national IMMIGRATION project of the National Lawyers Guild

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

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

How is an "unaccompanied alien child" (UC)[2] defined?

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

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[2] On July 23, 2021, the Executive Office for Immigration Review (EOIR) issued guidance directing EOIR employees—which include immigration judges—to avoid the use of the term "alien" unless quoting legal authority. The memo was issued in response to President Biden's executive order directing the federal government to "develop welcoming strategies that promote integration [and] inclusion." The memo directs EOIR to replace the term "unaccompanied alien child" with "unaccompanied noncitizen child," "unaccompanied non-U.S. citizen child," or "UC." This fact sheet uses the terms "unaccompanied child" or "UC" throughout.

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

Recognizing the vulnerability and special needs of UCs, in 2008 Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. 110–457, 122 Stat. 5044. Among other protections for unaccompanied children, the TVPRA grants USCIS initial jurisdiction over their asylum applications. TVPRA § 235(d)(7)(B), *codified at* 8 U.S.C. § 1158(b)(3)(C), INA § 208(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . ."). Thus, while the default rule for individuals in removal proceedings is that the immigration court has exclusive jurisdiction over their asylum applications, *see* 8 CFR § 208.2(b), the TVPRA creates a statutory exception to that rule for unaccompanied children. As the Board of Immigration Appeals (BIA) has recognized, "unaccompanied alien children have a statutory right to initial consideration of an asylum application by the DHS." *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 n.2 (BIA 2017); *see also Matter of M-A-C-O-*, 27 I&N Dec. 477, 479 (BIA 2018) ("[S]ection 208(b)(3)(C) of the Act limits an Immigration Judge's jurisdiction over an asylum application *filed by a UAC*.").

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

USCIS follows a 2013 policy in determining its jurisdiction pursuant to the TVPRA UC provision. Although USCIS issued another policy in 2019 about initial asylum jurisdiction in UC cases, the 2019 policy was swiftly enjoined, as described below. Under the 2013 policy currently in effect, USCIS must take initial jurisdiction over the asylum application of an individual in removal proceedings whom Immigration and Customs Enforcement (ICE) or CBP previously determined to be a UC (unless there was an "affirmative act" by HHS, ICE, or CBP to terminate the UC finding *before* the applicant filed the initial asylum application[3]). USCIS must adopt the previous UC finding and take jurisdiction even if there is evidence that the applicant turned 18 or reunified with a parent or legal guardian before filing an asylum application. If an applicant has no previous UC determination, then USCIS takes jurisdiction if it finds that the applicant met the UC definition on the date of initial filing of the asylum application—whether that filing was with USCIS or the immigration court.

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

In July 2019, four UC asylum seekers brought suit in the U.S. District Court for the District of Maryland to challenge a May 2019 USCIS policy that would have rescinded the 2013 policy on UC asylum jurisdiction described above. The suit challenged the legality of the 2019 policy based on the TVPRA, the Due Process Clause, and the Administrative Procedure Act. The district court, concluding that the plaintiffs were likely to succeed on the merits,[4] issued a nationwide preliminary injunction enjoining USCIS from applying the 2019 policy. The preliminary injunction prohibits USCIS from rejecting jurisdiction over the application of any UC whose application would have been accepted under the previous policy, and requires USCIS

[3] Note that as of March 2021, USCIS has placed on hold all asylum applications that, in USCIS's view, present a possible "affirmative act" that could cause USCIS to reject jurisdiction over an asylum application—with the exception of those cases in which the purported "affirmative act" relates to ICE placing a young person in adult immigration detention.

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

to retract any adverse decisions rendered applying the 2019 policy and reinstate consideration applying the 2013 policy. In other words, the *J.O.P.* injunction requires USCIS to accept jurisdiction over UC asylum cases if they meet the criteria outlined in the 2013 policy, described above.

On Dec. 21, 2020, the district court granted the *J.O.P.* plaintiffs' motions for class certification and to amend the preliminary injunction. The certified class is defined as

> All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be an Unaccompanied Alien Child ("UAC"); and (2) who filed an asylum application that was pending with the United States Citizenship and Immigration Services ("USCIS"); and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual's asylum application on the merits.

The amended injunction retains the provisions of the original injunction described above. In addition, the amended injunction prohibits USCIS from deferring to Executive Office for Immigration Review (EOIR) determinations in assessing USCIS's jurisdiction over asylum applications filed by class members. The amended injunction also enjoins ICE from opposing continuances or other postponements of a class member's removal proceedings, or taking the position that USCIS does not have initial jurisdiction of the class member's asylum application, while the class member's asylum application is pending with USCIS.

The order certifying a nationwide class and amending the injunction can be viewed on the USCIS website.

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

As discussed above, those entitled to file their asylum application initially with USCIS as UCs despite being in removal proceedings are those who, at the time of first filing the asylum application, either (1) meet the definition of UC found at 6 U.S.C. § 279(g)(2), or (2) were previously determined by ICE or CBP to be a UC and the UC determination has not been terminated. For those in category (2), whether the UC has reached the age of 18 or reunified with a parent or legal guardian at the time of filing is irrelevant. Individuals falling into one of these categories should file an asylum application with USCIS following applicable instructions.[5]

Respondents entitled to initial USCIS jurisdiction should file a motion for administrative closure, a continuance, or status docket placement in immigration court, attaching proof that they have

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

filed, or intend to file, an asylum application with USCIS.[6] As discussed above, the *J.O.P.* injunction prohibits ICE from opposing requests for a continuance or other postponements in the removal proceedings of a class member with an asylum application pending with USCIS. Thus, class members should reach out to ICE Office of the Principal Legal Advisor (OPLA)—the attorneys who represent DHS in immigration court proceedings—with proof that the asylum application is pending with USCIS, seeking OPLA's joinder of or non-opposition to the class member's proposed motion for administrative closure, placement on the status docket, or a continuance. If OCC indicates an intention to oppose the motion, practitioners may bring to OPLA's attention the December 2020 injunction. Alternatively, and depending on the client's circumstances and wishes, practitioners could ask OPLA to exercise prosecutorial discretion to move to dismiss the class member's removal proceedings given the pending USCIS asylum application and any other relevant factors.[7]

An immigration judge's (IJ) granting of administrative closure, continuances, or other postponements of the removal case until USCIS has issued a decision gives effect to UCs' "statutory right to initial consideration of an asylum application by the DHS." *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. at 169 n.2. EOIR guidance on administrative closure states that where a respondent requests administrative closure and DHS does not object, the IJ should generally grant administrative closure. Given the *J.O.P.* injunction, class members' requests for administrative closure should generally fall within this category. EOIR guidance and BIA precedent also recognize that administrative closure can be appropriate to allow a respondent to file an application with USCIS or await USCIS's adjudication of a pending application.[8] EOIR guidance also recognizes these cases as appropriate for placement on status dockets, an option that may be desirable for some UCs including those in the jurisdiction of the Sixth Circuit where the IJ may take the position that administrative closure is not an option. EOIR's status docket memo states that "cases in which a confirmed unaccompanied alien child (UAC) has filed an asylum application with USCIS must be continued while that application is pending adjudication with USCIS because USCIS has initial jurisdiction over such applications." Even if an IJ does not use a status docket or declines to put the case on the status docket, IJs must follow the framework set forth in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), in evaluating continuance requests. A continuance in this situation is warranted under the *L-A-B-R-* framework because the USCIS adjudication will "materially affect the outcome of the removal proceedings." *Id.* at 406. A grant of asylum by USCIS would constitute grounds to terminate the removal proceedings, *see* INA § 208(c)(1)(A); *cf. Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018) (termination is appropriate when DHS cannot meet its burden to prove that a

[6] In a 2021 decision, the attorney general overruled *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), thereby restoring the general authority of immigration judges and the BIA to administratively close cases. *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). However, EOIR appears to take the position that administrative closure is generally not available in the jurisdiction of the Sixth Circuit, due to a 2020 decision, *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). *See* EOIR administrative closure guidance at 4 n.4.

[7] Information about OPLA's prosecutorial discretion guidance can be found at https://www.ice.gov/about-ice/opla/prosecutorial-discretion.

[8] *See* EOIR administrative closure guidance at 3; *Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (listing among administrative closure factors "the likelihood the respondent will succeed on any . . . application . . . he or she is pursuing outside of removal proceedings"); *see also Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017) (where one party opposes administrative closure, the primary factor is the persuasiveness of the opposing party's reason for the case to proceed to the merits).

respondent is removable). A USCIS decision not to grant asylum would cause the IJ to gain jurisdiction to adjudicate the asylum application.

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

IJs are not required to make an independent UC determination while a respondent is pursuing asylum with USCIS under that agency's UC jurisdiction policy. In *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), the BIA concluded that the TVPRA asylum provision "does not prevent the Immigration Judge from determining whether initial jurisdiction over an application filed by an alien who has turned 18 lies with the Immigration Judge or the USCIS," and that a prior DHS or HHS UC determination was not binding on an IJ. *Id.* at 479. The BIA concluded that the IJ had not erred in taking jurisdiction over the respondent's asylum application, where the respondent had filed after turning 18.[9] However, neither *M-A-C-O-* nor any other authority *requires* the IJ to independently determine jurisdiction rather than postpone the case to allow USCIS—the agency Congress vested with initial jurisdiction—to adjudicate the asylum application pursuant to that agency's policy on initial jurisdiction. Indeed, a September 2017 EOIR Office of the General Counsel legal opinion states that IJs "may"—not must—"resolve any dispute about UAC status" in removal proceedings. *See also* Memorandum from Jean King, Acting Dir., EOIR, "Effect of Department of Homeland Security Enforcement Priorities," at 2 (June 11, 2021) (emphasizing that the role of IJs and the BIA is to "resolve disputes"). Further, under the *J.O.P.* injunction, OPLA is prohibited from opposing USCIS's initial jurisdiction in class members' removal proceedings; meaning that "disputes" between the parties about initial asylum jurisdiction should be rare.

IJs' holding cases in abeyance to allow USCIS to exercise its initial jurisdiction pursuant to that agency's policy facilitates coordination among agencies. EOIR issued guidance a few months after the TVPRA was enacted stating its policy "to ensure smooth coordination among government agencies responsible for the implementation of the asylum jurisdictional provision of the TVPRA." EOIR, Office of the Chief Immigration Judge, Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance), at 2 (Mar. 20, 2009); *accord* 2017 EOIR General Counsel opinion at 6 n.3. In some cases, ICE took an inconsistent position about initial jurisdiction from that of its sister agency USCIS, advocating for the IJ to take jurisdiction and against continuances to allow USCIS to adjudicate pending asylum applications. After the plaintiffs in *J.O.P.* challenged this conduct, the court enjoined ICE from opposing continuances or other postponements, or advocating for the IJ to take jurisdiction, while a class member who filed their asylum application with USCIS awaits an adjudication. Given that Congress granted USCIS, not EOIR, initial jurisdiction over UC asylum cases, IJs may determine that refraining from re-assessing jurisdiction while USCIS is adjudicating a case pursuant to USCIS's own jurisdiction policy facilitates "smooth coordination" among agencies. This point is underscored by the fact that the *J.O.P.* injunction also prohibits USCIS from deferring to an IJ's determination that the IJ has initial jurisdiction; thus an IJ's insistence on moving forward despite USCIS having taken initial jurisdiction will result in discoordination and extremely inefficient use of agency resources.

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

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

If an IJ indicates an intent to re-determine jurisdiction despite USCIS already having accepted the application pursuant to that agency's jurisdiction policy, practitioners should request a briefing schedule and the opportunity to submit arguments and evidence in support of USCIS jurisdiction. It is important that practitioners challenge any IJ jurisdictional re-determinations to preserve the best possible record for appeal to the BIA and eventual petition for review in federal court.

The question of jurisdiction can be fact-intensive and complex. It may require testimony and arguments about when the respondent first "filed" for asylum—which has been interpreted to mean the time the child first expressed an intent to seek asylum to a government official—which may be particularly relevant in a case where the asylum application receipt date was after the child's 18th birthday.[10] It may also involve nuanced determinations about a caregiver's "availability" to provide adequate care at the time of filing. *See, e.g.*, *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) ("[T]o be 'available to provide care' for a child, a parent must be available to provide what is necessary for the child's health, welfare, maintenance, and protection," including their physical and mental well-being); CIS Ombudsman, Ensuring a Fair and Effective Asylum Process for Unaccompanied Children, at 8 (Sept. 20, 2012) ("Exploring questions regarding parental behavior and whether it meets the child's physical, mental, and/or emotional needs is more appropriately within the purview of a trained clinician," particularly "where the UACs [sic] parents' or legal guardians' interests may be in conflict with their own"). Indeed, in the *J.O.P.* case, DHS recognized that "the question of whether a parent or legal guardian was available on the filing date can be an extremely complex factual issue and generally cannot be determined without . . . additional factfinding through [testimony]." Defendants' Opposition to Motion to Certify Class, at 13, ECF No. 126, *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 13, 2020).

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

For more information on the *J.O.P.* lawsuit, see NIPNLG's J.O.P. webpage.

[10] In a USCIS training created before the 2013 policy was enacted, USCIS recognized that the date of "filing" could be the date the applicant expressed intent to file the asylum application. USCIS Training Powerpoint, "The TVPRA and UAC Determinations," at 26 (Mar. 11, 2013) ("Given that there are many reasonable interpretations of what constitutes an asylum application 'filed by' a UAC under the TVPRA's initial jurisdiction provision, the Asylum Division has taken the position, pending promulgation of regulations, that the applicant should be a UAC at the time of filing the I-589. In circumstances where the applicant expressed intent to file the I-589 while still a UAC and such intent was documented, the Asylum Division may consider the applicant to have been a UAC at the time of filing.").