

## THE ABCS OF REPRESENTING UNACCOMPANIED CHILDREN

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This article provides an overview for immigration attorneys representing unaccompanied children<sup>1</sup> as principal clients. Screening tools, legal relief options, and recent updates in immigration law will be addressed.

You may come across unaccompanied children's cases through a variety of ways. Maybe you are asked by your local AILA chapter's pro bono committee chair to assist with a child's case. Or an immigration judge asks you to consider handling the case of a child in removal proceedings. Perhaps, a former client asks if you would assist his niece, who was recently released from immigration custody and is now living with him. The problem is that you have never represented a child as a principal client, other than in a family petition matter.

While not completely exhaustive of all immigration relief options for unaccompanied children,<sup>2</sup> this article provides a basic road map for immigration attorneys<sup>3</sup> and encourages them to assist this extremely vulnerable population.

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<sup>1</sup> Throughout this article, the authors focus on those who arguably qualify under the definition for "unaccompanied alien child (UAC)," *i.e.*, one who:

- (a) has no lawful immigration status in the United States;
- (b) has not attained 18 years of age; and
- (c) with respect to whom—
  - (i) there is no legal parent or legal guardian in the United States; or
  - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) sec. 235(g), citing Homeland Security Act of 2002 sec. 462. To avoid any reference to an individual as an "alien," as well as current confusion regarding who qualifies as a UAC, the authors use the broader terms "unaccompanied child(ren)" and "unaccompanied immigrant child(ren)."

<sup>2</sup> For example, this article will not discuss adoption and family petitions that may be filed on behalf of adopted unaccompanied children.

<sup>3</sup> Fortunately, there are a growing number of resources throughout the country that provide technical assistance to those representing unaccompanied children in immigration cases. In addition to a local non-profit immigration legal service organization that may have a dedicated project assisting unaccompanied children, there are several nationally focused programs, such as Catholic Legal Immigration Network (CLINIC) (<http://cliniclegal.org/pro-kids>), Kids In Need of Defense (KIND) ([www.supportkind.org](http://www.supportkind.org)), and U.S. Committee for Refugee and Immigrants (USCRI) ([www.refugees.org/our-work/child-migrants/about-ncric.html](http://www.refugees.org/our-work/child-migrants/about-ncric.html)), who specialize in referrals, training, and mentorship of pro bono attorneys assisting these children.

## BACKGROUND: WHO ARE THESE UNACCOMPANIED CHILDREN?

Every year, thousands of undocumented immigrant children enter the United States without a parent or legal guardian.<sup>4</sup> The majority cross the U.S.-Mexico border by foot, which is often a long traumatic journey. Many are smuggled into the country by adults, brought here to be reunited with parents or relatives, or serve illicit purposes. Many children are apprehended by Department of Homeland Security (DHS) officials soon after entering the United States,<sup>5</sup> but others arrive undetected and remain living with family, friends, or relatives for many years.

DHS is required to transfer custody of unaccompanied children it apprehends to the Department of Health and Human Services' Office of Refugee Resettlement (ORR) within 72 hours of apprehension.<sup>6</sup> As with adult immigrants it detains, DHS will generally initiate removal proceedings before the Executive Office for Immigration Review (EOIR) against the child.

ORR's Division of Unaccompanied Children's Services (DUCS) maintains the care and custody of these children.<sup>7</sup> DUCS subcontracts with children's shelters throughout the country to house these children. One of the primary goals of the shelter staff is to reunify children with family or other responsible caregivers in the United States.<sup>8</sup> Most children are released from ORR custody to adult relatives or "sponsors" with whom they can reside while their immigration proceedings are pending.<sup>9</sup> It is important to note that ORR/DUCS is not a judicial entity capable of establishing or transferring legal custody to these sponsors.<sup>10</sup>

In many jurisdictions, EOIR has developed special juvenile dockets with designated Immigration Judges who hear these children's cases and know the many nuances of ORR/DUCS custody,<sup>11</sup> as well as the children's vulnerabilities. Because court practices vary around the country, the practitioner may want to contact a local non-governmental organization (NGO) or experienced practitioner who may be able to provide some guidance with regard to these special juvenile dockets.

## UNACCOMPANIED CHILDREN AND RECENT CHANGES IN IMMIGRATION LAW

Whether or not a child client is legally considered an "unaccompanied alien child" (UAC) may determine different immigration legal relief options available. Section 235 of the William Wilberforce Trafficking

<sup>4</sup> See generally C. Haddal, "Unaccompanied Alien Children: Policies and Issues." *Congressional Research Service (CRS) Report for Congress*, Jan. 15, 2009; see also Women's Refugee Commission, "Halfway Home: Unaccompanied Children in Immigration Custody." Feb. 2009; see also O. Byrne, "Unaccompanied Children in the United States: A Literature Review." Vera Institute for Justice, Apr. 2008 (from 2005 to 2008, the number of unaccompanied minors in U.S. immigration detention annually has ranged from approximately 7,000 to 9,000).

<sup>5</sup> See Office of Refugee Resettlement, Division of Unaccompanied Children's Services, "DHS, UAC Apprehensions placed in ORR/DUCS care, FY2009 by State," available at [www.acf.hhs.gov/programs/orr/programs/FY2009UAC\\_ApprehensionsMap.pdf](http://www.acf.hhs.gov/programs/orr/programs/FY2009UAC_ApprehensionsMap.pdf).

<sup>6</sup> TVPRA sec. 235(b)

<sup>7</sup> See TVPRA sec. 235(b)(1); see generally Homeland Security Act of 2002 sec. 462.

<sup>8</sup> See Homeland Security Act of 2002 sec. 462 (b); see also U.S. Department of Health and Human Services, Administration for Children and Families, [www.acf.hhs.gov/programs/orr/programs/unaccompanied\\_alien\\_children.htm](http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm).

<sup>9</sup> While interviewing the client and investigating the facts of the case, it is important for the immigration attorney to determine if the child has ever been apprehended and placed in Office of Refugee Resettlement (ORR) custody. If the child has been in ORR custody, it is good practice to obtain a copy of the child's file with the ORR, which can provide valuable information regarding the child's background, immigration history, as well as medical and other useful information. In order to obtain a copy of a child's ORR records, the attorney must submit a written request accompanied by a signed release of information and a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, to: [requests.ducs@ACF.hhs.gov](mailto:requests.ducs@ACF.hhs.gov). Unfortunately, in some cases, the child may already have been ordered removed in absentia by the time an attorney is consulted. In these situations, it is critical to review the Executive Office for Immigration Review (EOIR) record of proceedings and submit a Freedom of Information Act (FOIA) request to DHS.

<sup>10</sup> See e.g., Fl. Stat. 39.091(34); Cal. Prob. Code §§2102, 2200 (discussing judicial authority to establish a legal guardianship).

<sup>11</sup> In 2010, the EOIR began a new initiative to assist those "sponsors" who are providing care to unaccompanied children post-ORR custody. See generally Department of Justice (DOJ), [www.justice.gov/eoir/press/2010/RecentInitiativesforLOPI0042010.htm](http://www.justice.gov/eoir/press/2010/RecentInitiativesforLOPI0042010.htm).

Victims Protection Reauthorization Act of 2008 (TVPRA)<sup>12</sup> re-established the federal definition of a UAC, but also created several significant procedural and substantive protections for this recognized vulnerable population,<sup>13</sup> including, but not limited to:

- eligibility for Voluntary Departure pursuant to INA §240B, at no cost to the child;<sup>14</sup>
- eligibility for initial consideration of asylum claims before a U.S. Citizenship and Immigration Services (USCIS) Asylum Office, including for those filed in defense to removal proceedings;<sup>15</sup>
- exemption from one-year filing deadline for asylum claims;<sup>16</sup>
- broadening and clarification of the definition of Special Immigrant Juvenile Status (SIJS), a humanitarian-based visa protection and pathway to legal permanent residency for certain vulnerable immigrant children;<sup>17</sup>
- expeditious adjudication of SIJS petitions;<sup>18</sup>
- expansion of specifically waived grounds of inadmissibility for Special Immigrant Juveniles seeking adjustment of status;<sup>19</sup> and
- eligibility for Unaccompanied Refugee Minor Program long-term placement and social services for those granted Special Immigrant Juvenile Status while in ORR custody.<sup>20</sup>

Considering the significant options available to UACs, an attorney representing a child client should always determine whether the client may be considered a UAC. A child's living circumstances or relationship with his or her family may be dynamic, so the child may fall both within and outside the UAC definition while present in the United States.<sup>21</sup> Given this fluidity, as well as inconsistencies in practice by DHS and EOIR, legal advocates believe that the UAC definition itself is too vague and impractical,<sup>22</sup> and that the status, once attached, should remain with a child during the pendency of his or her immigration case.

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<sup>12</sup> See TVPRA sec. 235. For an overview of TVPRA changes, please see D. Lee, M. Govindaiah, A. Morrison, and D. Thronson, "Legal Relief Options for Unaccompanied Alien Children: Update Since the Enactment of the 2008 Trafficking Victims Protection Reauthorization Act," *published on AILA InfoNet at Doc. No. 090221830 (posted Feb. 21 2009)*.

<sup>13</sup> Please note that the TVPRA designated special rules for treatment of children from contiguous countries, including Mexico. These children have much more limited rights. See TVPRA §235(a)(2).

<sup>14</sup> TVPRA sec. 235(a)(5)(D).

<sup>15</sup> INA §208(b)(3)(C).

<sup>16</sup> INA §208(a)(2)(E).

<sup>17</sup> INA §101(a)(27)(J).

<sup>18</sup> TVPRA sec. 235(d)(2).

<sup>19</sup> INA §245(h)(2).

<sup>20</sup> TVPRA sec. 235(d)(4)(A).

<sup>21</sup> For example, a child may be apprehended by DHS and, because she is alone or with an unrelated adult, may be considered a UAC and transferred to ORR custody. While in ORR custody, the child may be placed in removal proceedings before EOIR and file an asylum application before USCIS. ORR may then locate family members, including a parent within the United States and ultimately release the child to the parent. If that same child waited to submit a Form I-589, Application for Asylum and Withholding of Removal, until after he or she had been reunited with family, then she would need to file a Form I-589 with EOIR. In another example of confusion regarding UAC designation, a child may have been living with a parent in the United States but, due to abuse by this parent's paramour, the child lives with an adult friend nearby. This friend may have no legal obligation or relationship to the child. It is unclear if DHS (or EOIR) would consistently determine that the child is a UAC.

<sup>22</sup> Questions frequently arise about whether a parent or legal guardian is "available" simply because he or she is residing in the United States. An undocumented parent who comes forward to assume custody of his child from ORR will likely be placed in removal proceedings himself, which unfortunately can be a perverse disincentive for doing so. Furthermore, a parent may be in the United States, but the child may be cared for by another adult and have a tenuous relationship with his or her own parent. In the absence of regulations, practice in this area is inconsistent and has caused confusion. Clarification is needed regarding when the UAC status, along with its benefits, attaches and for how long.

## SCREENING FOR IMMIGRATION RELIEF: A MORE CHALLENGING TASK WITH CHILD CLIENTS

Screening an unaccompanied child for immigration relief can be a challenging task. The process of applying for relief in an adversarial court proceeding can be overwhelming for an adult, let alone an unaccompanied child. A child may lack the intellectual maturity to understand legal proceedings or communicate his or her desires in a definitive, adult-like manner. Furthermore, a child may be easily discouraged by the legal proceedings and prolonged uncertainty regarding his or her immigration case.

Creating a safe and private environment in which the child or adolescent may speak freely is crucial to ensure effective screening and representation. Your young client may not understand what an attorney does, what attorney-client privilege is, what your motivations are, or how you may be able to assist him or her. Be patient in eliciting the narrative and allow the child to tell his or her own story. To avoid re-traumatizing the child, seek the assistance of an appropriate therapist or mental health professional.

It is important to elicit as much information as possible about the child's family life because the child's relationship with his or her family may be critical to eligibility for immigration relief. Be aware that the child may minimize<sup>23</sup> or be reluctant to report critical information regarding his or her family or the trauma he or she has experienced.<sup>24</sup> Moreover, a child may not realize the legal significance of facts.<sup>25</sup>

Below are some key considerations that may help an immigration attorney in the effective representation of a minor child:<sup>26</sup>

- Avoid legal terms and abstract concepts.
- Speak clearly and concisely. Questions and sentences should be tailored to the child's age, stage of language, development, background, and level of sophistication. Avoid long or compound questions.
- Explain to the child your role and purpose.<sup>27</sup> Tell the child about the attorney-client privilege and what protections it provides to him or her.<sup>28</sup>
- Ensure that the child understands his or her rights and the nature of the proceeding. Encourage the child's participation in the process.<sup>29</sup>

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<sup>23</sup> For example, a child may simply explain that he or she came to the United States to work and conceal information about his or her role as the family's primary breadwinner. Also, the child's parents might have forced him or her to work at a very young age.

<sup>24</sup> A child may be reluctant to disclose critical information for several reasons, including shame, legal misinformation from others, including family members and friends, or fear of retaliation against family members by immigration or other law enforcement authorities.

<sup>25</sup> For example, a child may not understand legal definitions of abuse, abandonment, or neglect and, thus, may not readily answer "yes" or "no" when simply asked, "Have you ever been abused, abandoned or neglected?"

<sup>26</sup> See generally American Bar Association, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States 11–14 (2004), available at [www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/Immigrant\\_Childrens\\_Standards\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/Immigrant_Childrens_Standards_authcheckdam.pdf).

<sup>27</sup> Beware of potential for conflicts of interest, especially when an adult has retained legal services on a child's behalf. An adult relative or caregiver may have similar expectations and goals to the child client, but that is not always the case. Also, the adult may feel entitled to speak on the child's behalf. Understand who your client is and appropriately manage expectations, as well as confidentiality obligations.

<sup>28</sup> Often times, an immigration attorney for a child may interact with various individuals regarding the child client, including a case worker, guardian ad litem, defense attorney, therapist, family, or other adults. Be clear with your client and the other adults working with your client about the special nature of the attorney-client relationship. Obtain informed consent from your client for every service provider and be specific about limits to releases. Revisit the concept of confidentiality with your client as needed. Also, be sure you understand and respect the special relationships other service providers have with the client. Be aware that while it may be easier to simply work "around" the child by gathering what you need from members of a service team, this could undermine your attorney-client relationship and otherwise result in a sense of disempowerment and loss of agency on the part of the child.

<sup>29</sup> Try to explain immigration law to the child client in terms he or she will understand, without minimizing difficult risks and realities of the case. Explain options for relief available to a child multiple times and ways. Instead of asking a child client

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- Explain why the child may be questioned repeatedly about the same matter by different individuals.
- Do not expect children to be immediately forthcoming about painful events.
- Children cannot be expected to present testimony with the same degree of precision as adults.

### U.S. CITIZENSHIP AS IMMIGRATION RELIEF?

Brief mention here is worthwhile regarding screening a child client for United States citizenship, the best, albeit rare, form of “immigration relief.” Children may acquire,<sup>30</sup> derive,<sup>31</sup> or be found<sup>32</sup> to possess U.S. citizenship automatically by operation of law, often times without knowing it. While obtaining documentation may prove difficult, particularly for a child who has voluntarily or been forcibly separated from his or her family, establishing a U.S. citizenship claim will provide life-long protection for the child against removal from the United States.

### SPECIAL IMMIGRANT JUVENILE STATUS FOR UACS

The most common form of immigration relief for unaccompanied children is SIJS, which may be pursued affirmatively or defensively, *i.e.*, after removal proceedings have been commenced against the child. Generally, a Special Immigrant Juvenile (SIJ) is an immigrant present within the United States: (1) “who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; (2) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and (3) in whose case the Secretary of Homeland Security consents to the grant of the Special Immigrant Juvenile status.”<sup>33</sup> Once granted SIJS, one is deemed paroled into the United States.<sup>34</sup>

Somewhat similar to protections for domestic violence victims under the Violence Against Women Act (VAWA), SIJS is a humanitarian-based visa status for certain vulnerable youth. It provides immediate eligibility for lawful permanent residency. It is important to note that SIJS is not a generalized protection for any child who is at risk of removal from the United States. Instead, it is a specialized protection for certain children for whom a State or juvenile court has intervened and made specific findings regarding the child’s welfare.

The process for a SIJS case is generally:<sup>35</sup>

whether he or she has any questions or understands what you have said, ask him or her specific questions designed to elicit his or her level of understanding of the case and ask him or her to reiterate what he or she understands to be the next steps and possible outcomes of the case. This will alert you to possible misunderstandings and areas that are in need of further clarification.

<sup>30</sup> Whether a foreign-born child *acquires* citizenship at birth will turn on his or her date of birth, whether the person’s parents were married when he or she was born, whether one or both was a U.S. citizen already at the time of the child’s birth, and how long and at what age(s) the citizen parent(s) resided in the United States prior to the child’s birth. *See* INA §301(g).

<sup>31</sup> Citizenship *derivation* generally occurs when a child is already a lawful permanent resident, under the age of 18, unmarried, and living in the physical and legal custody of his or her U.S. citizen parent(s). *See* INA §320(a). An LPR child adopted before she turns 16 by a U.S. citizen who completes two years in the legal and physical custody of the adoptive citizen parent before she turns 18 also will derive U.S. citizenship. *See* INA §320(b).

<sup>32</sup> Citizenship may be established for a child of unknown parentage, *found* in the United States, before he or she turns 5 years of age, for whom a foreign birth is not established prior to the child attaining 21 years of age. *See* INA §301(f). Cases satisfying this so-called “founding” statute are rare, but should be considered by attorneys.

<sup>33</sup> INA §101(a)(27)(J). Additional subsections of this SIJ definition discuss the rare situations in which a juvenile court may request to transfer the custody status or placement of a child from ORR custody, as well as a parent’s preclusion from obtaining immigration benefits through the SIJS.

<sup>34</sup> *See* INA §245(h)(1).

<sup>35</sup> For a good, detailed description of the SIJS application process, please see J. Flanagan’s “Special Immigrant Juvenile Status: One Year After TVPRA,” AILA’s *Immigration Practice Pointers*, (AILA 2010-2011 Ed.) (published in conjunction with

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Pursuant to state law and procedures, a state or local juvenile court assumes jurisdiction over the youth. This may occur through a petition for the child's protection made by a proposed legal guardian, next best friend, or a state agency dedicated to ensuring a child's welfare.

Generally upon request by a party on the child's behalf, the state or juvenile court issues a consolidated order that summarizes the child's lack of reunification options,<sup>36</sup> as well as the determination that it is not in the child's best interest to be returned to her or her parent's home country. This is often called a Best Interest Order or a Special Interest Order.<sup>37</sup>

Along with a copy of this Best Interest Order and the child's birth certificate,<sup>38</sup> the immigration attorney applies for SIJS using a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, and mails the application to the USCIS Chicago lockbox. SIJs are immediately eligible to apply for lawful permanent residency in the United States. However, because EOIR has exclusive jurisdiction over generally all applications for adjustment of status for respondents in removal proceedings,<sup>39</sup> SIJ petitioners in removal proceedings (or with prior removal orders) may not pursue adjustment of status concurrently with their SIJS petition.

Local USCIS offices adjudicate the Form I-360 usually after an interview.<sup>40</sup> USCIS has the authority to waive the interview for children under the age of 14, or when it is deemed unnecessary.<sup>41</sup> USCIS offices around the country have different practices regarding interviews and, in many jurisdictions, interviews are routinely scheduled for children of all ages, except in exceptional circumstances.

If the SIJ applicant is not in removal proceedings, or has no prior removal order, then the immigration attorney may concurrently submit to USCIS a Form I-485, the application for adjustment of status, as well as a Form I-765, the application for employment authorization.

As a general matter, if the SIJ applicant is also in removal proceedings or has a prior removal order, the immigration attorney must terminate proceedings with EOIR before submitting the Forms I-485 and I-765 with USCIS. Alternatively, the SIJS applicant may proceed with the Form I-485 before the immigration court after USCIS has approved the Form I-360.<sup>42</sup>

## TVPPRA CHANGES TO SIJ DEFINITION AND ELIGIBILITY

The TVPPRA expanded certain benefits for children seeking SIJS.<sup>43</sup> It eliminated pre-existing language regarding being "eligible for long-term foster care." It is now clear that a child does not need to be in a foster home to qualify for SIJS.<sup>44</sup> Also, the TVPPRA expanded the SIJ definition to allow for a juvenile court to

AILA's 2010 Annual Conference).

<sup>36</sup> The non-viability of reunification with one or both parents must be due to abuse, abandonment, neglect, or some other similar basis under state law. *See* INA §101(a)(27)(J).

<sup>37</sup> Samples of such orders are on file with the authors.

<sup>38</sup> Or other evidence of age, such as a passport. *See* USCIS, "Instructions for Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant," available at [www.uscis.gov/files/form/i-360instr.pdf](http://www.uscis.gov/files/form/i-360instr.pdf).

<sup>39</sup> *See* 8 CFR §1245.2(a)(1)(i).

<sup>40</sup> As a general matter, USCIS does not have the authority to re-adjudicate the state court's findings regarding the child's eligibility for state court protection and dependency. *See* USCIS Interoffice Memorandum from D. Neufeld, Mar. 24, 2009, available at [www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPPRA\\_SIJ.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPPRA_SIJ.pdf). USCIS's interview of a child regarding his or her filed I-360 should not be adversarial in nature and any inappropriate questioning of a child should be followed-up with a formal complaint to the USCIS field office director.

<sup>41</sup> *See id.*

<sup>42</sup> Given different practices throughout the country, the authors encourage immigration attorneys for unaccompanied children to consult a nonprofit immigration legal service organization in their region that may have a dedicated project assisting unaccompanied children and may be able to advise on the most efficient handling of a child's case in removal proceedings.

<sup>43</sup> *See generally* INA §§101(a)(27)(J), 245(h), and TVPPRA sec. 235.

<sup>44</sup> *See* INA §101(a)(27)(J)(i).

consider whether family reunification with *one or both* of the child's parents is viable.<sup>45</sup> Further, the state or juvenile court now must find family reunification is not an option due to abuse, abandonment, neglect, or a similar basis under state law.<sup>46</sup> The TVPRA also established age-out protections for SIJ applicants, so long as they were eligible when they applied.<sup>47</sup> Importantly, while the SIJS statute has been amended by the TVPRA, corresponding regulations have yet to be issued since the passage of the TVPRA, and thus, to some extent, the statute and regulations are at odds.<sup>48</sup>

### CAUTIONARY NOTE FOR SIJ CASES: CRIMINAL INADMISSIBILITY CONCERNS

In order for a SIJ to adjust his or her status to that of a lawful permanent resident, he or she must be admissible under INA §245(h). While certain grounds of inadmissibility are automatically waived and do not require submission of a separate waiver application,<sup>49</sup> a SIJ's criminal history may render him or her ineligible for adjustment of status and negate the wisdom of pursuing SIJS altogether.<sup>50</sup>

While juvenile delinquency adjudications are not convictions for immigration purposes,<sup>51</sup> increasingly many states are prosecuting juveniles in adult criminal court, resulting in juveniles with adult criminal convictions.<sup>52</sup> And even if there is no adult criminal conviction, certain other conduct-based grounds of inadmissibility should be examined before proceeding with a SIJS case. Information that provides DHS with a "reason to believe" the child has been involved in drug trafficking is extremely problematic and will likely preclude the child from relief.

Since waivable grounds of inadmissibility must depend on a favorable exercise of discretion, the child's record also needs to be carefully reviewed for information that may trigger a negative exercise of discretion. For example, information about the child's involvement in gang activity may be very problematic.<sup>53</sup> Caution should be exercised in deciding whether to pursue such SIJS cases. The child's attorney may need to provide context,<sup>54</sup> demonstrate rehabilitation, and otherwise bolster the equities of the SIJS case.<sup>55</sup>

### ASYLUM FOR UACS

A growing number of children are seeking asylum and related protections in the United States, not merely as dependents or derivatives, but in their own right,<sup>56</sup> based on having suffered past persecution or fearing

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See* TVPRA sec. 235(d)(6); *see also* Signed Settlement Agreement, *Perez-Olano, et al. v. Holder, et al.*, 248 F.R.D. 248 (C.D.Cal. Jan. 8, 2008) (on file with authors).

<sup>48</sup> *See e.g.*, 8 CFR §§204.11(a) and (c)(4)–(5).

<sup>49</sup> *See* INA §245(h)(2) (exempting Special Immigrant Juveniles from certain grounds of inadmissibility and provides a waiver for other grounds of inadmissibility, except those related to crimes and security found in INA §§212(a)(2)(A)–(C) and INA §§212(a)(3)(A)–(C) and (E)).

<sup>50</sup> This is especially the case for those who are affirmatively applying for SIJS and not otherwise detected by immigration authorities.

<sup>51</sup> *See Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

<sup>52</sup> Some jurisdictions have a hybrid adjudication in which the child receives a juvenile sentence and an adult sentence that is held in abeyance unless the juvenile sentence is not completed. *See e.g.*, Minn. St. §260B.25; *In Re: Juan Miguel Paredes-Soto*, File: A26517521-Bloomington, MN, 2007 WL 2825104 (BIA) (in an unpublished decision reviewing Minnesota's extended juvenile jurisdiction statute, the BIA held that a child was convicted for immigration purposes).

<sup>53</sup> Other examples of potentially problematic cases for discretion include those involving a history of aggressive behavior or sexually-based offenses.

<sup>54</sup> As some communities use extremely broad measures to identify potential gang members, it may be helpful for the child's attorney to provide additional context to DHS. Also, it may be persuasive to describe the circumstances in which the child was living at the time, *e.g.*, the child was homeless, living with anyone who would provide shelter and protection, or was coerced into remaining in a questionable situation.

<sup>55</sup> Letters from social workers, teachers, probation officers, juvenile court judges, and mentors may be especially persuasive.

<sup>56</sup> USCIS Memorandum, "Guidelines for Children's Asylum Claims," Office of International Affairs (120/11.26), *reprinted in* *continued*

future persecution on account of their race, nationality, religious beliefs, political opinions, and perhaps primarily, their membership in a particular social group. While an exhaustive exploration of the state of substantive asylum law is beyond the scope of this article,<sup>57</sup> certain trends are worth noting when handling potential asylum claims for unaccompanied children:

- Recent domestic violence-related asylum cases<sup>58</sup> may be helpful in considering claims for certain child clients. Particular social groups defined by the child's nuclear family, lack of parental protection, orphan status, or some related combination of these may be persuasive for child abuse victim clients.
- Although the Board of Immigration Appeals (BIA) has found that past gang membership and forced gang recruitment cannot constitute a basis for establishing a particular social group on narrow "social visibility" and "particularity" analyses,<sup>59</sup> so-called "gang-based" asylum cases do occasionally succeed when persecution is also suffered on account of membership in a different particular social group, such as family, or a different protected ground entirely, such as political opinion or religious belief. Given the complex nature of these cases, the authors strongly encourage attorneys for children with these claims to consult with experts in the field.<sup>60</sup>

### TVPPRA CHANGES TO ASYLUM PROCEDURES FOR UACS

The TVPPRA created significant procedural protections and accommodations that now apply to UACs seeking asylum,<sup>61</sup> including exempting UACs from both the one-year filing deadline and the standard safe third-country limitation on asylum.<sup>62</sup> The USCIS Asylum Office now has initial jurisdiction over any asylum application submitted by a UAC, including those already in removal proceedings, affording all UACs the opportunity to first have their claim reviewed in a non-adversarial, less formal setting.<sup>63</sup> Finally, the TVPPRA also instructs that UACs seeking asylum or any other form of relief should be treated with special consideration of the child's developmental status and needs and that regulations shall be promulgated to govern both the procedural and substantive aspects of adjudicating UAC asylum claims.<sup>64</sup>

### T AND U VISA RELIEF FOR UACS

Children may also be eligible for other humanitarian-based protections based on their status as victims of trafficking or certain serious crimes. This article will not provide in-depth descriptions of the application

76 No. 1 *Interpreter Releases* 1, 5–34 (January 1999); see also EOIR Memorandum, "Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children," (May 2007), published on AILA InfoNet at Doc. No. 07052360 (posted May 23, 2007); United Nations High Commissioner for Refugees, "Guidelines on Policies and Procedures in dealing with Unaccompanied Minors Seeking Asylum (Feb. 1997).

<sup>57</sup> A wonderful substantive overview of children's asylum claims may be found in the Immigrant Legal Resource Center's (ILRC) manual titled *Special Immigrant Juvenile Status and Other Immigration Options for Children & Youth*, 3rd Edition, by A. Junck, S. Kinoshita and with K. Jackson and H. Lawrence. This resource is available online at [www.ilrc.org](http://www.ilrc.org). Another great resource is University of California-Hastings' Center for Gender and Refugee Studies (<http://cgrs.uchastings.edu/>).

<sup>58</sup> See UC-Hastings' Center for Gender and Refugee Studies's website for in-depth information, including DHS-filed briefs with helpful language in *Matter of R.A.* (2004) and *Matter of L.R.* (2009), recent domestic violence-related asylum grants.

<sup>59</sup> See e.g., *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

<sup>60</sup> AILA, "Gang-Based Asylum Applications," published on AILA InfoNet at Doc. No. 10051381 (posted Sept. 17, 2010).

<sup>61</sup> If a child pursues asylum as well as SIJS, it is generally a good idea to inform the USCIS Asylum Office about a pending I-360, and to tell local USCIS adjudicating an I-360 that there is a pending asylum application. USCIS has generally indicated a willingness to work with attorneys representing a child applying for both SIJS and asylum, sometimes continuing an interview to allow time for an SIJS I-360 to be adjudicated. This should not be presumed, though. Attorneys should also take timing into account when considering the nature of relief to pursue.

<sup>62</sup> See INA §208(a)(2)(E). See generally USCIS Asylum Division, *Guidelines for Children's Asylum Claims*, AOBTC Lesson Plan (Mar. 21, 2009), available at [www.uscis.gov/files/article/AOBTC\\_Lesson\\_29\\_Guidelines\\_for\\_Childrens\\_Asylum\\_Claims.pdf](http://www.uscis.gov/files/article/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims.pdf).

<sup>63</sup> See INA §208(b)(3)(C).

<sup>64</sup> See TVPPRA sec. 235(d)(8). As of this writing, USCIS has not indicated when draft regulations might become available for public review and comment.

process of T and U visas, but attorneys should be mindful of screening for these more rare forms of immigration relief.

T visas are humanitarian protections made available to children, as well as adults, who are victims of trafficking.<sup>65</sup> For children, trafficking includes not only sex trafficking in which a child engages in commercial sex acts, but also labor trafficking where a child may be forced, defrauded, or coerced into involuntary servitude, peonage, debt bondage, or slavery.<sup>66</sup> While a child under 18 years of age is not required to cooperate with law enforcement, legal advocates often find that such cooperation may practically be necessary to obtain temporary legal status known as “continued presence,” certification for access to certain public benefits and, ultimately, the T visa itself.

An attorney for a child who may be a victim of human trafficking should be aware that screening for trafficking is quite difficult. A child victim may not readily identify that he or she was victimized, particularly when the child may have been desperate to earn money to survive or help family members. Initial voluntary participation or receipt of income may lead the child to believe that the work situation was not fundamentally illegal or in violation of his or her rights. Once granted a T visa, the child may legally work,<sup>67</sup> receive public benefits to the same extent as refugees,<sup>68</sup> apply for certain family members as T visa derivatives,<sup>69</sup> and will be eligible for adjustment of status after three years.<sup>70</sup>

U visas are humanitarian-based visas for children and adults who are victims of certain serious crimes.<sup>71</sup> A child may be the principal victim when applying for the U visa, but may also be eligible for a U visa as a derivative of a parent or a sibling. In addition, for children under the age of 16 years old, a parent, guardian, or next friend may provide assistance and possess information, instead of the child.<sup>72</sup> Similar to T visas, once granted U visa status, the child may legally work,<sup>73</sup> apply for certain family members as derivatives,<sup>74</sup> and seek adjustment of status after three years.<sup>75</sup> As children may not recognize that a crime has been committed against them or know how to report such a crime, many children’s legal advocates believe that U visa relief is infrequently pursued. This may especially be the case for UACs who—without the protection of a parent, legal guardian, or stable family support—may be victimized more disproportionately than other children.

## CONCLUDING THOUGHTS

Given the complexity in screening for immigration relief, as well as preparing and presenting a substantive case on behalf of a child client, representing a UAC can be a daunting task. However, the benefit of helping a vulnerable child—without traditional parental support—obtain safety and lawful status in the United States can provide tremendous personal gratification. The authors commend attorneys who represent UACs and encourage them to continue assisting these very vulnerable children.

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<sup>65</sup> See INA §101(a)(15)(T); *see also* 22 USC §7102.

<sup>66</sup> See INA §101(a)(15)(T); *see also* 22 USC §7102.

<sup>67</sup> See INA §101(i)(2); *see also* 8 CFR §214.11(j)(4).

<sup>68</sup> See New Classification for Victims of Severe Forms of Trafficking in Persons, 67 Fed. Reg. 4784, 4785 (Jan. 31, 2002).

<sup>69</sup> See INA §101(a)(15)(T)(ii).

<sup>70</sup> See INA §245(l).

<sup>71</sup> To be eligible for a U-visa, one must: (a) have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity; (b) possess credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based; (c) have been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity; and (d) the qualifying criminal activity occurred in the United States, its territories or possessions, or violated a U.S. federal law that provides for extraterritorial jurisdiction. INA §101(a)(15)(U).

<sup>72</sup> See INA §§101(a)(15)(U)(i)(II) and (III).

<sup>73</sup> See INA §214(p)(6).

<sup>74</sup> See INA §101(a)(15)(U)(ii).

<sup>75</sup> See INA §245(m); *see also* 8 CFR §245.24.