as discussed in Section III.A *supra*, as of January 31, 2017 most unaccompanied children's cases are no longer a docket priority in immigration courts.

¹⁰⁴ If the Nebraska Service Center erroneously rejects the filing at the outset in a way that is contrary to the initial jurisdiction policy currently in place, advocates can re-file with a letter arguing why rejection was improper, and elevate or seek Ombudsman assistance as necessary. Advocates can also consider filing the application directly with their local USCIS Asylum Office if that option is available to them.

¹⁰⁵ An analysis of the viability of federal district court action would include looking at the jurisdiction-stripping provisions of 8 U.S.C. § 1252. *See, e.g.*, § 1252(b)(9) (requiring consolidation of claims "arising from any action taken or proceeding brought to remove an alien from the United States" in a Petition for Review); § 1252(g) (foreclosing review of claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders"). It will also be important to analyze the APA's various procedural requirements as applied to the case, including the finality requirement, *see* 5 U.S.C. § 704, and whether there are any exhaustion requirements, *see Darby v. Cisneros*, 509 U.S. 137, 153-54 (1993). For an overview of filing an APA action in the immigration context, see Mary Kenney, American Immigration Council, *Practice Advisory: Immigration Lawsuits and the APA: The Basics of a District Court Action* (June 20, 2013), available at <https://www.americanimmigrationcouncil.org/practice-advisories>. Practitioners considering federal court action may wish to contact the American Immigration Counsel for technical assistance, at clearinghouse@immcouncil.org.

¹⁰⁶ *See supra* note 5.

policy, such conduct by ICE could be interpreted as “an affirmative act by HHS, ICE or CBP to terminate the UAC finding before the applicant filed the initial application for asylum.”¹⁰⁷ Under the current policy, if an affirmative act has occurred, USCIS no longer adopts the prior UC determination.

If there is arguably some type of “affirmative act” in a child’s case, first consider the timing of the act. The relevant point in time for asylum jurisdiction is the moment of filing; if the “affirmative act” happened after the child filed the asylum application, it is not relevant to the USCIS’s jurisdiction.¹⁰⁸ If ICE has not yet engaged in an “affirmative act” such as filing a “termination of UC determination” document but the practitioner is concerned that this might happen,¹⁰⁹ consider whether it would be wise to file a skeletal asylum application sooner rather than later, and perhaps before the next master calendar hearing. Also consider carefully what the relevant date of “filing” is. Prior to the 2013 guidance, asylum officers interpreted the date of filing liberally to include the date that the person first expressed an intention to seek asylum to government authorities.¹¹⁰ This could happen at the initial border encounter (perhaps reflected on Form I-213), at a master calendar hearing, or on the date the child *signs* the asylum application. The practitioner may want to lay this out in the asylum application cover letter and be prepared to address it at the interview.

The practitioner should next consider whether he or she can argue that whatever conduct ICE engaged in is not sufficient to qualify as an “affirmative act by HHS, ICE or CBP to terminate the UAC finding” as contemplated by the 2013 policy.¹¹¹ The 2013 policy does not further define what “affirmative act” means and there is no guidance about how such an “affirmative act” can take place, although a footnote in the Affirmative Asylum Procedures Manual gives as an “example of a termination of a UAC finding” the situation where “ICE tak[es] an individual out of ORR custody and plac[es] the individual into ICE custody as an adult detainee, either because the individual has turned 18 or it has been determined that the original finding that the individual was under 18 was not correct.”¹¹² If the child has a previous government-issued document showing a UC determination, the practitioner could argue that the government has not established that its subsequent conduct is sufficient to overturn that official

¹⁰⁷ 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26.

¹⁰⁸ TVPRA § 235(d)(7)(B) (noting that asylum officer has initial jurisdiction over an asylum application “filed by” a UC); 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26 (noting that the “affirmative act” must occur “before the applicant filed the initial application for asylum”).

¹⁰⁹ For example, if other practitioners report that it is happening in the specific jurisdiction. It is wise to reach out to other practitioners in the area who handle UC cases to know what the current practices are in the particular jurisdiction.

¹¹⁰ The authors learned of this practice from Jennifer Bibby-Gerth of Catholic Charities of the Archdiocese of Washington, who was formerly an Asylum Officer with USCIS Arlington Asylum Office from December 2007 to September 2013, including serving as a training officer from October 2012 to September 2013.

¹¹¹ 2013 USCIS Asylum Jurisdiction Memo, *supra* note 26.

¹¹² USCIS, *Affirmative Asylum Procedures Manual*, at 38 n.9 (Nov. 2013), available at https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf.

determination. Practitioners may point to evidence of a prior written UC determination by the DHS or ORR, such as on the NTA, the I-213, or ORR documentation. Practitioners might argue that ICE (or the relevant agency) has not provided sufficient documentation to establish that this formally documented UC determination is terminated, particularly in the absence of any published guidance from USCIS stating that the conduct that has taken place in the child's case constitutes an "affirmative act" for determination stripping purposes. Practitioners could also consider arguments that the TVPRA does not give ICE or CBP the authority to remove a UC determination for asylum jurisdiction purposes.¹¹³ Similarly, advocates could challenge the purported removal of the UC determination on due process grounds, arguing that the child must have some sort of notice and opportunity to challenge the action.¹¹⁴ If USCIS intends to deny jurisdiction based on a finding that a previously classified child is no longer a UC, practitioners could request a fact-finding interview with USCIS in which evidence and arguments regarding the child's UC status can be presented.

Finally, even if ICE has taken an affirmative act to terminate the UC determination, and this act occurred prior to filing the asylum application, the practitioner can argue that USCIS still has an obligation to independently assess its own jurisdiction over the application under the TVPRA.¹¹⁵ The 2013 guidance simply says that an affirmative act by ICE means that USCIS will not adopt the prior UC determination. In such a scenario, USCIS then has an obligation to assess its jurisdiction in the case-specific context of the child's individual circumstances. The practitioner might argue that in this context, USCIS must follow the policy it used prior to the 2013 guidance, when it conducted an independent determination of each child's UC status. Thus, in this scenario, the practitioner should consider making arguments in the cover letter and at the interview regarding why the client was factually a UC at the time of filing, and use the arguments described earlier in Section IV.A.3.

2. *Strategies for Filing with the USCIS If a New Policy Is Issued*

Of course, it is too early to know whether a new asylum filing policy will be issued and what such policy would look like. The suggestions presented here are therefore somewhat general and may not apply depending on what any new policy contains.

If a new policy is issued that directs asylum officers to factually consider each asylum applicant's UC status rather than relying on a prior UC determination, the practitioner can present evidence and legal arguments in the initial filing and again at the asylum interview about why the client is a UC for initial filing purposes. The practitioner might include factual details about why the child is a UC and legal arguments about why any prior UC determination must be

¹¹³ Arguments could be made that the TVPRA only contemplates a role for ICE or CBP in UC determinations at the time of the encounter, and even in that circumstance they may either find that a child is a UC and transfer him or her to ORR custody, or must contact ORR regarding any child under 18 in custody. See TVPRA § 235(b)(2) and *supra* Section II.C. There is no provision allowing for ICE or CBP, at a later stage after a child has been determined to be a UC and afforded TVPRA protections, to revoke that determination.

¹¹⁴ See *supra* Section IV.A.3 and note 87.

¹¹⁵ See *supra* Section IV.A.2.

retained under the TVPRA.¹¹⁶ If helpful in the practitioner’s case, he or she might also present evidence about what the relevant date of “filing” is, such as, for example, the first time the child expressed an intention to seek asylum.¹¹⁷ Remember that the relevant point in time is the date of “filing,” so any attempt by the USCIS to consider the child’s UC status at some subsequent point – for example, at the date of the interview or the date of any asylum adjudication – would be improper. Practitioners should be prepared to argue against this if it comes up.¹¹⁸ Furthermore, if the USCIS implements an intervening policy change midway through the client’s case and applies it retroactively to the client to reject jurisdiction, the practitioner might challenge such retroactive application.¹¹⁹

If the USCIS rejects jurisdiction and the practitioner wishes to challenge this action, he or she should consider the vehicles available. One option would be to elevate the issue to USCIS Headquarters or request assistance with the USCIS Ombudsman’s Office.¹²⁰ The practitioner might also want to connect the client’s case to any larger policy advocacy efforts that are underway to challenge new agency practices that harm child asylum seekers. If the USCIS refers the case back to the immigration court, the practitioner should consider whether to renew the arguments about USCIS Asylum Office jurisdiction before the immigration judge. It is important to be careful about taking the initial position with the immigration court that only USCIS can decide its own jurisdiction, and then later arguing that the immigration judge has the authority to make this determination. The practitioner might frame the issue at the immigration court to preserve all arguments for appeal and include in an eventual Petition for Review, without suggesting that the immigration court can independently make this determination and force USCIS to accept it.¹²¹ Practitioners might also consider whether federal district court remedies are available, as mentioned earlier in this Section.

Finally, note that if a practitioner wants to preserve the challenge of the USCIS’s refusal to take jurisdiction over the case after a new policy comes out, it would be wise to file with the USCIS and get a rejection in order to build the record for appeal.

¹¹⁶ See *supra* Section IV.A.3.

¹¹⁷ See *supra* Section IV.B.1.

¹¹⁸ See TVPRA § 235(d)(7)(B); *Harmon v. Holder*, 758 F.3d 728, 733–35 (6th Cir. 2014) (per TVPRA, UC determination for initial jurisdiction assessed at time of filing with USCIS); *supra* Sections III.B; IV.A.2.

¹¹⁹ See *supra* Section IV.A.3 & notes 99-101.

¹²⁰ Practitioners can request case assistance with the USCIS Ombudsman’s Office at the following link: <https://www.dhs.gov/case-assistance>.

¹²¹ Of course, in the unlikely scenario that the immigration court agrees that USCIS jurisdiction is proper even after USCIS has rejected the filing, perhaps in such a situation it might be possible to seek termination in court for USCIS adjudication, or to use the immigration court’s reasoning to challenge the USCIS’s refusal to accept jurisdiction, such as through a request for reconsideration with the USCIS.

C. Anticipated Issue #3: The DHS or the Immigration Judge Says the Child Is No Longer a UC and Is Thus Subject to the One-Year Filing Deadline and/or the Safe Third Country Bar.

If the government takes the position that the client is no longer a UC, it may also argue that he or she is thus no longer exempt from the one-year filing deadline or the safe third country bar which apply to non-UC asylum seekers. This could come up in asylum filings before the USCIS or the immigration court. In addition to combatting the removal of the UC determination using the strategies discussed above, there may be specific arguments available based on the statutory text of these two provisions.

1. Strategies for Overcoming One-Year Filing Deadline Issues

Note that the asylum statute excepts from the one-year filing deadline persons who can demonstrate “changed circumstances which materially affect the applicant’s eligibility for asylum” or “extraordinary circumstances relating to the delay in filing an application” within the one-year period.¹²² If individuals qualify for an exception, they will still have to show that they filed their applications within a reasonable period.¹²³ In a case in which the child is determined to be a UC by the DHS at the time of apprehension or custody, but later found not to be by any government agency, the practitioner could argue that the UC label itself was an extraordinary circumstance that exempted the child from the one-year bar during the time it was in place. This argument would be analogous to the notion discussed below that a child’s aged-based legal disability is an extraordinary circumstance exempting him or her from the one-year bar. The UC label similarly is an extraordinary circumstance exempting a child from the bar’s operation while it is in place. In this way, the federal agency’s action in terminating a child’s UC determination (or in issuing a new policy on this issue) would be the event that “lifted” the extraordinary circumstance, justifying filing within a reasonable period after the government action. If a new agency policy or a change in the child’s personal circumstances motivates the government’s decision to terminate the child’s UC determination, a practitioner could argue that such changes further support the child’s claim that he or she satisfies the exception, *i.e.*, the new policy or change in circumstances could be used as further evidence of an extraordinary circumstance.¹²⁴

A practitioner could also argue that the extraordinary circumstances exception should apply to the client because of his or her age. The regulations state that a person who suffers from a legal disability during the one-year period can establish extraordinary circumstances exempting her from the one-year filing deadline.¹²⁵ The regulations give the example of an

¹²² 8 U.S.C. § 1158(a)(2)(D).

¹²³ 8 C.F.R. § 1208.4(a)(4)(ii); 8 C.F.R. § 1208.4(a)(5).

¹²⁴ For more information about establishing exceptions to the one-year filing deadline, see Sandra A. Grossman and Lindsay M. Harris, American Immigration Council, *Practice Advisory: Preserving the One-Year Filing Deadline for Asylum Cases Stuck in the Immigration Court Backlog* (Dec. 2015), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/preserving_the_one-year_filing_deadline_for_asylum_cases_stuck_in_the_immigration_court_backlog_practice_advisory.pdf.

¹²⁵ 8 C.F.R. § 1208.4(a)(5)(ii).

“unaccompanied minor” as someone with a legal disability, but USCIS has interpreted the extraordinary circumstances exemption to include any minor, whether accompanied or unaccompanied.¹²⁶ In 2016, the BIA issued a call for amicus briefing on the question of how the term “minor” should be interpreted in applying the extraordinary circumstances exemption to the one-year filing deadline, and what a “reasonable period” was for a youth once the age-based legal disability had ended.¹²⁷ The BIA has not yet answered those questions, but a number of advocacy groups submitted amicus briefing arguing, *inter alia*, that the term “minor” should extend to the age of 21, and that any “reasonable period” calculation should be conducted through a holistic determination of the applicant’s individual circumstances.¹²⁸ Advocates may wish to draw on these arguments when establishing that a youth’s asylum application is not time-barred.

2. *Strategies Regarding the Safe Third Country Bar*

Regarding the application of the safe third country bar found at 8 U.S.C. § 1158(a)(2)(A), note that this provision has very limited application currently, because it only applies where the “Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement” to a third country. The only third country with which the United States presently has such an agreement is Canada.¹²⁹ Thus, the safe third country bar would only come into play if the child first passed through or resided in Canada before making an asylum application in the United States.¹³⁰ In the rare circumstances where this bar applies to a child’s case and the advocate is not successful in arguing that the client is exempted as a UC or because of other applicable exemptions,¹³¹ the advocate could make arguments that the particular circumstances of the case merit a determination by the Attorney General that it is in the public interest for the client to receive asylum in the United States pursuant to 8 U.S.C. § 1158(a)(2)(A).

¹²⁶ AOBTC Children’s Guidelines, *supra* note 60, at 46 (“The same logic underlying the legal disability ground listed in the regulations also is relevant to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.”).

¹²⁷ <https://www.justice.gov/eoir/file/865851/download>.

¹²⁸ <https://cliniclegal.org/resources/clinic-pc-bia-amicus-brief>.

¹²⁹ See USCIS, U.S. – Canada Safe Third Country Agreement, <https://www.uscis.gov/unassigned/us-canada-safe-third-country-agreement>.

¹³⁰ The text of the agreement can be found at <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>. The agreement does not apply to unaccompanied minors (defined in the agreement as unmarried children under 18 with no parent or legal guardian in either Canada or the United States). Certain other exceptions also apply, such as if the asylum seeker has a family member with lawful status (other than as a visitor) in the country or with an asylum claim pending.

¹³¹ Note that the U.S.-Canada Safe Country Agreement contains other exceptions besides being an unaccompanied minor that are not discussed in this advisory.

D. Anticipated Issue #4: The DHS Detains Children It Alleges Are No Longer UCs.

If the DHS takes steps to apply the UC definition to a smaller group of children, this could put more children at risk of DHS detention. This is because, as explained in Section II *supra*, only “unaccompanied” children are entitled to placement in ORR custody as opposed to DHS custody. In practice, it seems unlikely that the DHS would detain children not in custody whose UC determination has been stripped simply because of the stripping. However, in some cases the DHS may have independent reasons why it wants to detain a child, such as allegations of gang or criminal activity.¹³² Losing the determination of “unaccompanied” could put such children at risk of DHS detention, where conditions are inappropriate for children and the child does not have access to the services provided in ORR custody.¹³³ This section will discuss how to mitigate the risk of DHS detention in the first place and what to consider if a client is detained by DHS while in removal proceedings.

1. Strategies for Preventing Detention in the First Place

As an initial matter, it is important to consider what steps can be taken to decrease the risk of detention, and to carefully advise the client about such steps. For example, advocates should remind clients of the importance of attending all immigration court hearings and ICE check-ins, if applicable. It is a good practice to remind the client via letter and phone call regarding upcoming hearings and appointments, and of the consequences of failing to appear (arrest, detention, and in the case of failure to appear for an immigration court hearing, removal). Advocates should also advise clients of the impact that any criminal arrest or allegations of criminal conduct could have on the case. Advocates should warn clients to avoid any illegal activity or conduct that would put them in contact with law enforcement. Advocates should also warn clients that their social media accounts can and often are being monitored by the DHS and to avoid any postings or content that could give rise to an inference of gang or criminal activity.¹³⁴

If the client is arrested or charged with a crime, whether in juvenile or adult proceedings, advocates should work with the child’s defense attorney to mitigate the immigration consequences of the disposition. Note, however, that under the Trump administration’s priorities, any criminal arrest or charge (even if not proven and even where there is no conviction) could make the client more vulnerable to detention.¹³⁵ If the client is detained in

¹³² See, e.g., Derek Hawkins, “Dreamer” Accused of Gang Ties Is Arrested, Threatened with Deportation, *Lawsuit Says*, Wash. Post, Feb. 15, 2017, available at https://www.washingtonpost.com/national/dreamer-accused-of-gang-ties-is-arrested-threatened-with-deportation-lawsuit-says/2017/02/15/653dafda-f266-11e6-8d72-263470bf0401_story.html?utm_term=.8aae176a3bda.

¹³³ See *Halfway Home*, *supra* note 23, at 8.

¹³⁴ For more information, see National Immigration Project of the National Lawyers Guild, *Community Advisory: Social Media, Criminalization, and Immigration* (Apr. 3, 2017), available at https://nipnlg.org/PDFs/community/2017_03Apr_comm-adv-social.pdf.

¹³⁵ Executive Order, *Enhancing Public Safety in the Interior of the United States* § 5 (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety->

delinquency or criminal custody, practitioners should try to avoid the placing of a detainer on the child—including, if applicable, invoking state law confidentiality provisions governing juvenile proceedings.¹³⁶ If a detainer is placed on the child, practitioners should try to prevent the child’s being held on the detainer.¹³⁷ Practitioners should advise clients to say nothing to ICE if questioned, other than that they want to speak with a lawyer.

It is also important to provide clients with general know-your-rights information regarding what to do if they have contact with immigration enforcement authorities. Youth should know, for example, about their right to remain silent and the fact that ICE needs a judicial warrant before its officers can enter a home without consent. Generally, ICE uses administrative warrants, which do not confer legal authority to enter a home.¹³⁸ There are many community resources available on this subject.¹³⁹

2. *Strategies for Children Detained by the DHS While in Removal Proceedings*

If a client is detained by the DHS based on its determination that he or she is no longer a UC, the practitioner should first consider whether he or she can challenge the determination that the child is “accompanied.” If the client is under 18, the practitioner should consider whether there are factual arguments as to why the client is not “accompanied” by a parent who is “available” to provide care and custody,¹⁴⁰ or arguments that by nature of the detention (and forced separation from the parent), the DHS has made the child “unaccompanied” and must transfer her to ORR custody within 72 hours as required by TVPRA § 235(b)(3).¹⁴¹ Practitioners

interior-united; Memorandum from DHS Sec’y John Kelly, *Enforcement of the Immigration Laws To Serve the National Interest* § A (Feb. 20, 2017), available at <https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest>.

¹³⁶ See, e.g., Cal. Welf. & Inst. Code § 831; Immigrant Legal Resource Center, *Practice Advisory: Confidentiality of Juvenile Records in California: Guidance for Immigration Practitioners in Light of California’s New Confidentiality Law* (Apr. 2016); available at https://www.ilrc.org/sites/default/files/resources/confidentiality_of_juvenile_records_advisory_ilrc_4.21.16_final.pdf

¹³⁷ See Lena Graber, National Immigration Project of the National Lawyers Guild, *The All-in-One Guide to Defeating ICE Hold Requests* (2012), https://www.ilrc.org/sites/default/files/resources/013_all_in_one_guide.pdf.

¹³⁸ ICE warrants are issued on Forms I-200 and I-205. See 8 C.F.R. §§ 287.5, 241.2; see also *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (holding that where search warrant was not issued by “the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all”).

¹³⁹ See, e.g., <https://cliniclegal.org/resources/know-your-rights>; <https://www.aclu.org/know-your-rights/what-do-if-immigration-agents-ice-are-your-door>; <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/>; <https://www.ilrc.org/know-your-rights-and-what-immigrant-families-should-do-now>.

¹⁴⁰ See *supra* Section IV.A.3.

¹⁴¹ Cf. *Halfway Home*, *supra* note 23, at 7 (“It appears that at times, ICE classifies children who have family members in the United States as ‘accompanied’ even if they are not willing to release the child to that family. In doing so, ICE is actually rendering these children unaccompanied by preventing the parent from retaining custody and providing care.”).

could also argue that since Section 235(b)(2) of the TVPRA requires that the DHS notify ORR within 48 hours that it has a minor in its custody, the DHS must notify ORR of the client's DHS detention and allow ORR to determine whether the child is in fact unaccompanied and therefore should be transferred to ORR custody.¹⁴² The practitioner could raise these arguments with the Enforcement and Removal Operations (ERO) Field Office Director and elevate to DHS Headquarters if necessary. If this does not work and the practitioner believes there is a strong argument that the child should be classified as a UC, the practitioner may consider whether a challenge to the DHS detention in federal district court would be appropriate.¹⁴³

Flores Practice Tip. Advocates should be wary of any attempts to detain children to force their undocumented parents to surrender for removal.¹⁴⁴ The *Flores* Settlement Agreement requires ORR or ICE to locate alternative custodians should a parent not seek a detained child's release. Advocates can contact *Flores* class counsel if ORR or the DHS insist on detaining a child despite the availability of alternative custodians.¹⁴⁵

Even if the practitioner cannot prevail on arguments that the client is a UC and should be in ORR custody, the *Flores* Settlement Agreement applies to all children under 18 detained in immigration custody, regardless of their "accompanied" status.¹⁴⁶ *Flores* creates a presumption in favor of release for all minors in DHS custody. Even if the DHS can establish that detention is necessary to protect safety or ensure the child's appearance, the conditions of the child's detention must still comply with the detailed standards set out in *Flores*.¹⁴⁷ If an advocate feels that the client's detention is in violation of *Flores*, the advocate may consider federal court vehicles, such as a *Flores* enforcement motion or a habeas action alleging that the detention is unlawful.¹⁴⁸

¹⁴² See *supra* Section II.C.

¹⁴³ For an introduction to habeas actions in federal district court, see American Immigration Council, *Introduction to Habeas Corpus* (June 2008), available at https://www.americanimmigrationcouncil.org/practice_advisory/introduction-habeas-corpus.

¹⁴⁴ One study from 2009 (conducted before the TVPRA was implemented) noted that "ICE agents sometimes use children as 'bait' and arrest undocumented individuals coming to pick up" children. *Halfway Home*, *supra* note 23, at 8.

¹⁴⁵ See *infra* note 148 for contact information.

¹⁴⁶ See discussion of *Flores* *supra* Section III.C.

¹⁴⁷ For example, the *Flores* Settlement Agreement entitles the child to placement in a facility licensed to care for dependent children. Practitioners should press the DHS to provide any detained child, whether accompanied or not, a licensed placement. If the DHS cannot provide a licensed placement, it may send the child to ORR custody.

¹⁴⁸ At least one federal court has acknowledged that courts have jurisdiction to consider UC challenges to detention through habeas petitions. In *D.B. v. Cardall*, a child brought a habeas action under 28 U.S.C. § 2241 arguing that his detention in ORR custody was unlawful because he was not unaccompanied, and also challenging his detention's constitutionality. 826 F.3d 721 (4th Cir. 2016). In a divided decision, the panel majority interpreted 6 U.S.C. § 279(g)(2)(C)(ii) to conclude that the child was a UC, despite the fact that his mother was in the United States and wanted him to be released to her, based on the ORR's determination that she was not a suitable custodian. It

The advocate may also consider seeking a custody re-determination before the immigration court. *Flores* provides that every child in immigration custody “shall be afforded” such a hearing.¹⁴⁹ The advocate can argue that the child also has a right to seek a bond re-determination before an Immigration Judge under INA § 236(a) and 8 C.F.R. § 236.1(d)(1) (“After an initial custody determination by the district director . . . the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released.”).¹⁵⁰ The advocate can argue that under *Flores* and the detention statutes, the client has a right to seek a bond re-determination. At the bond hearing, the advocate can seek the minimum bond of \$1,500 (assuming the client can afford a bond). Alternatively, the advocate can argue that the immigration judge has the authority to release the client without a bond on conditional parole, a form of release on recognizance, under INA § 236(a)(2)(B). While immigration judges have historically concluded that they lack authority to grant this type of release, in a class action lawsuit, the DHS conceded in a brief that immigration judges do have this authority.¹⁵¹

At the bond hearing, the practitioner should present evidence and arguments as to why the client should be released under the traditional bond factors of showing that he or she is not a flight risk nor a safety threat.¹⁵² The practitioner should discuss any relief that the client may be eligible for, and explain why the proposed custodian to whom the client would be released is safe.¹⁵³ Practitioners should combat any attempts by the DHS to raise deterrence as a bond

remanded to the district court for further consideration of the child’s procedural due process challenge to his detention.

Note that the *Flores* Settlement Agreement expressly provides for judicial review of DHS detention issues in federal district court, ¶ 24B. See discussion *supra* Section III.C. Practitioners may contact *Flores* class counsel for more information about *Flores* violations and enforcement actions: Carlos Holguín, Center for Human Rights & Constitutional Law, crholguin@centerforhumanrights.org.

¹⁴⁹ *Flores* Settlement Agreement ¶ 24A (unless the child expressly refuses such a hearing on the Notice of Custody Determination form). Note that the DHS has taken position that this paragraph was superseded by statute in litigation currently pending at the Ninth Circuit. See *supra* Section III.C.

¹⁵⁰ This assumes that the individual is not covered by the mandatory detention statute found at INA § 236(c). For more information regarding mandatory detention, see ACLU Immigrants’ Rights Project, *Challenging Detention Without a Bond Hearing Pending Removal Proceedings* (Feb. 2015), available at <https://www.aclu.org/files/assets/ACLU%20detention%20without%20bond%20hearing%20February%202015.pdf>.

¹⁵¹ *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015); see ACLU Immigrants’ Rights Project, *Practice Advisory: Immigration Judges’ Authority to Grant Release on Conditional Parole Under INA § 236(a) as an Alternative to Release on a Monetary Bond* (Sept. 2015), available at <https://www.aclu.org/legal-document/rivera-v-holder-practice-advisory>.

¹⁵² See *Matter of Guerra*, 24 I. & N. Dec. 37 (BIA 2006). For a *pro se* guide to bond hearings, see Florence Immigrant & Refugee Rights Project, *Getting a Bond: Your Keys to Release from Detention* (updated May 2013), available at <http://firrp.org/media/Bond-Guide-2013.pdf>.

¹⁵³ Cf. Children’s Bureau, Administration for Children & Families, U.S. Dep’t of Health & Human Servs., *Issue Brief: Immigration and Child Welfare*, at 6 (2015), available at <https://www.childwelfare.gov/pubs/issue-briefs/immigration/> (discussing placement with noncitizen kin in the child welfare context).

factor as inappropriate.¹⁵⁴ The practitioner should also consider whether he or she might invoke the 2007 EOIR Children’s Memo and its discussion of the best interest of the child as a factor that should be considered in immigration court procedures involving children.¹⁵⁵

If the client is over 18, then *Flores* does not apply; however, the child is still protected by the general bond statute and regulations discussed above and could seek bond with the immigration judge in the same manner. Further, if the client ends up in DHS custody through a transfer from ORR custody because the child turned 18, the law requires that the DHS:

“consider placement in the least restrictive setting available after taking into account the alien’s danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien’s need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.”¹⁵⁶

In addition to seeking release before the immigration judge, advocates could consider making a request for release on recognizance or humanitarian parole with ICE as an exercise of prosecutorial discretion,¹⁵⁷ and elevating the request where appropriate.

3. *Note on Children Detained by the DHS Who Have Final Orders of Removal*

Children with final orders of removal are not eligible for bond under 8 U.S.C. § 236(a). Strategies for children in this very vulnerable posture will vary and are beyond the scope of this advisory. It should be noted that advocates have been successful in securing release from detention for children in this posture in conjunction with a motion to reopen, as well as the filing of applications for relief.¹⁵⁸ Furthermore, children under 18 with removal orders are still covered by the *Flores* agreement, and advocates should argue for their release under that settlement.

¹⁵⁴ In December of 2014, a class action lawsuit was filed in the U.S. District Court in Washington D.C. on behalf of mothers and children challenging the DHS’s practice of detaining families without bond with a general deterrence rationale. *RILR v. Johnson*, Case 1:15-cv-00011-JEB (D.D.C. filed 2014). In May 2015, the government announced that it had decided to stop invoking deterrence as a factor in custody decisions in all cases involving families. In light of the government’s new policy the parties agreed to dissolve the preliminary injunction and administratively close the case, with a provision that the plaintiffs could move to reinstate the preliminary injunction if the government decides to invoke deterrence in custody decisions again. See <https://www.aclu.org/cases/rilr-v-johnson>. If the DHS raises deterrence in a practitioner’s case, it is recommended that he or she reach out to the ACLU Immigrants’ Rights Project.

¹⁵⁵ EOIR Children’s Memo, *supra* note 37. Note that the memo recognizes that some of its provisions apply beyond the context of unaccompanied children. *Id.* at 4.

¹⁵⁶ 8 U.S.C. § 1232(c)(2)(B).

¹⁵⁷ Note, however, that the Trump Administration has indicated its intention to limit the use of humanitarian parole. Kelly Memo, *supra* Section I & n.3, § K (“In my judgment, such authority should be exercised sparingly.”).

¹⁵⁸ See generally Section III.D *supra*. Note that many children with *in absentia* removal orders, particularly children released from federal custody in the Ninth Circuit, have strong claims to rescind the order based on the DHS’s failure to properly serve the NTA under governing regulations and case law. See, e.g., *Flores-Chavez v. Ashcroft*,

Practice Tip: Detained Clients from El Salvador. Remember that the *Orantes* injunction applies to Salvadorans detained in DHS custody who are eligible to apply for asylum.¹⁵⁹ If the client is Salvadoran, the practitioner should ensure that the DHS follows the requirements of *Orantes* and notify class counsel of any violations.¹⁶⁰ Among other things, the *Orantes* injunction: requires the government to advise detainees of their right to apply for asylum and to be represented by counsel; permits them access to counsel; gives them telephone access; requires that the government give counsel 24 hours advance notice of the date, time, and place of intended removal; permits counsel to rescind an agreement to voluntarily depart; and allows detainees access to and possession of legal materials.

E. Anticipated Issue #5: The DHS Places the Child in Expedited Removal Proceedings Based on Its Determination That the Child Is No Longer a UC.

If the DHS takes the position that a particular child is not, or is no longer, a UC, he or she would then no longer be statutorily exempt from expedited removal proceedings under INA § 235(b)(1).¹⁶¹ The DHS could initiate expedited removal proceedings during a child’s initial apprehension at the border or a port of entry, if, for example, the CBP officer determines that the child has a parent in the United States who is available to provide care and custody. If the CBP officer classifies the child as accompanied at the border and places him or her in expedited removal proceedings, in theory the child would remain in DHS custody and not be transferred to ORR custody.¹⁶²

The DHS could also seek to place children whom it initially classified as unaccompanied in expedited removal proceedings if it takes steps to “terminate” their UC determination after they reunify with a parent or turn 18. **Note that under the policy in place at the time this advisory was published, most children previously determined to be UCs would not be vulnerable to expedited removal.** To date, it has not been the DHS’ practice to institute expedited removal proceedings in these circumstances, due in part to current, agency-adopted

362 F.3d 1150 (9th Cir. 2004); *Matter of Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2002); Helen Lawrence, Kristen Jackson, Rex Chen & Kathleen Glynn, *Practice Advisory: Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, *supra* note 34.

¹⁵⁹ See *supra* note 63; <https://www.nilc.org/issues/immigration-enforcement/orantesinjunction/>.

¹⁶⁰ See *supra* note 63.

¹⁶¹ TVPRA § 235(a)(5)(D) (governing unaccompanied children from non-contiguous countries). The TVPRA also provides protections for unaccompanied children from contiguous countries, allowing them to withdraw applications for admission instead of being subjected to expedited removal, and for the initiation of § 240 proceedings where there are trafficking, persecution, or other concerns. TVPRA § 235(a)(2)(A), (B). For a more in-depth discussion of expedited removal, see National Immigration Project of the National Lawyers Guild, American Immigration Council & ACLU Immigrants’ Rights Project, *Practice Advisory, Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)* (Feb. 20, 2017), available at https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_17Feb-expedited-removal.pdf [hereinafter “Expedited Removal Practice Advisory”].

¹⁶² Note that *Flores* would still apply in this scenario. See *supra* Section IV.D.

temporal and geographic limits on the use of expedited removal. Under current policy the DHS may only place a noncitizen in expedited removal when the person is arriving at a port of entry or has been apprehended within 100 miles of the border and within two weeks of arrival in the United States.¹⁶³ However, the administration has indicated that it plans to expand expedited removal,¹⁶⁴ and the expansion could potentially cover noncitizens who have not been admitted or paroled and cannot show that they have been continuously physically present in the United States for at least two years and who are encountered anywhere in the United States.¹⁶⁵ **The DHS Secretary has stated that any expansion will be announced in the Federal Register.¹⁶⁶ The brief discussion below focuses on the possible future scenario where the DHS expands the scope of expedited removal to the greatest extent possible under the statute—although an expansion could be more limited.** It will discuss the potential use of expedited removal against a child initially classified as a UC at the border and released through the ORR reunification process, where DHS subsequently takes steps to terminate the UC determination and place the child in expedited removal proceedings.

1. Strategies for Scenario in Which Expedited Removal Proceedings Are Commenced

If the DHS places the child in § 235(b)(1) expedited removal proceedings (either at the outset or after termination of § 240 proceedings¹⁶⁷), the practitioner should consider the various vehicles for getting the client out of expedited removal:¹⁶⁸

¹⁶³ See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (2004) (designating for expedited removal noncitizens who entered without admission or parole, are inadmissible under § 212(a)(6)(C) or (a)(7), and who either arrive at a port of entry or are apprehended within 14 days of their arrival and within 100 miles of an international land border). Further, even before the TVPRA's enactment, agency policy guidance counseled against subjecting "unaccompanied minors" to expedited removal, and gave officers discretion to permit accompanied minors to withdraw applications for admission where appropriate. See Memorandum from Paul Virtue, *Unaccompanied Minors Subject to Expedited Removal* (Aug. 21, 1997), AILA Doc. No. 97082191.

¹⁶⁴ Executive Order, *Border Security and Immigration Enforcement Improvements* § 11(c), *supra* Section I & note 2 ("Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II)"); Kelly Memo, *supra* Section I & note 3, § G ("[T]he Department will publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, which may, to the extent I determine is appropriate, depart from the limitations set forth in the designation currently in force.").

¹⁶⁵ Specifically, two years prior to the determination of inadmissibility under the expedited removal statute, which must be a determination under either section 8 U.S.C. § 1182(a)(6)(C) or § 1182(a)(7). See 8 U.S.C. § 1225(b)(1)(A)(i), (iii).

¹⁶⁶ Kelly Memo § G, *supra* Section I & note 3.

¹⁶⁷ If practitioners encounter instances in which the DHS attempts to terminate § 240 proceedings in order to initiate § 235(b) proceedings against a child previously determined to be unaccompanied, we encourage them to reach out to the authors of this practice advisory for further strategies about how to combat this.

¹⁶⁸ For a more in-depth discussion of expedited removal, see Expedited Removal Practice Advisory, *supra* note 161.

- The practitioner might make a request to the DHS office likely to issue the expedited removal order via letter asking that they go forward under § 240 proceedings instead of § 235(b)(1) proceedings in an exercise of their prosecutorial discretion.
- Even in § 235(b)(1) proceedings, the client has a right to make a fear claim and have an interview with an asylum officer. If the client has a fear of return, the practitioner should assist her or him in asserting this claim and ensuring the client gets an interview. The practitioner should ask to attend the interview with the client. If the child can establish a credible fear of removal, he or she will be placed in § 240 proceedings. If the child is placed in § 240 proceedings, the practitioner can raise (or re-raise) arguments that the child is a UC and should be afforded the right to file for asylum with USCIS and raise any other claims for relief from removal.
- If an expedited removal order has already issued, the practitioner could file a motion to reopen or reconsider the expedited removal order with the DHS under 8 C.F.R. § 103.5, and allege new facts or incorrect application of law or policy.¹⁶⁹

If the practitioner believes that the client has been wrongly placed in expedited removal proceedings (for example, because the child is an unaccompanied child), there may also be federal court remedies to consider, such as a habeas action in federal district court. However, the INA purports to sharply limit the availability of federal court review of expedited removal orders, there is relatively little case law on habeas in the expedited removal context, and such cases present complex issues.¹⁷⁰ Practitioners should work with an experienced attorney in evaluating possible federal court remedies.¹⁷¹

Even in the expedited removal process, the *Flores* Settlement Agreement still covers the DHS's detention of children under 18, and the *Orantes* injunction still applies to detained Salvadorans.¹⁷²

¹⁶⁹ Some, but not all, courts of appeals have addressed the availability of motions to reopen or reconsider DHS-issued orders (as opposed to USCIS decisions) under 8 C.F.R. §103.5. Note that some CBP officers may take the position that they lack authority to reconsider or reopen an expedited removal order. When filing such motions, advocates should include other decisions agreeing to reopen DHS issued orders. *See Expedited Removal Practice Advisory, supra* note 161, at 6-7.

¹⁷⁰ *See Expedited Removal Practice Advisory, supra* note 161, at 4-6 (discussing jurisdictional limitations on habeas review of expedited removal orders imposed by 8 U.S.C. § 1252(e)(2) and relevant case law).

¹⁷¹ Practitioners may wish to reach out to the ACLU Immigrants' Rights Project in exploring federal court challenges to expedited removal orders. Practitioners can contact Jessie Baird (jbaird@aclu.org) and Alexis Warren (awarren@aclu.org).

¹⁷² *See supra* Section III.C.

2. *Other Considerations To Mitigate Risk of DHS Efforts To Commence Expedited Removal Proceedings*

If the practitioner is concerned about a client's future erroneous placement in expedited removal, it would be wise to gather documentation of facts that exempt the client from expedited removal (for example, proof of unaccompanied child determination, lawful admission, or two years of physical presence).¹⁷³ Also remember that the current expedited removal policy, which has not yet been expanded as of the date of this practice advisory, applies only to people arriving at a port of entry or apprehended within 100 miles of the border and within two weeks of entry. Practitioners should reach out to national groups monitoring this issue if a client is subjected to expedited removal under a more expansive scope of the statute without the DHS's first publishing a new policy in the Federal Register.¹⁷⁴

V. **Conclusion**

It is a challenging time for vulnerable noncitizens such as unaccompanied children, and likewise for advocates working to protect the rights of marginalized populations. It is all the more challenging to prepare successful strategies when it remains to be seen what new policies the current administration may implement that could affect unaccompanied children. It can, however, be said with certainty that unaccompanied children need the help of competent, well-prepared advocates now more than ever. We encourage advocates to connect (or remain connected) to larger advocacy efforts as new administrative policies and practices unfold. Information sharing among practitioners is an important way to ensure the sharing of best practices and information about new government policies so that individual and collective advocacy and litigation strategies can be explored. We encourage advocates to report specific examples about government efforts to remove UC determinations by completing this [web form](#).

It is important for advocates to encourage youth who may be feeling despair not to give up, and to continue to pursue their goals and positive opportunities, such as education and volunteering. In a time when immigrant youth may feel that their immigration case is out of their control, how they approach their education and what they do in their free time is within their control. These activities empower youth, build equities, and could help with advocacy if it becomes necessary.

Finally, advocates should remember that in these challenging times they may have to venture outside their comfort zones to protect their clients. This may include engaging in new types of strategies, as well as more clearly envisioning themselves as defense counsel as these proceedings become increasingly adversarial.

¹⁷³ While it is important for persons without status to gather documents of two years of presence, there are downsides to carrying such documentation (rather than keeping it in a safe place). In particular, depending on the content of the documents, they could be used by the DHS as evidence of removability for the person carrying them or others whom the documents reference.

¹⁷⁴ The National Immigration Project of the National Lawyers Guild is monitoring this issue. Practitioners can contact Kristin Macleod-Ball at kristin@nipnlg.org.

Sample Redacted "Notice of Termination of UAC Status"

[REDACTED]
Chief Counsel

[REDACTED]
Assistant Chief Counsel
[REDACTED]

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT**
[REDACTED]

In the Matter of:)
[REDACTED])
[REDACTED])
[REDACTED])
[REDACTED])
_____)

Juvenile/UAC Docket

File No. A [REDACTED]

Immigration Judge [REDACTED]

Date: [REDACTED]

Notice of Termination of UAC Status

The U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement ("the Department") filed the Notice to Appear in the above-captioned matter as an unaccompanied alien child ("UAC"). The term UAC is defined as an alien with no lawful immigration status, who has not attained 18 years of age, and "with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2). The Department hereby advises that the above captioned respondent no longer qualifies as a UAC because as a UAC because he/she has been returned to the custody of a parent or guardian, or he/she has turned 18 years old.

[REDACTED]
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security