

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Refugee, Asylum, and International Operations
Asylum Division
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U.S. Citizenship
and Immigration
Services

Decision Memorandum

TO: L. Francis Cissna
Director

FROM: John Lafferty
Chief, Asylum Division

SUBJECT: **Changes to Procedures Relating to Unaccompanied Alien Children (UAC)**

Purpose: In order to comply with the Executive Order on border security and the implementing Departmental guidance, the Asylum Division intends to change its procedures related to unaccompanied alien children (UACs). The purpose of this memorandum is to seek direction on three issues regarding implementation of these changed procedures, so that the Asylum Division can finalize guidance and training materials.

Background: A UAC is defined in statute as a child who: (1) has no lawful immigration status in the United States; (2) has not attained 18 years of age; and (3) with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody.

Typically, UACs are first encountered when presenting themselves to U.S. Customs and Border Protection (CBP) at the border or port-of-entry. U.S. Immigration and Customs Enforcement (ICE) may also apprehend UACs in the interior of the United States during immigration enforcement actions. Upon encounter, the apprehending agency must determine whether a child meets the statutory definition of a UAC in order to determine whether statutory requirements regarding custodial arrangements for the child apply.

Designation as a UAC does not provide lawful immigration status, but UACs are afforded certain procedural safeguards with respect to the asylum process that are not available to other aliens, including accompanied juveniles. Generally, an Immigration Judge has jurisdiction over asylum claims by aliens in removal proceedings. Legislation enacted in 2008, however, gives U.S. Citizenship and Immigration Services (USCIS) initial jurisdiction over any asylum application filed by a UAC, regardless of whether the UAC is in removal proceedings.

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To implement this jurisdictional provision pending promulgation of regulations, the affected agencies (including USCIS, ICE, and EOIR) adopted an interim process whereby USCIS would determine whether an application was “filed by a UAC” such that it had jurisdiction. For some years, USCIS performed this role by interviewing the applicant and conducting fact intensive assessments of whether he or she met the UAC definition on the date of filing. USCIS encountered a number of difficulties with this approach, and a USCIS Ombudsman report recommended revising it. In response, USCIS issued a 2013 memo instructing asylum officers to adopt without additional fact-finding initial UAC determinations made by CBP or ICE for purposes of taking initial jurisdiction over an asylum application. Under this 2013 memo, USCIS generally takes initial jurisdiction over such an application unless, before the date the application was filed, CBP, ICE, or HHS made an affirmative act that USCIS views as terminating the prior UAC determination.

Secretary Kelly’s February 20, 2017 memorandum directs USCIS, CBP, and ICE to develop procedures “to confirm that alien children who are initially determined to be ‘unaccompanied alien child[ren],’ as defined in section 279(g)(2), Title 6, United States Code, continue to fall within the statutory definition when being considered for the legal protections afforded to such children as they go through the removal process.”

Discussion: In order to comply with the Secretary’s February 20, 2017 memo, USCIS intends to rescind its 2013 UAC memo and revert to its prior procedures, instituted in 2009, that required asylum officers to examine whether the applicant met the factual definition of a UAC at the time the asylum application was filed. Prior to implementation, the Asylum Division seeks direction on the following implementation issues:

Issue 1: When USCIS reverts to its 2009 procedures, at what point in time must the applicant meet the UAC definition in to qualify for USCIS initial jurisdiction over the asylum application?

- **Should USCIS make a UAC determination based on whether the applicant met the UAC definition at the time of filing** (OCC believes the statutory language mandates this, as it requires that “[a]n Asylum Officer shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.” Under the plain language of the statute, it is difficult to argue that, when an applicant was a UAC on the date of filing, the application is not one that was “filed by a UAC.”) **or**
- **Should USCIS make a UAC determination based on whether the applicant continues to meet the UAC definition at the time of adjudication** (which may find support in the Secretary’s February 20, 2017 memo, which states in part that DHS should ensure that UACs who are initially determined to be UACs “continue to fall within the statutory definition when being considered for the legal protections afforded to such children.” OCC notes, however, that the Secretary’s reference to “legal protections afforded” would normally be interpreted to include statutory requirements for the treatment of applications that were “filed by UAC.”)?

Issue 2: Should USCIS apply these new procedures retroactively to

- a) individuals who upon apprehension were processed as UACs while the 2013 procedures were in place but who have not filed for asylum at the time the new procedures are implemented; and/or

- b) applications filed with USCIS under the 2013 UAC procedures that are still pending USCIS adjudication?
- **How should USCIS handle individuals who upon apprehension were processed as UACs while the 2013 procedures were in place but who have not filed for asylum at the time the new procedures are implemented?**
 - USCIS could consider providing a timeframe for individuals (or a subset of individuals) who were processed as UACs upon apprehension to file for asylum with USCIS with the 2013 procedures still in effect.
 - Alternatively, USCIS could apply the new procedures to all processed as UACs who have not yet filed for asylum at the time the new procedures are implemented.
- **How should USCIS handle the asylum filings that are pending with USCIS and were filed under the 2013 UAC procedures?**
 - For individuals who were processed as UACs upon apprehension AND who filed while the 2013 procedures were in effect, USCIS could examine UAC jurisdiction
 - under the 2013 approach;¹ or
 - some combination of the following:
 - under the 2013 approach *so long as the applicant was under 18 years of age on the date of filing*; or
 - under the 2013 approach *unless ICE subsequently makes an explicit “UAC status determination” that the applicant was not a UAC prior to the filing of the asylum application and USCIS confirms that the applicant was no longer a UAC on the date of filing.*²
 - Alternatively, for any case pending at the time the new procedures take effect, USCIS could apply the new procedures.

Issue 3: What kind of notice should USCIS provide to the public regarding these changes?

- **Should USCIS publish a Federal Register Notice to change its UAC procedures or is a new memo (along with a communications plan) to replace the 2013 memo sufficient?**

Recommendations: For each of the implementation issues described above, the Asylum Division recommends the following courses of action:

Issue 1: When USCIS reverts to its 2009 procedures, at what point in time should USCIS determine whether an asylum applicant is a UAC?

¹ Under the 2013 approach, Asylum Offices would not adopt the UAC determination if that UAC determination was terminated by an affirmative act by HHS, ICE, or CBP by the date the asylum application was filed.

² Since issuance of the Border Security EO and the Secretary’s implementation memo, some local ICE offices have attempted to make new UAC determinations for individuals AFTER the individual has properly filed an I-589 with USCIS under the 2013 memo and that application remains pending with USCIS. The new ICE determination claims that the individual no longer meets the UAC definition, so that USCIS does not have jurisdiction over the application despite the fact that the application was properly filed with USCIS under the 2013 memo. Where ICE has made such a determination, USCIS could examine the facts to confirm whether the applicant failed to meet the UAC definition on the date of filing such that USCIS does not have jurisdiction

- *Recommendation:* Consistent with the plain language of the statute, USCIS should determine whether the asylum applicant was a UAC at the time the asylum application was filed.

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Issue 2: Should USCIS apply these new procedures retroactively?

- *Recommendation:* No. For individuals who were processed as UACs upon apprehension AND who filed while the 2013 procedures were in effect, USCIS should examine UAC jurisdiction under the 2013 approach. Due to concerns of litigation risk, OCC has recommended that any cases in which an individual was processed as a UAC at the time of apprehension after the issuance of the 2013 memo through a date 30 days after notice of its rescission is published are exempt from the new UAC procedures, so long as the individual files the asylum application with USCIS within 180 days of either the date of the Federal Register Notice or the date of the individual's first master calendar hearing with EOIR, whichever is later.

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Issue 3: What kind of notice do we provide to the public regarding these changes?

- *Recommendation:* Before issuance of a new Asylum Division memo, notice of the revised procedures should be provided in a Federal Register Notice. The Notice would provide 30 days for the new procedures to take effect. OCC has advised that, while it is permissible for USCIS to rescind the 2013 procedures with a new memo, UAC stakeholders are extremely litigious and will likely challenge the rescission and the new procedures, arguing that implementation of the 2013 memo created an agency practice on which they relied. OCC has recommended that notice would either mitigate litigation risk or increase USCIS's likelihood of winning those suits that may occur.

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