



## Practice Advisory<sup>1</sup>

### Working with Child Clients and Their Family Members in Light of the Trump Administration’s Focus on “Smugglers”

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#### Table of Contents

<b>I.</b>	<b>Introduction .....</b>	<b>2</b>
A.	Defining Terms: “Alien Smuggling” v. Human Trafficking.....	3
B.	Overview of Statutory Grounds of Inadmissibility and Deportability for Noncitizens Found to Have Participated in “Smuggling” .....	5
C.	Exceptions or Defenses to the Admissibility and Deportability Smuggling Grounds .....	9
D.	Overview of Federal Criminal Law Prohibiting Smuggling.....	10
<b>II.</b>	<b>How the Trump Administration’s Announcements Target Individuals the Government Believes Have Engaged in Smuggling .....</b>	<b>12</b>
A.	Immigration Enforcement Against Persons Accused of Smuggling .....	12
B.	Criminal Prosecutions for Smuggling Conduct .....	13
C.	What Evidence Might the DHS or a Federal Prosecutor Use to Conclude That a Family Member Participated in Smuggling? .....	14
<b>III.</b>	<b>Strategies to Mitigate Risk to Family Members as a Result of Their Participation in a Child’s Immigration Case.....</b>	<b>15</b>
A.	Tip #1: Arrange for the Family Member to Have Access to Independent Counsel .....	16
B.	Tip #2: Best Practices for a Thorough and Effective Immigration Consultation for the Family Member of the Child Client.....	17
C.	Tip #3: Risk Mitigation Strategies When a Family Member Is Considering Presence and/or Live Testimony at Court or an Administrative Proceeding .....	20
D.	Tip #4: Risk Mitigation Strategies Where the Family Member Submits Written Testimony in an Immigration or Family Court Matter Relating to the Child .....	21
E.	Tip #5: Strategies for Mitigating Damaging Impact of Child’s Testimony and Documentation on Family Member .....	22
F.	Other Tips or Best Practices for Family Members of Child Clients.....	24
<b>IV.</b>	<b>Conclusion .....</b>	<b>25</b>
	<b>Appendix A: Common Criminal Smuggling Charges and Their Elements .....</b>	<b>26</b>
	<b>Appendix B: Smuggling Grounds, Exceptions, and Statutory Language .....</b>	<b>28</b>

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## I. Introduction

On February 20, 2017, Secretary of the Department of Homeland Security (DHS) John Kelly issued a memorandum entitled “Implementing the President’s Border Security and Immigration Enforcement Improvement Policies” [hereinafter “Kelly Memo”].<sup>2</sup> In a section entitled “Accountability Measures to Protect Alien Children from Exploitation and Prevent Abuses of Our Immigration Laws,” the Kelly Memo states that to counter “smuggling or trafficking of alien children” by “parents and family members of these children,”<sup>3</sup>

[T]he Director of [U.S. Immigration and Customs Enforcement (ICE)] and the Commissioner of [U.S. Customs and Border Protection (CBP)] shall ensure the proper enforcement of our immigration laws against any individual who—directly or indirectly—facilitates the illegal smuggling or trafficking of an alien child into the United States. In appropriate cases, taking into account the risk of harm to the child from the specific smuggling or trafficking activity that the individual facilitated and other factors relevant to the individual’s culpability and the child’s welfare, proper enforcement includes (but is not limited to) placing any such individual who is a removable alien into removal proceedings, or referring the individual for criminal prosecution.<sup>4</sup>

On April 11, 2017, Attorney General Jefferson Sessions issued a memorandum to federal prosecutors instructing them to make criminal prosecutions for immigration-related offenses, including for smuggling-related conduct, “higher priorities.”<sup>5</sup>

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<sup>2</sup> Memorandum from DHS Sec’y John Kelly, *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

<sup>3</sup> *Id.* at 11 § M. Though the Kelly Memo refers to “parents and family members,” for ease of reference this advisory refers to this group as “family members.”

<sup>4</sup> Kelly Memo, *supra* note 2, at 11 § M. The Kelly Memo followed the January 25, 2017 Executive Order issued by President Trump entitled *Border Security and Immigration Enforcement Improvements*. Exec. Order No. 13767, 82 Fed. Reg. 8793, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>. That Executive Order discusses smuggling only briefly, grouping it with drug and human trafficking and asserting that “transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs.” *Id.* § 1. For further discussion of the Executive Order, see, for example, CLINIC, *Increased Border Security and Immigration Enforcement Executive Order and DHS Memo Frequently Asked Questions* (Mar. 9, 2017), available at <https://cliniclegal.org/resources/increased-border-security-and-immigration-enforcement-executive-order-and-dhs-memo> [hereinafter “CLINIC Summary”]; American Immigration Council, *Summary of Executive Order “Border Security and Immigration Enforcement Improvements”* (Feb. 27, 2017), available at <https://www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order>.

<sup>5</sup> Memo from Attorney General Jefferson B. Sessions, *Renewed Commitment to Criminal Immigration Enforcement* (Apr. 11, 2017), available at <https://www.justice.gov/opa/press-release/file/956841/download> (directing that offices

Thus, in the Trump era noncitizen family members of children in removal proceedings are at increased risk of being placed in removal proceedings themselves if the government believes that they have “facilitated” a child’s unlawful entry into the United States, whether “direct or indirectly.” Family members may also face federal criminal charges instead of or in addition to these removal proceedings.

This practice advisory is designed for practitioners representing child clients in removal proceedings or advising family members of child clients in removal proceedings. As of June 30, 2017, an ICE spokesperson confirmed that the agency had begun to arrest family members of children, apparently following the Kelly Memo’s directives, without articulating specific policies or protocols about how it intends to implement these directives.<sup>6</sup> We expect that the Trump administration may adopt additional policies and/or practices in the future which shed light on the intended scope of its pronouncements. In the meantime, the goal of this advisory is to provide guidance and suggestions on best practices for mitigating the risk of civil immigration enforcement or criminal prosecution of family members of children in removal proceedings.

The rest of Section I will discuss the difference between “smuggling” and “trafficking” as well as relevant civil and criminal laws that govern charges of “smuggling.” Section II will analyze how the administration’s announcements appear to target individuals it accuses of smuggling. Section III will discuss strategies to mitigate family members’ risk of exposure to smuggling charges or other enforcement actions, in the context of their participation in the child’s immigration case.

### **A. Defining Terms: “Alien Smuggling” v. Human Trafficking**

As an initial matter, it is helpful to define “smuggling” and distinguish it from “human trafficking,” as the latter is not at issue in this advisory—though it is referenced in the Kelly Memo. Human trafficking is typically defined as maintaining control over the physical person of another for the purpose of involuntary labor or services, including commercial sex acts.<sup>7</sup> In

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“consider for prosecution any case involving the unlawful transportation or harboring of aliens, or any other conduct proscribed pursuant to 8 U.S.C. § 1324”) [hereinafter “Sessions Memo”]. The memo also directs prosecutors to consider prosecutions for other federal immigration-related crimes, such as improper entry and illegal re-entry.

<sup>6</sup> On June 30, 2017, news media reported that the Trump administration had confirmed that it would “begin arresting parents and other relatives who hire smugglers to bring their children into the U.S.” Garance Burke, *Feds Will Now Target Relatives Who Smuggled in Children*, ASSOCIATED PRESS, June 30, 2017, available at <https://apnews.com/291d565801984005886f5a22c800fee6/Feds-will-now-target-relatives-who-smuggled-in-children> (quoting an agency spokesperson as stating, “The sponsors who have placed children directly into harm’s way by entrusting them to violent criminal organizations will be held accountable.”); see also Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, THE NEW YORK TIMES, July 1, 2017, available at <https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html>.

<sup>7</sup> See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464 (defining “severe forms of trafficking in persons” as including “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery” and “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age”); see also United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and*

contrast, while definitions of smuggling vary,<sup>8</sup> in the United States both immigration consequences and criminal penalties may attach without any requirement that the “smuggler” obtain a financial or material benefit or engage in any nonconsensual conduct.<sup>9</sup>

In training materials, the DHS’s Human Smuggling and Trafficking Center outlines the government’s view that smuggling is “a crime against a **border**,” in contrast to human trafficking, “a crime against a **person**.”<sup>10</sup> This perspective provides a useful lens through which to understand the new enforcement priority of punishing family members of children who arrange for the children’s passage. Despite this distinction, the Kelly Memo appears to justify its intent to target family members who assist children in journeying to the United States out of concern for the children’s wellbeing, as though they are the primary victims of a family member’s crime.<sup>11</sup>

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*Children* (adopted Nov. 15, 2000),

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (defining trafficking as “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”).

<sup>8</sup> Under international law, smuggling of persons is defined as procuring “the illegal entry of a person” into a country “in order to obtain, directly or indirectly, a financial or other material benefit.” United Nations, *Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Organized Crime* (adopted 2000), available at [https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention\\_smug\\_eng.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf).

<sup>9</sup> See, e.g., Immigration and Nationality Act (INA) § 212(a)(6)(E)(i); INA § 237(a)(1)(E); INA § 274(a)(1)-(2).

<sup>10</sup> DHS Human Smuggling and Trafficking Center, *Fact Sheet, Human Trafficking v. Human Smuggling* (June 15, 2016) (emphases added), available at [http://ctip.defense.gov/Portals/12/Documents/HSTC\\_Human%20Trafficking%20vs.%20Human%20Smuggling%20Fact%20Sheet.pdf?ver=2016-07-14-145555-320](http://ctip.defense.gov/Portals/12/Documents/HSTC_Human%20Trafficking%20vs.%20Human%20Smuggling%20Fact%20Sheet.pdf?ver=2016-07-14-145555-320). The fact that the DHS views smuggling as a crime against a border rather than a person could be helpful when confronting arguments that because a person has engaged in smuggling activity he or she is dangerous or unworthy of discretion (such as in the bond context). An argument could be made that such conduct is more akin to a trespassing-type crime and does not, absent aggravating factors, mean that a person is dangerous.

<sup>11</sup> The Kelly Memo states, “Tragically, many of these children fall victim to robbery, extortion, kidnapping, sexual assault, and other crimes of violence by the smugglers and other criminal elements along the dangerous journey through Mexico to the United States,” and that “[r]egardless of the desires for family reunification, or conditions in other countries, the smuggling or trafficking of alien children is intolerable.” Kelly Memo, *supra* note 2, at 11 § M.

**Table 1: Trafficking vs. Smuggling**

TRAFFICKING	SMUGGLING
Crime against a person	Crime against a border
Victims can be U.S. citizens or foreign nationals	Involves foreign nationals
Exploitation-based	Transportation-based
No movement required	Requires border crossing
Involuntary	Voluntary

Source: DHS Human Smuggling and Trafficking Center, Fact Sheet, *Human Trafficking v. Human Smuggling* (June 15, 2016)

This practice advisory focuses on the potential increased enforcement against people accused of smuggling announced by the Trump administration, rather than the administration's references to human trafficking-related enforcement.

## **B. Overview of Statutory Grounds of Inadmissibility and Deportability for Noncitizens Found to Have Participated in "Smuggling"**

Under Section 212(a)(6)(E)(i) of the INA, any noncitizen who at any time "knowingly has encouraged, induced, assisted, abetted or aided" another noncitizen to enter or try to enter the United States in violation of law is inadmissible to the United States. Under Section 237(a)(1)(E)(i) of the INA, any noncitizen "who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided" another noncitizen to enter or to try to enter the United States in violation of law is deportable.<sup>12</sup> In short, noncitizens (even those with lawful immigration status) who the government alleges have assisted another person in entering the United States without permission are vulnerable to the initiation of removal proceedings, and/or may be disqualified from obtaining immigration benefits. This section will briefly describe the conduct that has been found sufficient to trigger these grounds of inadmissibility and deportability and the exceptions found in the law.

Though historically comparatively rare,<sup>13</sup> the DHS could initiate removal proceedings against a noncitizen based on a charge that he or she is deportable under INA § 237(a)(1)(E)(i) or

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<sup>12</sup> Note that this is not a *criminal* ground of deportability; a person may be charged as deportable under this ground even if she or he has never been convicted of a criminal smuggling offense.

<sup>13</sup> A 2011 data compilation by the Transactional Records Access Clearinghouse, Syracuse University, revealed that of 2,594,910 total NTA charges from 2002 to 2011, only 317 (0.01%) were for the smuggling inadmissibility ground, and 2,084 (0.08%) for the smuggling deportability ground. See TRAC Immigration, *Charges Asserted in Deportation Proceedings in the Immigration Courts: FY 2002-FY 2011 (through July 26, 2011) (counts are of charges, not of individuals charged)*, <http://trac.syr.edu/immigration/reports/260/include/detailchg.html>. In comparison, Department of State inadmissibility data for visa applicants reviewed by the authors for the period from 2010 to 2016 reflects a higher percentage of persons denied a visa due to smuggling-related inadmissibility findings, with a range of about 1.15%-3% for immigrant visa applicants, and about 0.11%-0.16% for nonimmigrant visa applicants. Tables for each fiscal year titled "Immigrant and Nonimmigrant Visa Ineligibilities by Grounds for Refusal Under the Immigration and Nationality Act" can be found at <https://travel.state.gov/content/visas/en/law-and-policy/statistics.html>.

inadmissible under INA § 212(a)(6)(E)(i) due to smuggling conduct. Those who were admitted to the United States are subject to the grounds of deportability and those who entered without admission are subject to the grounds of inadmissibility. In removal proceedings the government has the burden of proving smuggling charges of deportability by “clear and convincing” evidence.<sup>14</sup> In contrast, once the government establishes alienage of an individual charged as being in the United States without being admitted or paroled,<sup>15</sup> that individual bears the burden to prove that she is “clearly and beyond doubt entitled to be admitted and is not inadmissible.”<sup>16</sup> In order to establish that an individual has engaged in smuggling sufficient to trigger deportability or inadmissibility, some courts have held that the record must show that the individual knowingly committed an “affirmative act of help, assistance, or encouragement” to aid or attempt to aid in smuggling.<sup>17</sup> However, courts have found that “an individual need not be physically present at the time and place of the illegal crossing to have assisted an illegal entry.”<sup>18</sup> Further, smuggling can encompass situations where the individual did not render any assistance until after the person made the illegal crossing, particularly where there is evidence of a pre-arranged plan.<sup>19</sup> At least one circuit court has concluded that “the statute’s plain language does not contain an exception for assistance stemming in whole or in part from humanitarian concern”; rather, it merely requires “a knowing act of assistance to an attempted illegal entry into the United States.”<sup>20</sup>

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<sup>14</sup> INA § 240(c)(3)(A) (for proving deportability against noncitizen admitted to the United States); 8 C.F.R. § 1240.8(a); see *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 829 (9th Cir. 2011).

<sup>15</sup> 8 C.F.R. § 1240.8(c).

<sup>16</sup> INA § 240(c)(2)(A) (or the noncitizen can show that by clear and convincing evidence that he or she is “lawfully present in the United States pursuant to a prior admission”).

<sup>17</sup> *Altamirano v. Gonzales*, 427 F.3d 586, 592 (9th Cir. 2005) (discussing inadmissibility smuggling ground); accord *Dimova v. Holder*, 783 F.3d 30, 40 (1st Cir. 2015) (discussing deportability smuggling ground); see *Tapucu v. Gonzales*, 399 F.3d 736, 739-43 (6th Cir. 2005). Other courts have not explicitly adopted the affirmative act requirement, although advocates could argue that it is required as a matter of statutory interpretation. See, e.g., *Chambers v. Office of Chief Counsel*, 494 F.3d 274, 279 (2d Cir. 2007) (declining to reach the question whether “affirmative act” standard applied).

<sup>18</sup> *Dimova*, 783 F.3d at 40; see also *Parra-Rojas v. Attorney Gen.*, 747 F.3d 164, 170 (3d Cir. 2014); *Soriano v. Gonzales*, 484 F.3d 318, 321 (5th Cir. 2007); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 679 (9th Cir. 2005); *Sanchez-Marquez v. I.N.S.*, 725 F.2d 61, 63 (7th Cir. 1984).

<sup>19</sup> *Dimova*, 783 F.3d at 38 (concluding that entry had not been completed at the point of the illegal crossing such that alleged smuggler’s actions in picking a family up after they crossed constituted smuggling); *Santos-Sanchez v. Holder*, 744 F.3d 391, 394 (5th Cir. 2014) (assistance was provided after the person crossed in further transporting); *Soriano*, 484 F.3d at 321 (“The fact that [respondent] shepherded the aliens within a few hours of their crossing evidenced a plan for the meeting and transportation.”); *Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 154 (BIA 2009) (stating that “the act of an entry may include other related acts that occurred either before, during, or after a border crossing, so long as those acts are in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry”). But see *Parra-Rojas*, 747 F.3d at 168-72 (after-the-fact assistance not enough if the accused had no involvement with and made no prearranged plans with the travelers prior to their entry).

<sup>20</sup> *Dimova*, 783 F.3d at 41.

Courts have deemed the following conduct sufficient to trigger a smuggling ground:<sup>21</sup>

- presentation of a false form of identification for the smugglee at a port of entry (use of a U.S. birth certificate, passport, or driver's license of a person who is not the smugglee, or use of a falsified document)<sup>22</sup>
- paying a smuggler, and/or making other arrangements with a commercial smuggler to bring a family member to the United States, with no physical involvement in border crossing<sup>23</sup>
- knowingly traveling with an unauthorized noncitizen to a port of entry and deceiving immigration officers about the noncitizen's residence and whereabouts of his passport<sup>24</sup>

Conduct deemed insufficient to constitute a smuggling ground has included:

- applicant's act of picking up his brother in Arizona the day after the brother had crossed and after transport by smuggler had ceased (Administrative Appeals Office (AAO) concluded that the attenuated timeline did not "compel a finding that there was a prior plan for meeting and transportation")<sup>25</sup>

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<sup>21</sup> See also *Tapucu*, 399 F.3d at 741-42 (collecting cases). Note that the authors are not aware of case law on smuggling that addresses situations where a person presented himself or herself at the border seeking asylum rather than entering unlawfully. Practitioners should develop creative legal arguments to counter inadmissibility/deportability smuggling grounds or criminal smuggling charges stemming from this factual scenario while preparing for DHS to potentially institute civil immigration enforcement against the adult(s) via charges unrelated to smuggling.

<sup>22</sup> See, e.g., *In re Ismael D. Cruz Luiz*, No. A088-227-071, 2014 Immig. Rptr. LEXIS 7295 (IJ order Sept. 18, 2014) (unpublished) (respondent used the DMV identification of a U.S. resident cousin to attempt to aid a girlfriend to enter at a port of entry).

<sup>23</sup> *Ramos v. Holder*, 660 F.3d 200, 203-06 (4th Cir. 2011) (parents who "financially facilitate[d] their children's illegal entry into the United States satisfied both the assistance and knowledge requirements of the 'alien smuggling'" inadmissibility provision barring eligibility for NACARA relief); *Urzua Covarrubias v. Gonzales*, 487 F.3d 742 (9th Cir. 2007) (concluding that payment by the respondent after his brother was already in the United States was still in violation of smuggling inadmissibility ground, barring eligibility for suspension of deportation, as it occurred before the "initial transporter" had ceased transport); *Moran v. Ashcroft*, 395 F.3d 1089, 1091-92 (9th Cir. 2005), *overruled on other grounds by Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (concluding that inadmissibility smuggling ground barred eligibility for cancellation of removal, where respondent paid a smuggler to transport himself and his future wife across the border); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (triggering inadmissibility ground and barring good moral character finding).

<sup>24</sup> *Chambers*, 494 F.3d at 279 (affirming alien smuggling inadmissibility charge where applicant "personally arranged to provide transportation for [the alien] into the United States and purposefully deceived customs officials at the time of his attempted entry").

<sup>25</sup> *In re: [name redacted]*, 2014 Immig. Rptr. LEXIS 4288 (AAO Oct. 22, 2014) (unpublished) (concluding that no inadmissibility waiver was needed for TPS application because no inadmissibility ground had been triggered); see also *In re Maria Isabel Guzman-Sanchez*, A087 118 694 (BIA Oct. 23, 2013) (unpublished), available at <https://www.scribd.com/document/181834734/Maria-Isabel-Guzman-Sanchez-A087-118-694-BIA-Oct-23-2013> (stating that "[w]here the respondent picks up aliens near the border, the focus is on whether there was pre-arrangement").

- reluctant acquiescence to another's smuggling plan and presence in a vehicle where it took place<sup>26</sup>
- transporting several undocumented persons within the United States after the persons had entered illegally, where the respondent had no previous contact with them and was not part of any pre-arranged plan<sup>27</sup>

Note that while the statutory language defining the inadmissibility and deportability smuggling grounds is nearly identical, a review of case law indicates that individuals who facilitate the unlawful entry of a family member indirectly (in contrast to those who participate directly in the smuggling or do so for monetary gain) are more likely to face a smuggling allegation as a bar to relief,<sup>28</sup> rather than as a charge of removability in the Notice to Appear (NTA). The practical effect of this distinction is that in such cases, it becomes the noncitizen's burden to prove that the conduct did not amount to smuggling, or that he or she qualifies for a waiver. This is because while the government must prove charges of deportability, noncitizens have the burden to prove that they are not subject to a ground of inadmissibility and to prove eligibility for immigration relief.<sup>29</sup>

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<sup>26</sup> *Aguilar-Gonzalez v. Mukasey*, 534 F.3d 1204 (9th Cir. 2008) (remanding for termination where lawful permanent resident "reluctantly" acquiesced to her father's plan to use her own child's U.S. birth certificate to smuggle two infants into the United States after concluding that mere acquiescence to her father's use of her son's birth certificate, without actual furnishing of the birth certificate to her father or to CBP, did not amount to an "affirmative act" of assistance or encouragement necessary to sustain the smuggling inadmissibility charge); *see also Altamirano*, 427 F.3d at 595 (presence in a vehicle and knowledge that an undocumented person was in the trunk was insufficient to support inadmissibility smuggling ground); *Perez-Arceo v. Lynch*, 821 F.3d 1178 (9th Cir. 2016) (remanding for further fact-finding and clarification by IJ).

<sup>27</sup> *Matter of I- M-*, 7 I. & N. Dec. 389, 391 (BIA 1957) (interpreting previous version of smuggling statute); *see also Parra-Rojas*, 747 F.3d at 170 (interpreting inadmissibility provision); *In re Alma Nelida Martinez*, A076 824 333 (BIA Mar. 19, 2015) (unpublished), *available at* <https://www.scribd.com/document/262074269/Alma-Nelida-Martinez-A076-824-333-BIA-March-19-2015> (conviction for transporting aliens after entry under 8 U.S.C. § 1324(a)(1)(A)(ii) insufficient to establish that respondent "knowingly" assisted with illegal entry as required for inadmissibility smuggling ground).

<sup>28</sup> *See supra* note 23 and cases cited. One common way in which smuggling inadmissibility grounds can harm noncitizens is its application in the cancellation of removal context, where it can create a bar to the required showing of good moral character. *See, e.g., Sanchez v. Holder*, 560 F.3d 1028 (finding petitioner ineligible for cancellation of removal based on the fact that he paid a coyote \$1,000 to smuggle himself and his wife into the United States). In *Sanchez*, the Ninth Circuit overruled its 2005 holding in *Moran*, 395 F.3d 1089, and emphasized that the inadmissibility waiver for immediate family members (spouse, parent, son or daughter) did not apply in the context of establishing good moral character as required for cancellation of removal. *Id.* at 1030. The smuggling inadmissibility ground also comes into play in other relief applications. *See, e.g., In re Rafael Carrasco-Ibarra*, No. A019 982 046, 2015 Immig. Rptr. LEXIS 10794 (BIA Sept. 24, 2015) (unpublished) (denying application for registry pursuant to INA § 249 for having paid a smuggler to assist him in bringing his wife and children to the United States); *Matter of G-R-S-*, 2016 Immig. Rptr. LEXIS 5946 (AAO Aug. 17, 2016) (unpublished) (application to reapply for admission after removal).

<sup>29</sup> While a discussion of affirmative applications for immigration relief is beyond the scope of this advisory, it is important to note that for the reasons discussed herein, noncitizens applying for relief who have committed smuggling related conduct may be ineligible for immigration relief or may need to seek a waiver. In the context of an application for an immigration benefit, the noncitizen will need to establish that she is not subject to any



### **C. Exceptions or Defenses to the Admissibility and Deportability Smuggling Grounds**

There are limited exceptions and defenses to the inadmissibility and deportability smuggling grounds.<sup>30</sup> The **deportability smuggling ground** found at INA § 237(a)(1)(E)(i) by its terms does not apply to conduct committed more than five years after the date of any entry. Nor does it apply to certain individuals eligible for Family Unity, who are seeking admission as an immediate relative or second preference beneficiary or seeking Family Unity benefits, and who were physically present on May 5, 1988 and committed the smuggling conduct prior to that date, and solely to aid the person's "spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law."<sup>31</sup> Additionally, there is a discretionary waiver of deportability available to persons who are lawful permanent residents (LPRs), who assist only a "spouse, parent, son, or daughter" to illegally enter the United States and who can show that this exercise of discretion serves humanitarian, family unity, or other public interests.<sup>32</sup> The requisite family relationship must have existed at the time of the smuggling.<sup>33</sup> However, in light of the Kelly Memo, this discretionary waiver might be harder to obtain, for example if the DHS forcefully opposes a waiver grant arguing that the individual does not merit a favorable exercise of discretion.<sup>34</sup>

The **inadmissibility smuggling ground** found at INA § 212(a)(6)(E)(i), which is identical to the deportability smuggling ground in terms of conduct covered, contains a limited exception for those who are eligible for Family Unity, who are seeking admission as an immediate relative or second preference beneficiary or seeking Family Unity benefits, and who were physically present on May 5, 1988 and committed the smuggling conduct prior to that date, and solely to aid the person's "spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law."<sup>35</sup> The inadmissibility smuggling ground can also be

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applicable ground of inadmissibility, including smuggling, and typically the application form itself will specifically query whether the noncitizen has ever engaged in smuggling conduct. If the noncitizen has triggered the smuggling ground of inadmissibility, she will need to establish that a waiver is available and that she qualifies for such a waiver. Given these realities, it is essential that a noncitizen wishing to apply affirmatively for an immigration benefit who has committed potential smuggling conduct consult with an experienced immigration practitioner prior to filing and, if she decides to proceed, that she obtain representation.

<sup>30</sup> See Rebecca M. Abel, *Who's Bringing the Children?: Expanding the Family Exemption for Child Smuggling Offenses*, 110 MICH. L. REV. FIRST IMPRESSIONS 52 (2012) (arguing that the current statutory scheme punishes more people seeking family unity than was intended by Congress, and for a more robust family exemption as a remedy), available at [http://repository.law.umich.edu/mlr\\_fi/vol110/iss1/4](http://repository.law.umich.edu/mlr_fi/vol110/iss1/4).

<sup>31</sup> INA § 237(a)(1)(E)(ii).

<sup>32</sup> INA § 237(a)(1)(E)(iii).

<sup>33</sup> INA § 237(a)(1)(E)(iii) (requiring relationship "at the time of the offense").

<sup>34</sup> The waiver might also be more difficult to obtain in cases where a federal smuggling prosecution is brought and results in a conviction, which could affect discretion.

<sup>35</sup> INA § 212(a)(6)(E)(ii).

waived in an exercise of discretion for LPRs who temporarily traveled abroad and for those seeking admission or adjustment of status as an immediate relative or through a family preference petition<sup>36</sup> who have smuggled only a spouse, parent, son, or daughter.<sup>37</sup> The requisite family relationship must have existed at the time of the smuggling.<sup>38</sup>

#### **D. Overview of Federal Criminal Law Prohibiting Smuggling**

A federal statute titled “Bringing in and harboring certain aliens” defines several criminal offenses related to “smuggling” under which a family member could be charged.<sup>39</sup> These include bringing an undocumented person to the United States “in any manner whatsoever” (other than at a designated place),<sup>40</sup> domestic transportation of an undocumented person,<sup>41</sup> concealing or harboring an undocumented person,<sup>42</sup> encouraging an undocumented person to enter the United States,<sup>43</sup> and engaging in a conspiracy or aiding and abetting any of the preceding acts.<sup>44</sup>

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<sup>36</sup> Except for fourth preference petitions (siblings of U.S. citizens), where the waiver is not available. INA § 212(d)(11).

<sup>37</sup> INA § 212(d)(11) (providing discretionary waiver for “humanitarian purposes, to assure family unity, or when it is otherwise in the public interest”). A review of AAO cases available on the USCIS website reviewing denials of this waiver reveal that in many cases where the applicant was statutorily eligible for the waiver, the waiver was granted. *See, e.g., In re [name redacted]* (AAO Apr. 18, 2011) (unpublished), *available at* [https://www.uscis.gov/sites/default/files/err/H7%20-%20Waiver%20of%20Inadmissibility%20-%20Unlawful%20Presence%20-%20212%20\(a\)\(9\)\(B\)/Decisions Issued in 2011/Apr182011\\_01H7212.pdf](https://www.uscis.gov/sites/default/files/err/H7%20-%20Waiver%20of%20Inadmissibility%20-%20Unlawful%20Presence%20-%20212%20(a)(9)(B)/Decisions%20Issued%20in%202011/Apr182011_01H7212.pdf) (granting waiver where applicant admitted during consular interview to providing money for her child’s smuggling into the United States). For an argument that the family unity waiver should be expanded, see Abel, *supra* note 30.

<sup>38</sup> INA § 212(d)(11) (stating that relationship must have existed “at the time of such action”).

<sup>39</sup> 8 U.S.C. § 1324(a).

<sup>40</sup> 8 U.S.C. § 1324(a)(1)(A)(i); 8 U.S.C. § 1324(a)(2)(B); *see, e.g., United States v. Lopez*, 484 F.3d 1186, 1188 (9th Cir. 2007) (“Because, here, the defendant transported undocumented aliens only within the United States and did so only after the initial transporter had dropped the aliens off inside the country, and because there is insufficient evidence to establish that the defendant otherwise aided and abetted the initial transportation, we reverse the convictions on the ‘bringing to’ offense.”).

<sup>41</sup> 8 U.S.C. § 1324(a)(1)(A)(ii).

<sup>42</sup> 8 U.S.C. § 1324(a)(1)(A)(iii).

<sup>43</sup> 8 U.S.C. § 1324(a)(1)(A)(iv).

<sup>44</sup> 8 U.S.C. § 1324(a)(1)(A)(v). Note that this broad criminal statute is not an exact match with the deportability and inadmissibility smuggling grounds. For example, the Fifth Circuit has noted that a conviction for transporting aliens within the United States does not render the person inadmissible under the smuggling ground of inadmissibility. *Rodriguez-Gutierrez v. I.N.S.*, 59 F.3d 504, 509 n.3 (5th Cir. 1995) (“We note, however, that the Government misapplies section 1182. This provision states that an alien who has knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is excludable. As the IJ in this case noted, Rodriguez was convicted for transporting illegal aliens rather than for aiding and abetting an entry. Therefore, he is not excludable under section 1182(a)(6)(E).”).

Appendix A located at the end of this advisory, titled “Common Federal Criminal Offenses Related to ‘Smuggling,’” provides further information regarding these provisions. As in all criminal prosecutions, the burden is on the prosecutor to prove each element of a smuggling-related crime “beyond a reasonable doubt,”<sup>45</sup> and the accused individual is entitled to a public defender at no cost if he or she is indigent, unlike in immigration court proceedings.

If convicted under this statute, an individual can face a maximum criminal sentence of between one and 20 years depending on the conduct.<sup>46</sup> The statute of limitations for prosecuting such conduct is ten years.<sup>47</sup> In addition, such a conviction carries significant immigration consequences. A criminal “smuggling” conviction under 18 U.S.C. § 1324(a)(1)(A) or (2)—including a non-commercial smuggling of another person—is an aggravated felony for the purposes of immigration law.<sup>48</sup> An aggravated felony conviction renders a noncitizen deportable, bars the individual from various forms of immigration relief, subjects the individual to mandatory detention, and can trigger criminal liability with a maximum possible sentence of 20 years if the person is deported and subsequently reenters.<sup>49</sup> Noncitizens who are not permanent residents and are convicted of an aggravated felony may also be subjected to a form of summary removal under INA § 238(b), in which an immigration officer orders removal without any hearing before an Immigration Judge (IJ). The aggravated felony statute does provide an exception to a smuggling conviction’s automatic classification as an aggravated felony, in the case of a first-time offense in which the individual assisted only his or her child,

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<sup>45</sup> See, e.g., *United States v. Torralba-Mendia*, 784 F.3d 652, 664 (9th Cir. 2015) (affirming conspiracy smuggling conviction where a “rational juror could find beyond a reasonable doubt that [the defendant] joined the conspiracy with the intent to further it”).

<sup>46</sup> See 8 U.S.C. § 1324(a)(2)(A) (one-year maximum); *id.* § 1324(a)(1)(B)(ii) (five-year maximum); *id.* § 1324(a)(1)(B)(i) (10-year maximum if the “offense was done for the purpose of commercial advantage or private financial gain”); *id.* § 1324(a)(1)(B)(iii) (20 year maximum if the “person causes serious bodily injury . . . to, or places in jeopardy the life of, any person”). A sentence of the death penalty or life imprisonment is also authorized if the offense causes the death of any person. *Id.* § 1324(a)(1)(B)(iv).

<sup>47</sup> 18 U.S.C. § 3298.

<sup>48</sup> INA § 101(a)(43)(N); see, e.g., *United States v. Rodriguez-Vega*, 797 F.3d 781, 784 (9th Cir. 2015) (vacating guilty plea for attempted transportation of undocumented persons in violation of 8 U.S.C. § 1324(a)(2)(A), a misdemeanor, where petitioner received ineffective assistance of counsel because her criminal attorney did not advise her that such a plea was an aggravated felony and “rendered her removal a virtual certainty” under statute); *In re Ruiz-Romero*, 22 I. & N. Dec. 486, 490 (BIA 1999) (despite parenthetical phrase found in aggravated felony provision of “related to alien smuggling,” there are no exceptions to convictions under § 1324(a)(1)(A) and (2) categorically qualifying as aggravated felonies).

<sup>49</sup> INA § 237(a)(2)(A)(iii) (aggravated felony deportability provision); INA § 236(c) (mandatory detention for those with aggravated felony convictions); 8 U.S.C. § 1326(b)(2) (reentry after removal when convicted of an aggravated felony).

parent, or spouse in violating immigration law.<sup>50</sup> To qualify for this exemption the noncitizen must “affirmatively show[]” his or her eligibility for it.<sup>51</sup>

## **II. How the Trump Administration’s Announcements Target Individuals the Government Believes Have Engaged in Smuggling**

As mentioned above, the Kelly Memo directs that ICE and CBP shall ensure “proper enforcement” against individuals who directly or indirectly “facilitate[] the illegal smuggling or trafficking of an alien child into the United States.”<sup>52</sup> It further states that “proper enforcement includes (but is not limited to)” placing the person in removal proceedings or referring him or her for criminal prosecution.<sup>53</sup> Thus, the Kelly Memo specifies two non-exclusive ways that family members of child respondents alleged to have facilitated the child’s illegal entry into the United States may be targeted for enforcement: (1) through civil immigration enforcement against the individual, including placing him or her in removal proceedings; and (2) by bringing criminal smuggling charges against the individual. This Section will briefly discuss considerations relevant to who is at risk for each of these possibilities.

### **A. Immigration Enforcement Against Persons Accused of Smuggling**

The Kelly Memo indicates an intention to target family members of noncitizen children who facilitated the children’s travel and entry to the United States by placing them in removal proceedings. While Section I discussed smuggling-related charges of deportability and inadmissibility that could be brought against an individual and the elements needed to prove such charges, in reality these charges may not necessarily come into play. Whether or not the DHS has sufficient evidence to prove that a child’s family member has committed a chargeable smuggling violation, the Kelly Memo suggests that the DHS may attempt to place these family members into removal proceedings under inadmissibility or deportability grounds not necessarily related to “smuggling” violations. This could happen if the family member is already removable for some other conduct, for example if he or she entered the United States without permission. In such a case, the government could initiate removal proceedings based on a charge of inadmissibility for being present without admission or parole,<sup>54</sup> rather than any smuggling conduct.

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<sup>50</sup> INA § 101(a)(43)(N).

<sup>51</sup> *Id.* The exception reads that all offenses under 8 U.S.C. § 1324(a)(1)(A) or (2) are aggravated felonies for immigration purposes, except in the case of a “first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien’s spouse, child, or parent (and no other individual) to violate a provision of this chapter.”

<sup>52</sup> Kelly Memo, *supra* note 2, at 11 § M.

<sup>53</sup> *Id.*

<sup>54</sup> INA § 212(a)(6)(A)(i).

Thus, the smuggling allegations may be the reason that the government decides to initiate removal proceedings against an individual, but the government may simply charge such a person as removable for other conduct. In these cases, the government need not go through the more burdensome process of proving a smuggling allegation of deportability or alleging smuggling-based inadmissibility.<sup>55</sup> For such individuals, the smuggling issue may arise in the context of seeking relief from removal. In that context, the individual would need to show that he or she has not triggered the smuggling inadmissibility ground or in the alternative that he or she qualifies for a waiver. In addition, an immigration court might consider smuggling in the context of good moral character, where required, or discretion. Of course, if the family member is present in the United States after having been admitted, then the government would need to prove a ground of deportability under INA § 237, such as smuggling or another, perhaps more easily provable, ground. Further, U.S. citizen family members are not amenable to removal proceedings regardless of alleged smuggling conduct.

In addition to initiation of removal proceedings under INA § 240, there are other immigration enforcement actions that the government could take in certain situations. For example, the DHS may target and detain a family member with prior immigration issues, such as individuals with prior removal orders, those who received voluntary departure and did not depart, and those who re-entered without inspection after a prior removal. In such cases, the family member may not be provided a hearing in front of an IJ or the option to post bond and instead may be vulnerable to swift removal.

In sum, if the government decides that an individual has facilitated the smuggling of a child into the United States and wishes to target the individual as a result, there are various enforcement tools it might use.

## **B. Criminal Prosecutions for Smuggling Conduct**

The Kelly Memo also mentions referral for criminal prosecution as a means to target for enforcement family members of children brought to the United States illegally.<sup>56</sup> Of course, in order to bring criminal smuggling charges against an individual, the prosecutor would need to prove the elements of the criminal offense (found at 8 U.S.C. § 1324(a)) beyond a reasonable doubt.<sup>57</sup>

On April 11, 2017, Attorney General Sessions issued a memorandum to all federal prosecutors directing that “[e]ach District shall consider for prosecution any case involving the unlawful transportation or harboring of aliens, or any other conduct proscribed pursuant to 8

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<sup>55</sup> While the burden is on the noncitizen to prove he or she is admissible when confronted with inadmissibility charges, including those for smuggling, in practice to sustain a smuggling-based inadmissibility charge there must still be evidence in the record to support such a charge, which typically would fall on the government to supply. *Cf. Perez-Arceo v. Lynch*, 821 F.3d 1178, 1182 (9th Cir. 2016).

<sup>56</sup> Kelly Memo, *supra* note 2, at 11 § M.

<sup>57</sup> *See supra* Section I.D.

U.S.C. § 1324.”<sup>58</sup> The Sessions Memo states that if “a determination must be made regarding use of finite resources,” priority should be afforded to those accused of smuggling three or more persons and offenses where there are aggravating circumstances such as injury or death. As of the date of this advisory’s publication, the authors are unaware of any post-Sessions Memo prosecutions of family members involved in bringing children to the United States. However, just as the Trump administration has selectively targeted undocumented individuals previously considered a low priority under the Obama administration with a goal of prompting self-deportation, practitioners should consider the possibility that the administration might selectively prosecute smuggling with the goals of deterring children from fleeing to the United States and family members from volunteering to sponsor children out of Office of Refugee Resettlement (ORR) custody causing the children to remain detained.

### **C. What Evidence Might the DHS or a Federal Prosecutor Use to Conclude That a Family Member Participated in Smuggling?**

An important initial question to consider is how federal law enforcement officials might obtain evidence to conclude that a family member has participated in smuggling activity. In many of the immigration cases discussed in this advisory, CBP officers conducted interviews or an investigation at the time of an encounter at or near the border, and recorded the information on Form I-213, Record of Deportable/Inadmissible Alien.<sup>59</sup> In some cases, the evidence comes in the form of a statement, either from the person accused of smuggling or someone else.<sup>60</sup>

In the context of family members who facilitate a child’s journey to the United States, there are a number of sources from which the DHS might obtain evidence. First, when the child is apprehended at the border and a CBP officer conducts an interview, the CBP officer frequently asks the child about how he or she came to the United States, who made the smuggling

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<sup>58</sup> See Sessions Memo, *supra* note 5, at 1; see also Remarks Prepared for Attorney General Jeff Sessions, *Meeting with Customs and Border Protection Personnel and Immigration Policy Announcement* (Apr. 11, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal> (directing federal prosecutors to more aggressively prosecute the “transportation or harboring of aliens”).

<sup>59</sup> See, e.g., *Sanchez v. Holder*, 704 F.3d 1107, 1108-09 (9th Cir. 2012) (interview with CBP memorialized on Form I-213); *Gonzalez v. Mukasey*, 534 F.3d 1204, 1207-08 (9th Cir. 2008) (government relied on Form I-213 as well as Form G-166, Report of Investigation). In some cases it may be possible to seek suppression of the statements contained in the Form I-213 or in other government documents, or to present evidence rebutting the veracity of the information contained therein or calling into question the voluntariness of the statements. See, e.g., *In re Guadalupe Ramirez Moran*, A095-445-013 (BIA Dec. 18, 2014) (unpublished), available at <https://www.scribd.com/document/252389711/Guadalupe-Ramirez-Moran-A095-445-013-BIA-Dec-18-2014> (remanding to give the respondent the opportunity to rebut the statements made in the I-213 regarding alleged smuggling, and directing that the IJ make specific findings as to whether the respondent made the statements indicated on Form I-213 and whether those statements were made voluntarily).

<sup>60</sup> See, e.g., *Alimi v. Gonzales*, 489 F.3d 829, 832 (7th Cir. 2007) (discussing respondent’s statement taken by immigration officers during airport encounter); *Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 155 (BIA 2009) (referencing “Record of Sworn Statement (Form I-263B) signed by the respondent” as well as documents from a related criminal prosecution).

arrangements for the child, as well as the contact information for the family member with whom the child intends to reside in the United States. This information is recorded on the child's Form I-213. Second, children apprehended at the border who are deemed "unaccompanied" are transferred to the custody of ORR while an appropriate custodian is located.<sup>61</sup> ORR personnel may interview the child about his or her journey and who helped arrange the travel. While ORR has not generally shared such information with the DHS, the Trump administration has suggested that it intends to curtail privacy protections for noncitizens<sup>62</sup> and it is possible that the DHS in the future could try to obtain this information from ORR.<sup>63</sup>

Third, state court pleadings and other documents submitted in the course of custody or guardianship proceedings in which Special Immigrant Juvenile Status (SIJS) findings are sought on behalf of a child may be another source of information about the child's travel. Depending on the type of proceeding and the state in question, the proceedings may be protected by confidentiality provisions or may be public record. Fourth, smuggling information might be elicited from a child by a U.S. Citizenship and Immigration Services (USCIS) officer during the child's interview in connection with an application for an immigration benefit such as asylum or SIJS or by an IJ or ICE trial attorney during testimony in immigration court. Finally, the government could elicit an adult family member's own statements during any of the above—the family member's conversations with CBP, ICE, or ORR during efforts to secure the child's release, statements made in state court pleadings/proceedings, declarations or testimony in support of a child's applications before USCIS or the immigration court, as well as if an aggressive IJ or ICE trial attorney wishes to question a family member who comes to court with the child.

### **III. Strategies to Mitigate Risk to Family Members as a Result of Their Participation in a Child's Immigration Case**

While it is impossible to predict every scenario in which a family member may be vulnerable to enforcement during the pendency of a child's case, what follows are general guiding principles for practitioners representing child clients and practitioners representing the family members of child clients. All representatives of child clients and of family members can provide a practical benefit to clients by following best practices to the fullest extent possible.

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<sup>61</sup> See generally Office of Refugee Resettlement, *About Unaccompanied Alien Children's Services*, <https://www.acf.hhs.gov/orr/programs/ucs/about>.

<sup>62</sup> See Exec. Order No. 13768, 82 Fed. Reg. 8799, *Enhancing Public Safety in the Interior of the United States* § 14 (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> ("Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.") [hereinafter "Interior Enforcement Executive Order"].

<sup>63</sup> Typically, the immigration court and ICE file for an unaccompanied child will contain an ORR Verification of Release Form, which indicates the name, contact information, and family relationship of the sponsor to whom the child was released from ORR custody. This form does not typically contain any direct information or evidence about the child's journey to the United States or any smuggling activity.

**A. Tip #1: Arrange for the Family Member to Have Access to Independent Counsel**

An advocate representing a child in removal proceedings has a duty to fully protect and advance her child client's legal interests. In many cases, a child client's well-being and express wishes may favor maximizing the protection for family members who may be vulnerable to immigration or criminal consequences for "smuggling." However, it may also be in the child's interest to have the family member participate in the child's immigration case, for example in a situation where the family member could initiate a state court action seeking SIJS findings on behalf of the child, or where the family member has direct knowledge helpful to the child's asylum claim and could provide testimony before USCIS or the immigration court. Depending on the family member's particular circumstances, it may not be so clearly in the interests of the family member to participate in the child's case, at least not without careful consideration of the risks involved and the level of participation contemplated.

**Because of the potential ethical issues presented by this situation, it is highly recommended that the family member retain separate counsel to advise him or her about the range of options of participation in the child's case, the potential risks presented by those options, and how to minimize the risk of smuggling-related civil immigration enforcement or criminal prosecution.** Of course, many family members may not be able to afford to pay private counsel. Legal services organizations working with children in removal proceedings might consider various strategies to provide family members access to a free or low-cost immigration consultations. These may include:

- Nonprofit practitioners from one organization could agree to provide limited scope consultations for the family members of another organization's child clients, and vice versa. In this way, family members can receive free legal services, and practitioners can help one another avoid ethical concerns raised by providing advice to a non-client party and potential conflicts. Part of the goal of the initial consultation will be to assess the family member's need for further legal assistance and provide referrals where appropriate. Ideally, the limited scope consultation could transform into full representation, if needed, but this will depend on the non-profit's capacity and resources, which are increasingly in demand.
- Depending on the resources in a given jurisdiction, perhaps a limited-scope *pro bono* project could be established in which members of the private immigration bar agree to provide one-time immigration consultations to family members of child clients.

Where a family member is able to obtain independent counsel, the family member's representative should coordinate closely with the family member client and with the child's representative to limit disclosure of potentially damaging information and limit in-person contact of the family member with immigration officials in the various manners described below. Joint strategy sessions between the child's immigration representative and the family member's representative will ensure minimization of the potential risk for the adult family member.

It is important to realize that family members will likely seek counsel from the child's representative as the child's representative may be the only trusted advocate with whom the family has contact, so it is important for the child's representative to be prepared for this request



from the family member by having a referral plan and relevant family preparedness and know-your-rights resources.<sup>64</sup>

## **B. Tip #2: Best Practices for a Thorough and Effective Immigration Consultation for the Family Member of the Child Client**

Before a family member makes the decision to participate in the child's case either through physical presence or written or telephonic testimony, it is best practice that he or she consult with his or her own immigration representative who can discuss the risks and benefits so that the family member can make an informed decision before proceeding. The consultation should include a thorough evaluation of the risk factors present in the family member's case, including but not limited to smuggling conduct. According to the Trump administration's announced immigration enforcement priorities,<sup>65</sup> other risk factors may include:

- lack of immigration status
- prior removal order
- entry without inspection and less than two years physical presence in the United States (if the government implements its announced plan to expand the scope of expedited removal; this expansion has not happened as of the date of this advisory's issuance)<sup>66</sup>
- use of false documents
- misrepresentation on public benefits requests, immigration applications, tax filings, or other government paperwork
- criminal history including arrests for minor offenses
- gang or drug trafficking involvement or allegations of the same

During the consultation the practitioner should also evaluate the family member's eligibility for immigration relief, including screening for asylum, U or T Nonimmigrant Status (as principal or as derivative on a family member's application), relief under the Violence Against Women Act, DACA, and family-based options.<sup>67</sup> If the family member is eligible for immigration relief, it would be wise for the family member to discuss this with an immigration practitioner and pursue such relief, if appropriate. The family member may need to obtain further

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<sup>64</sup> See resources listed *infra* note 69.

<sup>65</sup> See Interior Enforcement Executive Order, *supra* note 62, § 5; Memorandum from DHS Sec'y John Kelly, *Enforcement of the Immigration Laws To Serve the National Interest*, at 2 § A (Feb. 20, 2017), available at <https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest>.

<sup>66</sup> See Kelly Memo, *supra* note 2, § G; CLINIC Summary, *supra* note 4.

<sup>67</sup> For sample screening materials, see, for example, CLINIC, *Screening Tool*, <https://cliniclegal.org/sites/default/files/resources/presidential-transition/images/Screening-Tool.pdf>; CLINIC, *Is There an Immigration Benefit Available to You?*, [https://cliniclegal.org/sites/default/files/toolkits/case-management/Is-there-an-immigration-benefit-available-to-you-\(English\).pdf](https://cliniclegal.org/sites/default/files/toolkits/case-management/Is-there-an-immigration-benefit-available-to-you-(English).pdf); CLINIC, *¿Hay Algún Beneficio Migratorio Para Usted?*, [https://cliniclegal.org/sites/default/files/toolkits/case-management/Is-there-an-immigration-benefit-available-to-you-\(Spanish\).pdf](https://cliniclegal.org/sites/default/files/toolkits/case-management/Is-there-an-immigration-benefit-available-to-you-(Spanish).pdf).

documentation before the advising practitioner can provide detailed advice, such as by filing a FOIA or FBI records request,<sup>68</sup> or seeking arrest or court records.

In addition to assessing the specific risk factors and possible relief in the family member's case, a thorough consultation will also consider:

- Local practices. For example, have other practitioners reported ICE enforcement or adverse consequences to participating family members in a similar context, be it state court, USCIS office, or immigration court? It may be wise to query local listservs or contact experienced local practitioners to learn about current trends.
- Is the family member already on the immigration “radar”—*i.e.*, has he or she filed an application for relief, is he or she in removal proceedings, has he or she come forward as the child's “sponsor,” or was his or her information provided to CBP during the child's apprehension such that his or her name and contact information is already known to immigration authorities? If so, perhaps participation in the child's case would carry minimal additional risk.
- Is there information in the family member's “record” (*e.g.* a prior removal order or criminal history) that would already make him or her someone that ICE would be interested in? If so, consider whether the family member's participation could increase the person's risk exposure by making him or her easier to locate and arrest.
- In a case where the family member is considering whether to participate in a state court proceeding concerning a child, consider whether state law confidentiality provisions apply to the proceeding. For example, if the family member files a custody action, does his or her name become searchable on a public court website such that anyone can access the pleadings or obtain information about the date and time of upcoming hearings?
- Are the risk factors present in the family member's case based on facts not yet disclosed to the government? For example, perhaps the family member in fact sent money to bring a child to the United States, but this information has never been provided to any government entity. If so, consider whether the family member could participate in the child's case in a way that would avoid the need to disclose these facts (see Sections III.C-F below).

The consultation should include a discussion with the family member about the risks and benefits of participation in the child's case tailored to the specific context(s) in which the family member's participation is sought. There are different fora where family member participation might be sought, and each situation comes with its own potential risks that should be analyzed distinctly. Common scenarios in which a family member's participation may be sought include:

- Participation in the child's immigration court proceedings (including physical presence and/or oral testimony at a hearing)

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<sup>68</sup> Information about filing FOIA requests with USCIS can be found on the USCIS website. USCIS, *How to File a FOIA/PA Request*, <https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request>. The FBI website contains information about submitting FBI records requests. FBI, *Identity History Summary Checks*, <https://www.fbi.gov/services/cjis/identity-history-summary-checks>.

- Participation related to the child’s application for an immigration benefit with USCIS (including oral testimony or the submission of a written declaration in support of the child’s claim)
- Participation in the state court SIJS predicate proceeding

In addition to these scenarios, other points of contact with federal authorities for family members include volunteering to be a sponsor to care for a child released from ORR, coming forward for a child being released from federal custody, appearing before DHS to accept service of a child’s NTA where such service is required by regulation or case law, and being asked to accompany a child to ICE check-ins. The consulting practitioner should present the family member with the range of options for participation, as appropriate, and discuss the pros and cons of those options.

It is also wise to provide the family member with general advice that he or she can follow to mitigate the risk of civil immigration enforcement or criminal prosecution. This advice might include:

- Advising an adult family member **not to share information with others (including the child) regarding the family member’s participation in arranging the child’s journey.** Limiting other people’s knowledge of details regarding a family member’s “smuggling” conduct—including details such as payments or arrangements made by a family member for a child’s passage—decreases the likelihood that such information may come into the record in situations such as an asylum or adjustment interview with a USCIS officer or a cross-examination of a child in immigration court.
- Providing the family member with general know-your-rights information.<sup>69</sup> The family member should be advised to avoid conduct that could lead to a law enforcement encounter, be careful about use of social media,<sup>70</sup> exercise the right to remain silent (and ask to speak with his or her representative) in the event of arrest or detention, and remember that law enforcement officers including ICE need a judicial warrant, which is not the same as an administrative warrant issued by DHS, or consent to enter a home.

At the conclusion of the consultation, it is best practice to document the fact that the consultation occurred, that the family member was informed of potential risks, and that (if accurate) the family member decided to participate in the child’s case.

The subsequent tips will discuss strategies for mitigating risk when the family member does decide to participate in the child’s case. Two main goals for protecting noncitizen family members who may be vulnerable to charges of smuggling from risk exposure are: (1) to limit disclosure of damaging information during the course of the child’s case; and (2) to minimize or

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<sup>69</sup> See CLINIC, *Know Your Rights: A Collection of Resources*, <https://cliniclegal.org/resources/know-your-rights>; Kids in Need of Defense (KIND), *Know Your Rights Information on ICE Raids for Parents/Community/Attorneys*, <https://supportkind.org/resources/know-rights-information-ice-raids-parentscommunityattorneys/>.

<sup>70</sup> See National Immigration Project of the National Lawyers Guild, *Community Advisory, Social Media, Criminalization, and Immigration* (Apr. 3, 2017), available at [https://www.nationalimmigrationproject.org/PDFs/community/2017\\_03Apr\\_comm-adv-social.pdf](https://www.nationalimmigrationproject.org/PDFs/community/2017_03Apr_comm-adv-social.pdf).

eliminate circumstances where the vulnerable family member might be physically detained or served with an NTA by government agents. Of course, it is impossible to predict every scenario and practitioners should analyze the circumstances of their individual case to determine what the most likely risk points are. The following discussion provides general guiding principles to consider as practitioners navigate the particularities of clients' individual circumstances.

### **C. Tip #3: Risk Mitigation Strategies When a Family Member Is Considering Presence and/or Live Testimony at Court or an Administrative Proceeding**

A practitioner advising a family member should advise him or her regarding benefits and drawbacks of physically appearing and/or providing in-person testimony in support of the child's case, whether in immigration court, at a USCIS Office, in state court if the child is seeking an SIJS predicate order, or at an ICE check-in. Given that many family members are strongly motivated to support a child's case and that their participation may be critical to a child's removal defense, practitioners advising family members of children in removal proceedings should be prepared to analyze and advise family members regarding areas of greatest risk based on the facts of their case.

Where there is reason to believe that being physically present at immigration court, USCIS, or state court may expose the family member to service of an NTA or potentially to apprehension or detention and the adult is thus loathe to appear, consider arranging for the family member to appear telephonically<sup>71</sup> (in ideal circumstances, with his or her own counsel present for telephonic testimony) or proffering a written declaration (see Section III.D below). This could apply to family members who were involved in a child's journey, as well as those who have additional risk factors such as prior criminal or immigration issues.

In the case of children eligible for SIJS in which a state court action must be initiated in order to seek SIJS predicate findings, it may not be possible for the family member to avoid a physical appearance. This will depend on the particularities of the state law governing the type of state court proceeding. In many states, for example, the adult family member is the petitioner bringing the state court action and must appear at a hearing before the state court.

If a family member decides to testify in a proceeding in support of the child, it is important that the family member be carefully prepared in advance for questions that may arise. In a preparation session, the family member could be instructed to pause after every question on cross examination to give the practitioner time to object if necessary. During preparation, the

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<sup>71</sup> See, e.g., Immigration Court Practice Manual Ch. 4.15(o)(iii) (discussing process for seeking leave for witness to testify telephonically before the immigration court), available at <https://www.justice.gov/sites/default/files/pages/attachments/2017/06/27/practicemanual.pdf#page=107>; 8 C.F.R. § 208.9 (discussing asylum interview procedures including the applicant's right to present witnesses; no mention of telephonic appearance); USCIS, *Affirmative Asylum Procedures Manual*, at 16 (Nov. 2013), available at [https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum\\_Procedures\\_Manual\\_2013.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Asylum_Procedures_Manual_2013.pdf) (noting the applicant's right to present witnesses but not specifically discussing any procedure for telephonic appearances). Note that an asylum officer might be unwilling to allow an individual to testify telephonically without having a mechanism to verify the individual's identity. Practitioners could consider submitting a notarized affidavit from the individual indicating his or her willingness and availability to testify telephonically during the child's interview, along with a phone number where the person can be reached.

family member should be reminded that he or she should not guess or speculate about specific arrangements made regarding the child's journey to the United States. "I'm not sure" or "I don't know" are perfectly acceptable answers, if true. The family member could also be advised to invoke his or her Fifth Amendment privilege against self-incrimination if the question calls for an answer that could give rise to possible criminal liability (such as illegal entry, smuggling, etc.).<sup>72</sup> It will be essential to prepare the family member on how to invoke the Fifth Amendment right. This preparation should consist of practice answering questions by invoking this privilege. If the family member witness has difficulty asserting this privilege, the practitioner should argue that this privilege can be invoked by the practitioner, assuming the practitioner represents that family member as well barring any potential conflict of interest.<sup>73</sup> Ideally though likely unrealistic given limited family resources and non-profit capacity, the family member will have separate representation during such a proceeding.

The practitioner appearing at the hearing or interview should also prepare to object to questioning. For example, if an ICE trial attorney, IJ, asylum officer or other official asks questions about the child's journey to elicit whether a family member in the United States arranged for the child's passage, and if these facts are not relevant to the hearing or interview, practitioners should object as to relevance. If the IJ overrules the objection, family members could be advised to invoke their Fifth Amendment privilege against self-incrimination, or the practitioner could seek a continuance citing the need for the family member to be represented by independent counsel who can be present for any further questioning on the subject and help the family member protect his or her rights. If the IJ does not wish to continue the proceedings for this purpose, the practitioner could also orally move the court to limit the types of questions that the ICE trial attorney can ask the family member witness on cross-examination via a motion *in limine*.<sup>74</sup>

#### **D. Tip #4: Risk Mitigation Strategies Where the Family Member Submits Written Testimony in an Immigration or Family Court Matter Relating to the Child**

If a family member decides to submit written testimony in support of a child's case, efforts should be made to avoid unnecessary disclosures regarding the family member. This may mean limiting discussion of the family member's nationality, citizenship, place of birth,

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<sup>72</sup> The privilege against self-incrimination may be "asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. U.S.*, 406 U.S. 441, 444-45 (1972); *see also McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it").

<sup>73</sup> *See Matter of Sandoval*, 17 I. & N. Dec. 70, 72 n.1 (BIA 1979) (finding that the Fifth Amendment privilege had been properly raised where counsel invoked it on behalf of the client who faced a "language barrier").

<sup>74</sup> For a sample motion *in limine* in the suppression context, see materials prepared by University of Maryland School of Law clinic students, *available at* <https://www.law.umaryland.edu/programs/clinic/initiatives/immigration/documents/motion-limine.pdf>.

immigration status, immigration history, or any other information relating to the family member's alienage as well as the date, details, and fact of his or her entry into the United States.<sup>75</sup> When possible, it may also mean avoiding disclosure of the family member's physical address. One way of doing this is to notarize the written testimony rather than submitting a copy of the driver's license or passport. Avoiding an unnecessary disclosure also includes avoiding discussion of the family member's knowledge of or involvement in the child's journey to the United States.<sup>76</sup>

When considering whether to include information such as the family member's alienage or entry details, evaluate whether it is necessary, and if not, whether including it is damaging or helpful. If it is necessary,<sup>77</sup> practitioners should limit and carefully word such disclosures. A best practice would be for the family member to work with his or her own representative to draft and finalize the statement; if this is not possible, it would be wise to at least have a practitioner look over the statement and address any concerns before it is finalized and signed.

An example of an unnecessary disclosure would be affirmatively including information about the family member's country of birth, length of presence in the United States, or involvement in bringing the child to the United States in the family court pleadings. While pleading requirements will depend on the applicable state law, such information is likely not relevant or required in the family law custody context.<sup>78</sup>

#### **E. Tip #5: Strategies for Mitigating Damaging Impact of Child's Testimony and Documentation on Family Member**

Regardless of a family member's level of direct participation in the child's immigration case, questions could nevertheless arise in the context of the child's immigration proceedings that implicate the family member's smuggling conduct. It is thus wise for advocates representing child clients to prepare for such questions and try to prevent the disclosure of damaging information about family members to the extent possible. These disclosures could

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<sup>75</sup> Details regarding entry could become evidence used against the family member; for example if the family member discloses that he or she entered the United States fewer than two years ago, he or she could be at risk of removal without a hearing if the new administration acts on its stated intent to expand the current scope of expedited removal. *See supra* note 66.

<sup>76</sup> Disclosure of the family member's role in facilitating the child's entry could put him or her at higher risk for immigration enforcement, *see* Sections I & II *supra*. It could also put the family member at risk of criminal prosecution. If included in sworn pleadings or testimony, it is possible it could be considered admissible in federal criminal proceedings.

<sup>77</sup> An example of a necessary disclosure would be providing the family member's address in bringing a custody proceeding in state court. Such information may be required under state custody laws or procedures.

<sup>78</sup> *Cf. In re Custody of A.L.R.*, 830 N.W.2d 163 (Minn. Ct. App. 2012) (concluding that district court should not have relied on mother's undocumented status as a basis for granting custody to the child's grandparents as "[t]here is nothing in the record to indicate that mother's parenting ability or the child's well-being is affected by her immigration status").

occur through written testimony submitted by the child, or via oral testimony at an interview or hearing.

### *Tips for Written Testimony and Documentation*

Advocates for children should be mindful of unnecessary disclosures when assisting the child in preparing applications for relief, written declarations, or other documentation to be submitted to immigration authorities. An example of an unnecessary disclosure is a child naming a family member who the child believes paid for the journey or made arrangements (“...so I told my grandmother who lives in Los Angeles, and she paid for me to come to the United States”) in an asylum application where the child discusses difficult circumstances experienced in the home country. While this may be an understandable way of concluding a narrative about hardships and the child’s motivations, it is not necessary for the adjudication of the child’s asylum claim, and therefore is unnecessary. Such a disclosure might lead an adjudicator to ask probing questions at the child’s asylum interview, such as the name of the child’s grandmother, how much she paid for the child to cross and to whom, or what the precise arrangements were. These statements (both the written statement in the asylum application and any oral statements from the child at the interview) could later be used by the government as evidence to support smuggling inadmissibility or deportability charges or a referral for criminal prosecution (even if not clearly admissible in the criminal case itself).

If possible, an advocate should avoid submitting documentation that contains evidence of the family member’s alienage. For example, a child’s birth certificate may list the parents’ full name, date of birth, and nationality or place of birth, which would establish alienage. Instead of a birth certificate, a passport or other government issued identification that does not contain the name of the parents would be preferable.<sup>79</sup>

### *Tips for Oral Testimony from Child*

It is not uncommon for an ICE trial attorney, IJ, asylum officer or other official to ask a child questions not directly relevant to a child’s removability or eligibility for relief. In light of the Kelly Memo, questions about the child’s journey—specifically to elicit whether a noncitizen family member in the United States arranged for the child’s passage—could become routine. Such questions are already routine, at least in some jurisdictions, during a child’s USCIS interview for asylum or SIJS. Where these facts are not relevant to the hearing or interview, practitioners should object as to relevance. Child clients should be made aware that they do not need to guess or speculate about specific arrangements made on their behalf for their passage to the United States. “I’m not sure” or “I don’t know” are perfectly acceptable when true.

In sum, practitioners should advise children not to offer information about their journey, and if asked directly, avoid speculation if they do not have actual knowledge of who arranged for

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<sup>79</sup> Further, in immigration court, practitioners may want to consider whether the representative’s office address could be provided as the mailing address for the child, as an NTA for a parent may reasonably be served on the parent at the child’s address if it is known they live together. However, practitioners will want to carefully assess the benefits and drawbacks of this strategy and in particular will want to consider whether such a practice is compliant with INA § 239(a)(1)(F).

their passage. Practitioners should also advise their child clients about the potential risks of affirmatively offering testimony regarding involvement of family members in their journey to the United States where such information is not necessary.

## **F. Other Tips or Best Practices for Family Members of Child Clients**

The Kelly Memo suggests that the government may attempt to punish noncitizen family members whom it suspects of smuggling-related conduct, whether it can prove that that individual engaged in “smuggling” or not. Given that the potential punishment could go beyond smuggling-related grounds, family members should be advised of their rights and how to protect their rights in the following ways:

- Practitioners working with adult family members who may be suspected and investigated for smuggling should advise them to avoid making false statements by exercising their right to remain silent if approached by a law enforcement officer. It is important to remember that in the context of investigating potential federal criminal activity (such as for smuggling), federal officials can charge an individual with simply making a false statement under 18 U.S.C. § 1001.
- If the noncitizen adult is subject to reinstatement of removal or expedited removal, the advocate advising the individual should also make the individual aware of the need to request a credible or reasonable fear interview by an asylum officer if they are detained by ICE or CBP and fear returning to their home country.<sup>80</sup>
- To avoid risk of erroneous placement in expedited removal proceedings should this be expanded to the interior,<sup>81</sup> practitioners should advise clients to gather documentation showing that they have been physically present in the United States for more than two years and keep this documentation in a safe place.<sup>82</sup>
- Finally, advocates can refer clients and other concerned parties to “Know Your Rights” materials and community resources for emergency planning and preparedness.<sup>83</sup>

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<sup>80</sup> For pro se materials on the credible and reasonable fear process, see Florence Project, *Guide to Credible and Reasonable Fear Proceedings* (2013), available at <https://firrp.org/media/CF-RF-Guide-2013.pdf>.

<sup>81</sup> See *supra* note 66.

<sup>82</sup> For discussion of the risks and benefits of carrying such documentation rather than keeping it in a safe place, see National Immigration Project of the National Lawyers Guild, American Immigration Council & American Civil Liberties Union, *Practice Advisory, Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)*, at 10-11 (Feb. 20, 2017), available at [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/gen/2017\\_17Feb-expedited-removal.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_17Feb-expedited-removal.pdf).

<sup>83</sup> See resources listed *supra* note 69.



## IV. Conclusion

In this new enforcement landscape, it appears that civil immigration enforcement and/or criminal prosecutions against those accused of “smuggling” will increase. In light of the Kelly and Sessions Memos, this practice advisory is meant to encourage practitioners representing both child clients and noncitizen family members to consider how to strategically limit exposure of their clients and families to possible future civil immigration enforcement or criminal prosecution. While the practice advisory serves as a starting point for overall strategies to limit immigration and criminal exposure for smuggling-related offenses, it is likely that should such enforcement become more commonplace, new suggestions or best practices will emerge. Accordingly, practitioners are encouraged to share information about local practices with one another, such as lines of questioning about smuggling from ICE trial attorneys, IJs, or asylum officers, as well as strategies they have successfully employed to mitigate risk for clients and their families. Additionally, should targeting of family members as “smugglers” become more common, practitioners should consider creative strategies to bring awareness to the issue, including use of the news media or organizing efforts or campaigns, to pressure the government to reduce or eliminate the retaliation against family members seeking to reunite with their loved ones and to protect their children from harm.<sup>84</sup>

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<sup>84</sup> Secretary Kelly previously recognized the harm many Central American families face in an article he wrote as a Marine Corps General and the commander of the U.S. Southern Command. John F. Kelly, *SOUTHCOM Chief: Central America Drug War a Dire Threat to U.S. National Security*, AIRFORCE TIMES, July 8, 2014 (on file with authors).

## Appendix A: Common Criminal Smuggling Charges and Their Elements<sup>85</sup>

CHARGE	ELEMENTS
<b>BRINGING TO UNITED STATES (OTHER THAN DESIGNATED PLACE)</b>  <b>8 U.S.C. § 1324(a)(1)(A)(i)</b>	<p>First, the defendant [brought] [attempted to bring] a person who was an alien to the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;</p> <p>Second, the defendant knew that the person was an alien; [and]</p> <p>Third, the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official[.] [; and]</p> <p>[Fourth, the defendant did something that was a substantial step toward committing the crime.</p> <p>Mere preparation is not a substantial step toward committing a crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]</p> <p>An alien is a person who is not a natural-born or naturalized citizen of the United States.</p>
<b>ILLEGAL TRANSPORTATION</b>  <b>8 U.S.C. § 1324(a)(1)(A)(ii)</b>	<p>First, [<i>name of alien</i>] was an alien;</p> <p>Second, [<i>name of alien</i>] was not lawfully in the United States;</p> <p>Third, the defendant [knew] [acted in reckless disregard of the fact] that [<i>name of alien</i>] was not lawfully in the United States; [and]</p> <p>Fourth, the defendant [transported or moved] [attempted to transport or move] [<i>name of alien</i>] in order to help [him] [her] remain in the United States illegally[.] [; and]</p> <p>[Fifth, the defendant did something that was a substantial step toward committing the crime.</p> <p>Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]</p>

<sup>85</sup> Note that the language in Appendix A is derived from the Ninth Circuit's Manual of Model Criminal Jury Instructions, available at <http://www3.ce9.uscourts.gov/jury-instructions/node/660>. Practitioners may wish to consult the pattern jury instructions relevant to their jurisdiction.

	<p>An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an Immigration Officer.</p>
<p><b>ENCOURAGING ILLEGAL ENTRY</b></p> <p><b>8 U.S.C. § 1324(a)(1)(A)(iv)</b></p>	<p>First, <i>[name of alien]</i> was an alien;</p> <p>Second, the defendant encouraged or induced <i>[name of alien]</i> to [come to] [enter] [reside in] the United States in violation of law; and</p> <p>Third, the defendant [knew] [acted in reckless disregard of the fact] that <i>[name of alien]</i>'s [coming to] [entry into] [residence in] the United States would be in violation of the law.</p> <p>An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien enters the United States in violation of law if not duly admitted by an Immigration Officer.</p>
<p><b>BRINGING TO THE UNITED STATES (WITHOUT AUTHORIZATION)</b></p> <p><b>8 U.S.C. § 1324(a)(2)(B)(i)-(iii)</b></p>	<p>First, the defendant [brought] [attempted to bring] a person who was an alien to the United States [[for the purpose of the defendant's [commercial advantage] [private gain]] [and upon arrival did not immediately bring and present the alien to an appropriate immigration official at a designated port of entry] [with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year];</p> <p>Second, the defendant [knew] [was in reckless disregard of the fact] that the person was an alien who had not received prior official authorization to [come to] [enter] [reside in] the United States; [and]</p> <p>Third, the defendant acted with the intent to violate the United States immigration laws[.] [; and]</p> <p>[Fourth, the defendant did something that was a substantial step toward committing the crime.</p> <p>Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]</p> <p>An alien is a person who is not a natural-born or naturalized citizen of the United States.</p>

## Appendix B: Smuggling Grounds, Exceptions, and Statutory Language

SMUGGLING GROUNDS & EXCEPTIONS	STATUTORY LANGUAGE
<p><b>SMUGGLING — INADMISSIBILITY GROUND</b>  <b>INA § 212(a)(6)(E)(i)</b></p> <p style="text-align: center;">* * *</p> <p><b>Exceptions or waivers to this ground</b></p> <p><b>INA § 212(a)(6)(E)(ii-iii)</b></p> <p><b>INA § 212(d)(11)</b></p>	<p><b>(i) In general</b>  Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.</p> <p style="text-align: center;">* * *</p> <p><b>(ii) Special rule in the case of family reunification</b>  Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.</p> <p><b>(iii) Waiver authorized</b>  For provision authorizing waiver of clause (i), see subsection (d)(11).</p> <p><b>(d)(11)</b> The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.</p>
<p><b>SMUGGLING — DEPORTABILITY GROUND</b>  <b>INA § 237(a)(1)(E)(i)</b></p> <p style="text-align: center;">* * *</p> <p><b>Exceptions or waivers to this ground</b></p> <p><b>INA § 237(a)(1)(E)(ii)-(iii)</b></p>	<p><b>(i) In general</b>  Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.</p> <p style="text-align: center;">* * *</p> <p><b>(ii) Special rule in the case of family reunification</b>  Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the</p>

	<p>Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.</p> <p><b>(iii)Waiver authorized</b>  The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.</p>
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The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—300 organizations in 47 states and the District of Columbia—is the largest in the nation.

In response to growing anti-immigrant sentiment and to prepare for policy measures that will hurt immigrant families, CLINIC launched the Defending Vulnerable Populations (DVP) Project. The Project's primary objective is to increase qualified representation for immigrant respondents in immigration court proceedings. To accomplish this, the DVP Project conducts court skills trainings for nonprofit agency staff and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

The DVP Project offers a variety of written resources including timely practice advisories on removal defense tactics, amicus briefs before the BIA and U.S. Courts of Appeals, and *pro se* materials to empower the immigrant community. Examples of these include a practice advisory entitled "Strategies to Combat Government Efforts to Terminate Unaccompanied Child Determinations" (May 2017), an amicus brief on the "serious nonpolitical crime" bar to asylum as it relates to youth, and an article in Spanish and English on how to get back one's immigration bond money.

These resources and others are available on the DVP webpage at [cliniclegal.org/defending-vulnerable-populations](http://cliniclegal.org/defending-vulnerable-populations).



Public Counsel is the largest pro bono law firm in the nation working with major law firms and corporations to change people's futures. Founded in 1970, Public Counsel is the public interest law firm of the Los Angeles County and Beverly Hills Bar Associations as well as the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. The staff of 71 attorneys and 50 support staff - including five social workers - along with over 5,000 volunteer lawyers, law students and legal professionals assists over 30,000 children, youth, families, and community organizations every year. The staff provides training, model pleadings and forms to volunteers.

Public Counsel's Immigrants' Rights Project provides legal representation to children and families in affirmative immigration cases and in removal proceedings. In addition, Public Counsel's substantive areas of work include: Veterans Advocacy; Appellate Law & Federal Pro Se; Community Development; Early Care and Education Law; Homelessness Prevention Law; Children's Rights, Adoptions; Consumer Law; Bankruptcy; and Opportunity Under Law, which combats economic injustice.

For more information and access to Public Counsel's Immigrants' Rights Project resources, please visit [http://www.publiccounsel.org/practice\\_areas/immigrant\\_rights](http://www.publiccounsel.org/practice_areas/immigrant_rights).