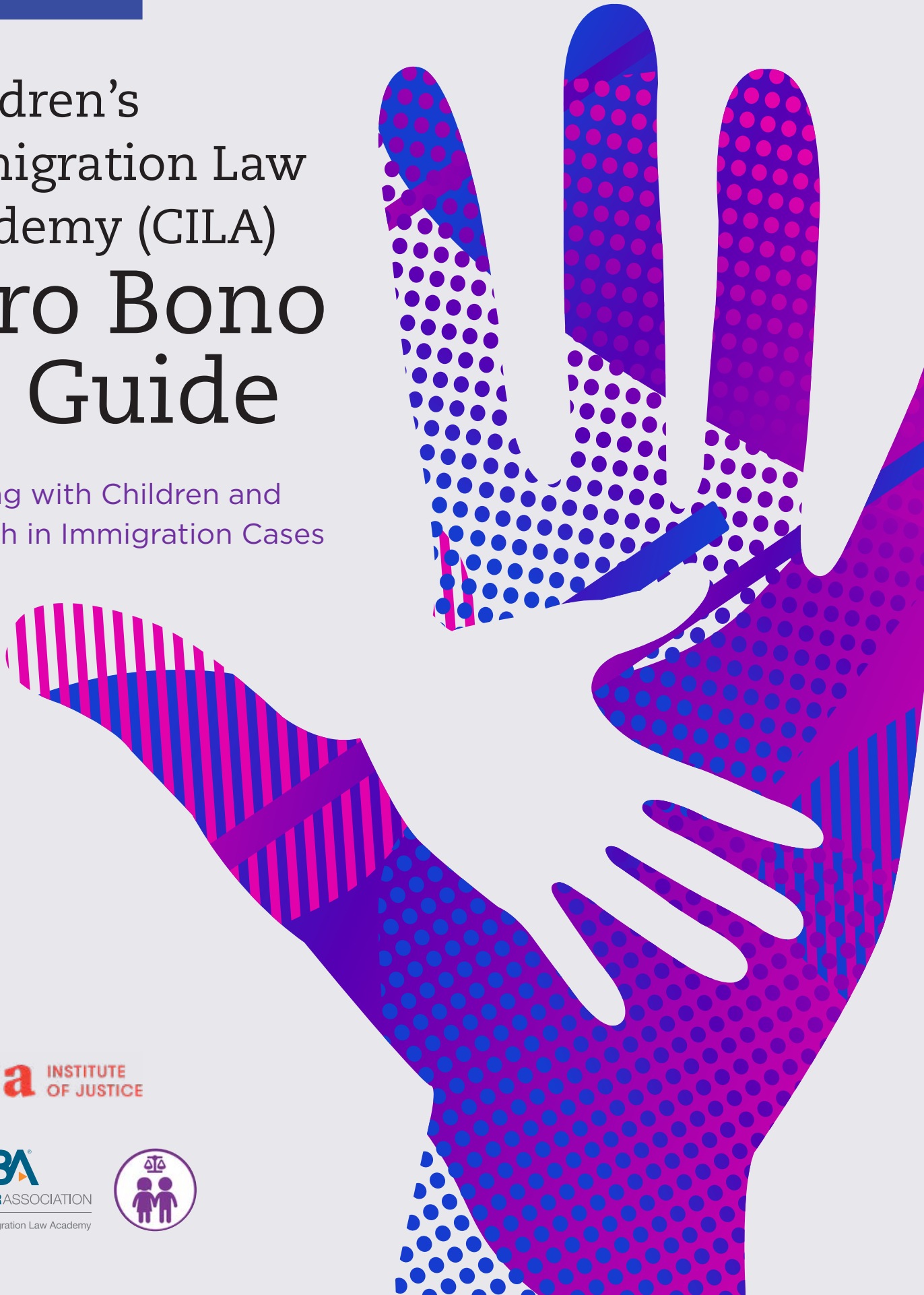


2021

Children's Immigration Law Academy (CILA) Pro Bono Guide

Working with Children and
Youth in Immigration Cases



Vera INSTITUTE
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ABA
AMERICAN BAR ASSOCIATION
CILA Children's Immigration Law Academy



“I think of legal representation as a form of personal accompaniment; it is like embarking on a difficult journey with your client, unable to confirm the destination, but providing guidance and companionship along the way. During my practice, I always felt like that accompaniment was just as important as the legal representation itself, because without it, the representation was likely to fail. For me it was a way of supporting another human being, validating that person’s existence, and sharing that person’s story. Because at the end of the day, your client will remember how you made him or her feel, just as much as the outcome of the case.”

—MEREDITH LINSKY, DIRECTOR OF THE
ABA COMMISSION ON IMMIGRATION

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Authors: CILA Legal Team—Dalia Castillo-Granados, Laura Egan, Vickie Giambra, Chloe Walker, and Yasmin Yavar

****This is not legal advice. This is for informational purposes only and should not substitute your own research and analysis. This is not comprehensive. We simply wanted to highlight some information and resources to help get you started in your pro bono representation in a child’s immigration case.****

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GLOSSARY

Common Acronyms and Forms

- A#: Alien number
- [AR-11](#): Alien's Change of Address Card (USCIS)
- CBP: Customs and Border Protection
- DHS: Department of Homeland Security
- DOJ: Department of Justice
- EAD: Employment Authorization Document
- EOIR: Executive Office for Immigration Review
- FOIA: Freedom of Information Act
- [Form EOIR-26](#): Notice of Appeal from a Decision of an Immigration Judge
- [Form EOIR-28](#): Notice of Entry of Appearance as Attorney or Representative before the Immigration Court
- [Form EOIR-33](#): Alien's Change of Address Form (EOIR)
- [Form EOIR-42B](#): Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents
- [Form G-28](#): Notice of Entry of Appearance as Attorney or Accredited Representative (DHS)
- [Form G-639](#): Freedom of Information/Privacy Act Request
- [Form G-1055](#): Fee Schedule (USCIS)
- [Form I-130](#): Petition for Alien Relative
- [Form I-192](#): Application for Advance Permission to Enter as a Nonimmigrant
- Form I-213: Report of Deportable/Inadmissible Alien
- [Form I-290B](#): Notice of Appeal or Motion
- [Form I-360](#): Petition for Amerasian, Widow(er), or Special Immigrant
- [Form I-485](#): Application to Register Permanent Residence or Adjust Status
- [Form I-589](#): Application for Asylum and for Withholding of Removal
- [Form I-765](#): Application for Employment Authorization
- Form I-770: Notice of Rights and Disposition
- Form I-862: Notice to Appear
- [Form I-912](#): Request for Fee Waiver
- [Form I-914](#): Application for T Nonimmigrant Status
- [Form I-914, Supplement A](#): Application for Family Member of T-1 Recipient
- [Form I-914, Supplement B](#): Declaration of Law Enforcement Officer for Victim of Trafficking in Persons
- [Form I-918](#): Petition for U Nonimmigrant Status
- [Form I-918, Supplement A](#): Petition for Qualifying Family Member of U-1 Recipient
- [Form I-918, Supplement B](#): U Nonimmigrant Status Certification
- HHS: Department of Health and Human Services
- ICE: Immigration and Customs Enforcement
- ICH: Individual Calendar Hearing (aka merits hearing)
- IJ: Immigration judge
- INA: Immigration and Nationality Act
- LTFC: Long term foster care
- MCH: Master Calendar Hearing
- NBC: National Benefits Center
- NOID: Notice of Intent to Deny
- NOIR: Notice of Intent to Revoke or Rescind
- NTA: Notice to Appear
- OPLA: Office of the Principal Legal Advisor
- ORR: Office of Refugee Resettlement
- OTIP: Office on Trafficking in Persons
- RFE: Request for evidence
- URM: Unaccompanied refugee minor
- USCIS: U.S. Citizenship and Immigration Services



I. INTRODUCTION

A. About CILA

The Children's Immigration Law Academy (CILA) is an **expert** legal resource center created by the American Bar Association (ABA). CILA's mission is to empower advocates who guide immigrant youth through complex legal procedures, to do so with courage, competency, compassion, and creativity. CILA builds capacity for those working to advance the rights of immigrant youth seeking protection through trainings, technical assistance, and collaboration.

CILA serves nonprofit, pro bono, and private sector legal advocates who work with children in immigration-related proceedings. CILA began operations in Houston, Texas in late 2015 in response to the thousands of children from Central America who surged across our Southern border fleeing prolific violence and abuse in their home countries and seeking humanitarian protections offered under U.S. law. Through our work, we hope to ensure more children are represented and to provide the resources and expertise needed to support those who endeavor to represent them.

Complementary and critical to our capacity-building efforts for legal advocates, CILA's new social services initiative aims to increase capacity for social workers and social services providers serving immigrant youth at legal services organizations throughout Texas, thereby ensuring stability in the lives of youth so that they may meaningfully participate in their immigration cases.

Should you or someone you know wish to make a donation to support our work, please visit: https://www.americanbar.org/groups/departments_offices/fund_justice_education/donate/com-imm-cila/.

CILA Services and Resources

TRAININGS

CILA provides regular training opportunities for individuals who are working with children in immigration proceedings. CILA offers day-long trainings covering a wide range of topics related to representing immigrant youth and regular webinar trainings on emerging practice issues for advocates of all experience levels. In addition, through a partnership with the National Immigration Litigation Alliance (NILA), CILA has a series of trainings focused on appellate and litigation strategy. Videos of all of our webinars and select day-long trainings are available to view on the CILA website: <http://www.cilacademy.org/trainings/>. We regularly train new legal staff at nonprofits who work with children detained by the government and are expanding our efforts to provide training for social services staff.

PRO BONO

CILA hosts an online platform, *Pro Bono Matters for Children Facing Deportation*, to connect pro bono attorneys and law students with pro bono opportunities from around the country. Legal service providers post a wide range of pro bono opportunities, from short-term projects to direct representation. Available opportunities can be found at: <https://cilacademy.org/pro-bono/pro-bono-matters/>. CILA's trainings and resources listed below additionally support the work of pro bono attorneys and law students. Moreover, CILA has a webpage dedicated to pro bono coordinators to see creative models for pro bono engagement and to get expert tips regarding running a pro bono program. CILA has a pro bono focused nationwide working group and listserv, Pro Bono Coordination for Child Immigration, that meets quarterly by video conference.

RESOURCES

CILA has a vast array of resources available to assist legal service providers, attorneys, and legal staff with their work to help immigrant youth.

- **CILA's Website:** Resources can be found on CILA's website in the Online Library and Legal Updates pages. Additional online materials can be accessed after requesting an entry password.
- **Texas Champions for Immigrant Youth Corner:** CILA shares monthly updates via a newsletter to our Texas working group listservs with legal updates, opportunities to connect and learn, as well as celebrations of the work of advocates. Texas advocates can sign up to receive the newsletter by joining a CILA working group (information below).

EMERGENCY RECEPTION CENTERS

CILA is available to provide training to legal service providers and volunteers at emergency shelters for unaccompanied children nationwide when the need arises.

TEXAS SPECIFIC:

CILA WORKING GROUPS

CILA hosts three Texas-wide working groups which meet through teleconference and create spaces for advocates from around the state to connect with each other, share on-the-ground trends, and receive updates on major changes in the law. We host a quarterly meeting for three different issue areas: (1) Special Immigrant Juvenile status, (2) children's asylum law, and (3) working with detained unaccompanied children.

CILA also hosts a quarterly in-person Houston-wide working group on Special Immigrant Juvenile status attended by nonprofit, pro bono, and private immigration attorneys.

In addition, CILA's Texas Children's Immigration Social Services Working Group launched in September, 2021.

To learn more about our working groups or to join one of CILA's listservs, please visit: <http://www.cilacademy.org/resources/working-groups/>.

TECHNICAL ASSISTANCE

CILA provides individualized technical assistance to Texas legal advocates relating to specific case questions and issues. Requests can be made on CILA's website: <http://www.cilacademy.org/request-assistance/>.

CILA also provides individualized technical assistance in Texas related to the psychosocial service needs of children and youth. Requests for assistance may relate to best practices for working with children and victims of trauma, assistance in identifying psychosocial needs, and available resources to assist in meeting those needs. CILA's website will soon also allow for online submission of inquiries. Currently, technical assistance can be requested via email by writing to cila@abacila.org.

B. How to Use this Guide

This Guide is intended to help provide a background to pro bono attorneys representing children and youth in immigration cases. The legal definition for children facing deportation alone in immigration cases is "unaccompanied alien child." We follow the ABA's lead in using the terminology "unaccompanied child," to avoid the unintentional dehumanization of our clients. It is important to note, we use the term unaccompanied child to refer to a range of ages and developmental levels. Unaccompanied children can be toddlers, tender-age, preteen, teenagers, adolescents, and even young adults depending on their age

of arrival in the United States and the length of their immigration case. The Guide is designed to provide introductory information and links to webinars and additional resources to explore for more detailed training.

The Guide covers essential advocacy skills that go beyond the black letter of the law and has an emphasis on practical tips to help you navigate your pro bono representation. Additionally, Section III, relating to Common Forms of Relief, provides more detail regarding the most common claims for youth, which include asylum, withholding of removal, and protection under the Convention Against Torture (CAT), as well as Special Immigrant Juvenile status (SIJS) and adjustment of status than the other forms of relief (U and T visas, family-based petitions, and Violence Against Women Act (VAWA) petitions).

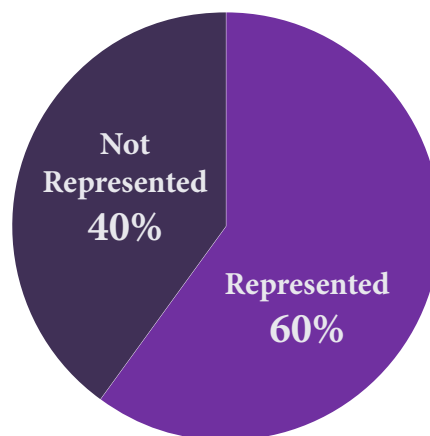
Immigration law is complex, and this is not intended to be a comprehensive guide. This is not a replacement for your own research and study of the relevant issues and law involved in your case and jurisdiction. Our hope is that the Guide provides a solid starting point as you begin your pro bono representation.

What Is the Need for Pro Bono Representation of Children?

Unfortunately, children in immigration court are not entitled to free appointed legal counsel or best interest advocates like children in the juvenile or child welfare systems in the United States. Many children and youth are facing deportation alone. The Executive Office for Immigration Review (EOIR) (immigration court) provides some data regarding pending unaccompanied children's cases. EOIR data through June 2021 shows that 104,738 unaccompanied children's cases are pending in immigration court.¹ According to EOIR, 60% of unaccompanied children have representation and 40% do not, which means that over 42,000 unaccompanied children do not have representation in immigration court in currently pending cases.²

[Transactional Records Access Clearinghouse \(TRAC\) Immigration](#), Syracuse University's data tool, also provides information regarding juveniles' cases in removal proceedings.³ TRAC's most recent data from 2018 to 2021 represents all juveniles (including those who are unaccompanied children and those who are with their parents or guardians), while their older data from 2005 to 2017 shows data only regarding unaccompanied children. Looking at TRAC's total data on juveniles from 2005 through July 2021, overall, 736,532 juveniles (56%) were not represented by an attorney, and 588,184 (44%) were represented.

HOW MANY UNACCOMPANIED CHILDREN WITH PENDING CASES HAVE REPRESENTATION IN IMMIGRATION COURT?

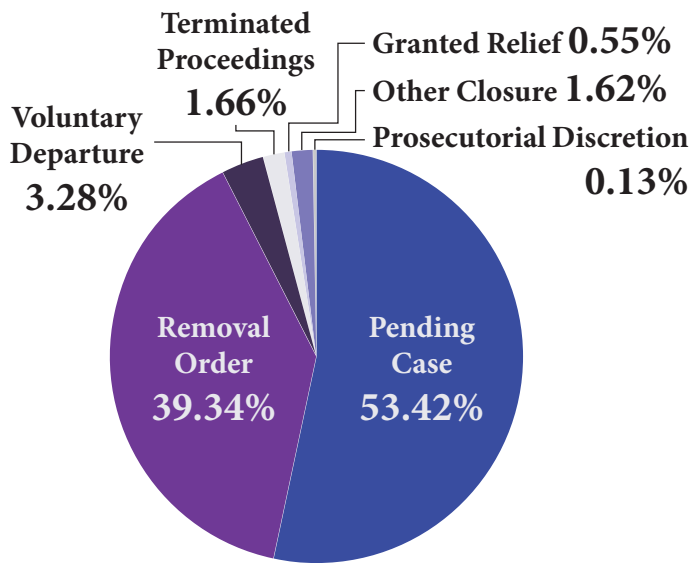


¹ Executive Office for Immigration Review Adjudication Statistics, UAC Statistics, EOIR, <https://www.justice.gov/eoir/page/file/1083086/download> (last visited Sept. 3, 2021).

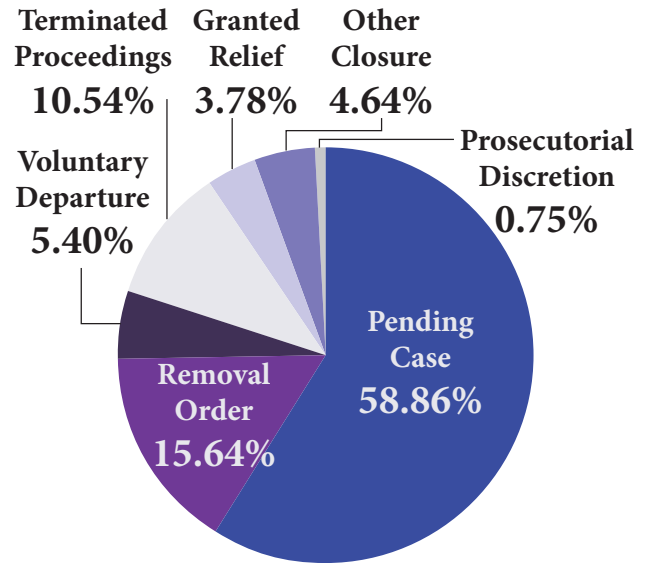
² Executive Office for Immigration Review Adjudication Statistics, Current Representation Rates, EOIR, <https://www.justice.gov/eoir/page/file/1062991/download> (last visited Sept. 3, 2021).

³ Transactional Records Access Clearinghouse (TRAC) data regarding juveniles in immigration court proceedings from 2005 to July 2021 covers 1,324,716 cases. Of those, 739,646 matters are currently pending before the immigration court. TRAC Immigration, *Juveniles – Immigration Court Deportation Proceedings*, Syracuse University, <https://trac.syr.edu/phptools/immigration/juvenile/> (last visited Sept. 3, 2021).

LOOKING AT THE TOTAL DATA:
What Is the Impact for a Juvenile
Who Does Not Have Representation?



LOOKING AT THE TOTAL DATA:
What Is the Impact for a Juvenile
Who Has Representation?



The data⁴ shows that juveniles who have a representative are over six times more likely to be granted relief than a juvenile without counsel. Additionally, represented juveniles are also over six times more likely to have their cases terminated, which is usually a positive result in removal proceedings.

Moreover, the numbers show that there are a large number of pending cases, which shows the need for additional representation for kids. Children are facing deportation in immigration courts across the United States, including in a community near yours. We must find a way to elevate the voices of these youth by providing representation. Children should not be alone in this process.

There are many barriers to obtaining representation for children facing deportation. Federal funding, authorized by the Homeland Security Act of 2002⁵ and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),⁶ provides legal orientations and screenings for children who are in the custody of the Office of Refugee Resettlement (ORR), under the

**Learn More About
Representing Children &
Youth in Immigration Cases**

- Watch CILA and ProBAR's co-created fourteen-minute [video](#) *Standing with Children: Unaccompanied Children and the Need for Pro Bono Representation* to learn more.
- Watch the ABA COI's [video](#), *Tu Futuro, Tu Voz*, a fourteen-minute inspiring video made by youth for youth. The video features four individuals who were previously detained and fighting their immigration cases as minors. Today, as adults and as U.S. permanent residents or citizens, they explain what they went through and why they chose to trust in the legal services offered to them. Creating this video was the idea of one of the individuals featured.

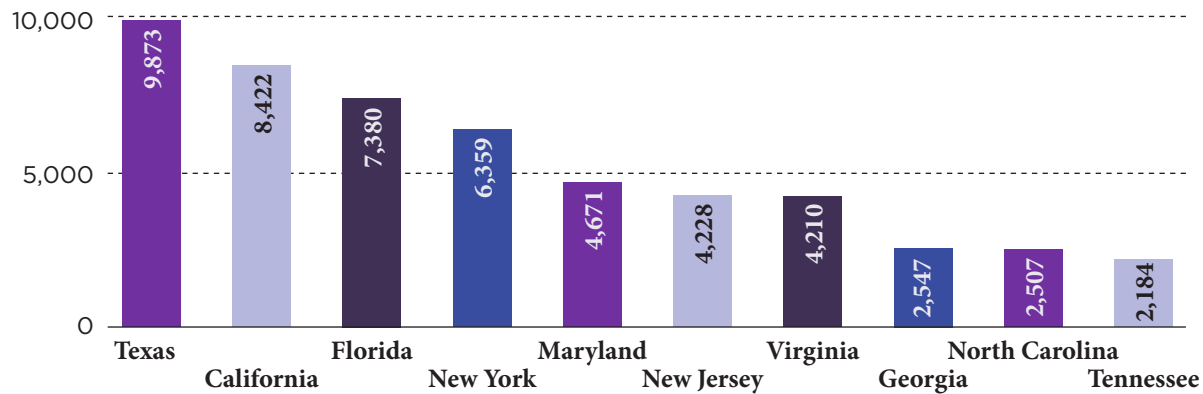
⁴ *Id.*

⁵ Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002); 6 U.S.C. § 279.

⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044, 5080 (Dec. 23, 2008); 8 U.S.C. § 1232.

Department of Health and Human Services (HHS), along with representation while they are detained.⁷ Many youth, however, are released from ORR care to a sponsor somewhere in the United States, and are set for hearings at immigration courts in their communities.

TOP TEN STATES RECEIVING CHILDREN IN COMMUNITY FY2019



Unaccompanied Children Released to Sponsors by State, U.S. HHS ORR (Sept. 27, 2019).
<https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>

Although children may have spoken to a lawyer while they were in detention, there is no guarantee of representation in the community where they are released, especially if they are released to a different area than where their shelter was located. Additionally, many parts of the country do not have legal service providers that represent youth for free or low cost, or who are able to provide support to pro bono attorneys to help kids released in their areas.⁸ This means oftentimes youth are not represented upon release from detention unless a pro bono attorney is willing to take the case.

We thank you for your time and effort in your pro bono representation. We hope this Guide helps equip you with the knowledge and tools needed to effectively advocate for your child client.

⁷ There have also been reports of limitations to children’s access to representation while detained. The judge in *Lucas R. v. Azar* lawsuit authorized a class of children in the Office of Refugee Resettlement (ORR) based on the fact that “ORR blocks lawyers from representing detained children with respect to placement, non-consensual administration of psychotropic medications, or release to available custodians notwithstanding that Congress has allocated funds specifically to provide such lawyers to represent children who are or have been in ORR custody in ‘legal matters,’ including issues related to ... [placement in the least-restrictive setting].”

⁸ For a list of free or low-cost legal services, search this directory by state or zip code. See ImmigrationLawHelp.org, <https://www.immigrationlawhelp.org/> (last visited Aug. 27, 2021).



II. EFFECTIVE REPRESENTATION

A. Working with Unaccompanied Children

The migration of children and adolescents is not a new phenomenon and is not unique to the United States. According to the United Nations, there were 272 million international migrants worldwide in 2019, and of those, 38 million were below the age of 20.⁹

Beginning in March 2020, thousands of individuals coming to the United States were expelled without the opportunity to seek protection in the United States. This included unaccompanied children until January 2021. In 2020 in total, there were 458,088 apprehensions/inadmissibles at the U.S. Southwest border according to data from the U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP).¹⁰ This figure includes 33,239 unaccompanied children; therefore, unaccompanied children accounted for approximately 7% of the apprehensions/inadmissibles at the Southwest border of the United States in 2020.¹¹ In the beginning of 2021, there was a significant increase in the number of children who arrived unaccompanied at the Southwest border.¹²

Learn About Unaccompanied Children in Your Area

ORR releases data regarding unaccompanied children released to sponsors per [state](#) and [county](#). View the Migration Policy Institute's [interactive tool](#) regarding data: *Unaccompanied Children Released to Sponsors by State and County, FY 2014-Present*.

Unaccompanied Child Definition

An “unaccompanied alien child” is a child who enters the United States without a valid entry document and who was not accompanied by a parent or legal guardian. An unaccompanied child is defined by the Homeland Security Act of 2002 and the TVPRA as an individual (a) under eighteen years of age; (b) without lawful immigration status; and (c) with no parent or legal guardian in the United States available to provide care and physical custody.¹³

DEMOGRAPHICS OF UNACCOMPANIED CHILDREN

Currently, the majority of unaccompanied children are migrating to the United States from Central America, particularly Guatemala, Honduras, and El Salvador.¹⁴ Primarily, teenage boys are the ones migrating.¹⁵ Children migrate for a variety of reasons and often for multiple reasons, but certainly common

9 *International Migrant Stock 2019*, U.N. Department of Economic and Social Affairs (Sept. 2019), https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationStock2019_TenKeyFindings.pdf.

10 *Southwest Border Migration FY 2020*, U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2020> (last modified Nov. 19, 2020). The government fiscal year for 2019 began October 1, 2019 and ended on September 30, 2020.

11 *Id.*

12 View the April 9, 2021 webinar hosted by the American Bar Association (ABA) *Unaccompanied Children at the Border: Get the Facts from the Experts* to learn more. *Unaccompanied Children at the Border: Get the Facts from the Experts*, ABA, https://www.americanbar.org/groups/crsj/events_cle/recent/unaccompanied-children/ (last visited May 17, 2021). See also *Rising Border Encounters in 2021: An Overview and Analysis*, American Immigration Council (May 13, 2021), <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021>.

13 See *supra* notes 5-6.

14 Data from FY 2020 shows that 48% of unaccompanied children migrated from Guatemala, 25% from Honduras, 14% from El Salvador, 6% from Mexico and 8% from other countries. See *Facts and Data*, ORR, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (last reviewed Mar. 11, 2021).

15 Data from 2020 shows that 72% of unaccompanied children were over 15 years of age and 68% were boys. *Id.* ORR also releases monthly [data](#) regarding unaccompanied children who are detained and released from ORR.

reasons for migration relate to uncontrolled violence in home countries, corruption, impunity, family-based violence, gender-based violence, and gang-related violence.¹⁶

What Happens When Unaccompanied Children Arrive in the United States?

Most often, children are apprehended by CBP. Unaccompanied children from contiguous countries (i.e., unaccompanied children from Mexico and Canada) must be screened within 48 hours for claims of persecution, trafficking, and fear of trafficking, as well as willingness to withdraw their application and voluntarily return home.¹⁷ Voluntary returns must be processed within 48 hours. DHS must transfer unaccompanied children from non-contiguous countries and those from Mexico who qualify to ORR generally within 72 hours.¹⁸

In 2019, there was much news coverage of the abhorrent conditions in border patrol facilities such as the one in Clint, Texas where reports of conditions for both children and adults shocked the conscious of many Americans.¹⁹ These reports echoed similar reports made in other facilities in the Rio Grande Valley in 2013.²⁰

In 2021, there were problems in border patrol facilities with overcrowding.²¹ With increased numbers of youth at the border, emergency shelters were opened that were inadequate and not well-equipped for youth.²²

CBP officers record their interview notes on Form I-213, *Record of Deportable/Inadmissible Alien* and issue a Notice to Appear (NTA), an official charging document, asserting any violations of immigration law against the children. Officers should also serve Form I-770, *Notice of Rights and Disposition* when the child is apprehended. Since unaccompanied children are entitled to speak to an immigration judge in removal proceedings, Immigration and Customs Enforcement (ICE) will then file the NTA with the immigration court, initiating removal proceedings for the unaccompanied children. Next, the immigration court will mail out hearing notices with required court dates for the child to attend court. There are many instances in which you might find that one of these steps was missed (i.e. failure to file the

Learn More About Expulsions at the Border

Read the American Immigration Council's [resource](#) *A Guide to Title 42 Expulsions at the Border*.

Learn More About Unaccompanied Children in Immigration Detention

Check out CILA's [blog post](#) on the topic: *Frequently Asked Questions: Who Regulates the Detention of Children Facing Deportation?*

¹⁶ See Paulina Villegas, *Detentions of Child Migrants at the U.S. Border Surges to Record Levels*, N.Y. Times (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/world/americas/unaccompanied-minors-border-crossing.html>. View CILA's webinar *A Deep Dive Into Current Conditions in El Salvador, Guatemala, & Honduras with the Experts* to learn more.

¹⁷ Unaccompanied children from contiguous countries are processed differently than other unaccompanied children. See TVPRA 2008, *supra* note 6.

¹⁸ *Id.* There is an exception to the 72-hour requirement during "exceptional circumstances."

¹⁹ See Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes, and Caitlin Dickerson, *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. Times (July 6, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html?module=inline>.

²⁰ See Guillermo Cantor, PhD, *Hieleras (Iceboxes) in the Rio Grande Valley Sector*, American Immigration Council (Dec. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf.

²¹ See Mica Rosenberg and Go Nakamura, *Thousands of migrant kids stuck in U.S. border patrol custody, again*, Reuters (Mar. 8, 2021), <https://www.reuters.com/world/americas/thousands-migrant-kids-stuck-us-border-patrol-custody-again-2021-08-03/>. See also Shaw Drake and Kate Huddleston, *Border Patrol Must Stop Holding People in an Inhumane Outside Pen Under a Highway in South Texas*, ACLU (Aug. 9, 2021), <https://www.aclu.org/news/civil-liberties/border-patrol-must-stop-holding-people-in-an-inhumane-outside-pen-under-a-highway-in-south-texas/>.

²² See Adolfo Flores, *Detained Immigrant Teens Feel Desperate And Hopeless At Emergency Shelters, Attorneys Say*, BuzzFeed News (Aug. 9, 2021), <https://www.buzzfeednews.com/article/adolfoflores/immigrant-youth-er-shelters>.

NTA with court, failure to serve Form I-770) or lacking in due process (i.e. copying and pasting incorrect information on a child’s I-213). See Section IV.B. to learn more about what to expect in immigration court.

Once in ORR’s care, the agency will work to place the youth with a sponsor to facilitate reunification, commonly with a parent or other close family member. If there is no option to reunify with a sponsor, the child will remain in ORR care via transfer to a long-term foster care (LTFC) and/or unaccompanied refugee minor (URM) program if the child qualifies for immigration relief.²³ Children who do not qualify for immigration relief and have no reunification option are repatriated to their home country. ORR shelters are spread across the United States with a large concentration found in the Rio Grande Valley along the border of Texas with Mexico. At ORR, a child goes through an assessment involving a biographic intake, medical exam, and mental health evaluation. If the child turns 18, the unaccompanied child might be transferred to ICE detention to be detained with adult immigrants on the youth’s birthday.²⁴

Foundational Sources of Law Impacting Unaccompanied Children’s Rights

SOURCE OF LAW	NOTES
<p><i>Flores Settlement Agreement</i></p>	<ul style="list-style-type: none"> • 1984: Advocates sued INS over their policy to release unaccompanied children only to a parent and legal guardians and over the detention conditions of children, who were strip-searched, placed with unrelated adults, and deprived recreation and education • 1997: Settlement approved improving standards for detention, release, and treatment of minors in immigration custody <ul style="list-style-type: none"> - Must be detained in “least restrictive setting” - Apprehension—Safe and sanitary facilities and transfer out within 3 days - Custody—Must be placed in state licensed facility although it does contemplate secure facilities in some cases with the option to request bond - Policy favoring release—including release to non-parent relatives and other placements with a sponsor agreement • 2019: DHS and HHS issued a Joint Final Rule (84 Fed. Reg. 44,392 (2019)). The new regulations were challenged in litigation in <i>Flores v. Rosen (Flores III)</i>, and the U.S. Court of Appeals for the Ninth Circuit found that the regulations pertaining to HHS except for two provisions could go into effect, and the DHS regulations were enjoined except for two provisions. Learn more in CILA’s blog post <i>The Flores Saga Continues: Update on the DHS and HHS Flores Regulations after the 9th Circuit’s Ruling</i> and the Congressional Research Service’s <i>Child Migrants at the Border: The Flores Settlement Agreement and Other Legal Developments</i>.

²³ In June 2021, ORR Field Guidance #18, eligibility for long-term foster care placement for unaccompanied children expanded to those without legal immigration relief.

²⁴ This is currently an issue in litigation in the case *Garcia Ramirez v. ICE*. See *ICE Unlawfully Detains Immigrant Youth: Federal Court Ruling*, National Immigrant Justice Center (NIJC) (July 2, 2020), <https://immigrantjustice.org/press-releases/ice-unlawfully-detains-immigrant-youth-federal-court-ruling>. Check out NIJC’s website for updates regarding the case.

SOURCE OF LAW	NOTES
<p>Homeland Security Act of 2002</p> <p>Codified as to ORR at 6 U.S.C. § 279</p>	<ul style="list-style-type: none"> • Transferred the responsibility of custody of unaccompanied children from “legacy” INS to ORR • Led to the creation of the child advocate program: “ensuring that the interests of the child are considered in decisions and actions relating to the care and custody” • Defined “unaccompanied alien child”
<p>William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008</p> <p>Codified at 8 U.S.C. § 1232</p>	<ul style="list-style-type: none"> • Asylum protections for unaccompanied children <ul style="list-style-type: none"> - Safe third country bar does not apply to unaccompanied children - One-year filing deadline does not apply to unaccompanied children - Initial jurisdiction of an unaccompanied child’s application is with an asylum officer • Expedited removal protections <ul style="list-style-type: none"> - Treatment of children from contiguous countries - Safe repatriation of children - Placement in removal proceedings - Care and custody of unaccompanied children - Safety and suitability assessments for custodians - Access to counsel - Child advocates • Expanded protections and eligibility for Special Immigrant Juvenile Status

Sample Checklist of What to Do Before Your First Client Meeting

- Review the information you have in the client file.
- If you are working with a nonprofit organization as a pro bono attorney, review all materials provided by the nonprofit organization.
- Do some research regarding the country your client is from so you have some background and context. Consider how you plan to represent the child with cultural competency and with a trauma-informed approach.
- Learn more about Cultural Competency with CILA's Guide: *Cultural Competency and Humility When Representing Unaccompanied Children*.
- Learn more about working with survivors of domestic violence and child abuse, trauma-informed lawyering, and interviewing techniques in Sections II.B.-C. of this Guide.
- Consider case strategy and summarize your client's options.
 - This may require some legal research and familiarization with your client's immigration options. The resources in this Guide should provide some background and a starting point to get to know the relevant law.
 - Think about how you will explain this information and the immigration process to your client in language appropriate to your client's age and developmental stage.
 - Use a case strategy matrix or other tool to help keep track of legal and factual elements. CILA has case theory and evidence matrix charts for SIJS and asylum posted on CILA's website on the *Additional Resources* [page](#).²⁵
- Prepare any documents you will need signed at your first meeting including any documents you will need to request additional records. See Section IV.B. for more information and resources on seeking records and conducting FOIAs.
- Draft a list of questions to ask your client based on your case file review and initial case strategy.
- Create a meeting agenda taking into consideration your trauma-informed stance. Review the sample first meeting checklist below for ideas.
- Offer the client a choice in meeting times among those you have available and make sure the client has directions and a plan for transportation, parking, child care, etc. during the meeting. When working with a child client, you may often be communicating with a parent or caregiver about some of these details. However, many adolescent and teenage clients are able to communicate and arrange meetings as well, and it is empowering to give them a voice in the process.
- Be sure to arrange an interpreter, if needed, for your meeting whether in person or through a telephonic interpretation system, as appropriate. See Section II.D. for tips regarding working with an interpreter.
- Check in with the client the day before the meeting to make sure they have all of the information they need to be present at the meeting.
- Make sure any office staff knows to expect them in person or possibly receive a phone call if they are having trouble finding the office and that other staff has a trauma-informed stance as well.

²⁵ If you would like to access these resources and do not have the password, please contact CILA at cila@abacila.org.

Sample Checklist for Your First Client Meeting

- Remember your trauma-informed stance: start by building rapport and giving your client signals of warmth and safety. Consider bringing items to break the ice, like music, games, coloring books, or toys.
- Be curious: try to get to know your client and connect on a more personal level. Ask about your client's interests, daily life, etc.
- Remember that the client may have never met a lawyer before or been provided a voice in this process, and that their cultural context for law enforcement, lawyers, and adults may be different than yours.
- Be patient, kind, and practice empathetic listening skills. *See Section II.C.*
- Introduce anyone in the room including interpreters, associates, legal staff, or interns.
- Review what you are going to be talking about in the meeting, how long it will last, and let the client know that they can ask for a break at any time to use the restroom or get some water.
- Review your role.
 - This is a good time to ensure your client knows you are there to help.
 - Discuss your duties of confidentiality to help put your client at ease. Do not forget to go over any exceptions to confidentiality that may exist in your jurisdiction. For example, in Texas all professionals including attorneys are mandatory reporters of child abuse.
 - If you have a computer or are going to take notes, explain why and let the child know the rules about confidentiality apply to the notes as well.
 - Remind the client that you do not work for the government, the court, the ORR shelter, or anyone other than them.
- Set clear expectations—what your client can expect and what you expect from your client, including any client obligations (being honest, appearing for court, etc.). For example, *see Section IV.B.* for your client's obligations while in removal proceedings.
- Sign documents.
- Review the file and information you have already received with your client.
- Discuss strategy options including any pertinent deadlines.
- Emphasize the need to stay in communication, and make sure you have the best contact information for your client and alternative methods of contact.
- Make a plan for next steps in the case.
- Try to end the interview on a lighter note, away from the substance of the meeting. If the

Know Your Rights

Review with your client their rights if they are stopped by the police, ICE, or other law enforcement. Additionally, your client may need this information in case their family or sponsor are picked up by ICE. Several organizations have great Know Your Rights (KYR) resources.

- [KYR](#) wallet cards issued by Immigrant Legal Resource Center (ILRC)
- [KYR](#) immigrants' rights issued by American Civil Liberties Union (ACLU)
- [KYR](#) for children and youth issued by National Immigrant Justice Center (NIJC)
- [KYR](#) information on ICE raids issued by Kids in Need of Defense (KIND)
- [KYR](#) information in Mayan Mam issued by the International Mayan League

client was emotional or had to discuss anything hard to talk about, remind them of their strength and bravery. This will help your client transition into the rest of their day.

Filing a Civil Rights Complaint with the Department of Homeland Security

If a DHS employee (i.e., a CBP or ICE officer or U.S. Citizenship and Immigration Services (USCIS) adjudicator) violated your client's civil rights or civil liberties, your client may want to consider making a Civil Rights Complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL).

Check out CILA's blog post: *Keeping the Government Accountable: Upholding Civil Rights and Due Process for Unaccompanied Children*, October 2019. The blog post will help provide more information about the process and gives tips on how to screen for these issues in your case. It is always important to ask the right questions! Unfortunately, violations have occurred. A DHS Office of Inspector General (OIG) July 2019 [report](#) highlighted problems occurring when children were held at CBP holding facilities, such as overcrowding, prolonged detention, and lacking access to showers and limited access to change clothes.

Links to Learn More About WORKING WITH UNACCOMPANIED CHILDREN

- Check out CILA's 101 [webinar: Introduction to Working with Unaccompanied Children](#) (2 hours, 9 minutes). The webinar covers: a Profile of an Unaccompanied Child; Legal Protections for Unaccompanied Children [beginning at 30:58]; and The Current System of Apprehension, Detention, Release and Representation of Unaccompanied Children [beginning at 1:10].
- Check out this [flowchart](#), to learn more about the process unaccompanied children go through upon entry into the United States and which agencies are involved in the process.
- Check out CILA's Guide on Stakeholder's Relations: *Who's Who in the Unaccompanied Children World? A Guide to Identifying and Working with Stakeholders*.
- Read the Council on Foreign Relations' article *U.S. Detention of Child Migrants*, January 30, 2020.

B. Trauma-Informed Lawyering

Working with Survivors of Domestic Violence and/or Child Abuse

Oftentimes domestic violence and/or child abuse is a common thread of children's stories. You will hear histories that include children who have suffered abuse by a parent; witnessed abuse between their parents; suffered threats and/or sexual violence in their home country, by gang members for instance; or experienced violence on the journey to or after arriving in the United States. Understanding how these experiences have impacted your child client and their families will help you become a better advocate for them.

“Domestic violence (also called intimate partner violence (IPV), dating abuse or relationship abuse) is a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship.”²⁶ Abuse can take many forms including controlling behavior, fear tactics, physical and sexual violence, coercion, threats, emotional or financial abuse, etc.²⁷ According to the [Children's Hospital of Philadelphia Research Institute's Center for Injury Research and Prevention](#), “[c]hild maltreatment (both abuse and neglect) is often linked with [intimate partner violence], and encompasses any act or failure to act on the part of a parent or caregiver which results in harm to the child, including

²⁶ *What is Domestic Violence?*, National Domestic Violence Hotline, <https://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited May 18, 2021).

²⁷ *Id.*

serious physical or emotional harm, sexual abuse or exploitation, or death.”²⁸ In addition to child abuse often co-occurring with other domestic violence at home, “[a] child can be an indirect victim of [intimate partner violence] as a witness and still face the serious consequences of the abuse.”²⁹

A common question by outsiders to this work is why a person would stay in a situation where there is domestic violence. It is important to know that the individual facing the abuse is in the best position to know when and whether they should leave the situation. It is a complicated decision to make. The [National Coalition Against Domestic Violence](#) (NCADV) says, “[a]busers repeatedly go to extremes to prevent the victim from leaving. In fact, leaving an abuser is the most dangerous time for a victim of domestic violence.”³⁰ NCADV goes on to explain,

[a] victim’s reason for staying with their abusers are extremely complex and, in most cases, are based on the reality that their abuser will follow through with the threats they have used to keep them trapped; the abuser will hurt or kill them, they will hurt or kill the kids, they will win custody of the children, they will harm or kill pets or others, they will ruin their victim financially - - the list goes on.³¹

When working with a child, sometimes due to age or cultural differences, a child may have a different perception of the abuse and this may be something that has to be defined and explained to the child. Depending on the age of your client, it may be helpful to use [power and control wheels](#) to discuss the issues with your client.³²

Many children have suffered abuse and/or neglect in their home country, but if a child is currently in an abusive situation, check in regarding the client’s safety during their representation. For example, ask your client questions such as if their phone number is a number where you can leave a voice-mail and if your client has a safe place to receive mail. You can also help your client by encouraging them to make a safety plan and working with them to create the plan.³³ Additionally, remember your ethical responsibilities, including in some states, the mandatory duty to report child abuse. See Section II.E. Also keep in mind legal relief such as VAWA and U visas and ensure you screen for these types of legal relief. See Sections III.D and III.E. You can also share the hotline numbers included in this resource and research other local sources to assist your client.

Important Resources

[Childhelp National Child Abuse Hotline:](#)

1-800-4-A-CHILD (1-800-422-4453)

[National Domestic Violence Hotline:](#)

24/7 phone line where advocates are available to talk in more than 200 languages 1-800-799-SAFE (7233), TTY 1-800-787-3224, text (START to 1-800-799-SAFE (7233)), and chat tool.

[Loveisrespect](#), a resource for teens experiencing dating abuse, that includes a peer advocate 24/7 hotline 1-866-331-9474, TTY 1-800-787-3224, text (LOVEIS to 22522*), and chat tool.

28 *Domestic Violence and Child Abuse*, Children’s Hospital of Philadelphia Research Institute, <https://injury.research.chop.edu/violence-prevention-initiative/types-violence-involving-youth/domestic-violence-and-child-abuse#.Xj-WqzFKiM9> (last visited May 18, 2021).

29 *Id.*

30 *Why do Victims Stay?*, The National Coalition Against Domestic Violence (NCADV), <https://ncadv.org/why-do-victims-stay> (last visited May 18, 2021.)

31 *Id.*

32 The [National Center on Domestic and Sexual Violence](#) provides several wheel adaptations that could be useful to discuss these issues with your client. Take a look at the various wheels to see what is most relevant to your client’s particular situation.

33 View National Domestic Violence Hotline’s website with an interactive tool to create a safety plan. *Create a Safety Plan*, National Domestic Violence Hotline, <https://www.thehotline.org/plan-for-safety/create-a-safety-plan/> (last visited July 1, 2021). See also *Personalized Safety Plan*, NCADV, <https://ncadv.org/personalized-safety-plan> (last visited May 18, 2021); *What is a Safety Plan?*, National Child Abuse Hotline (June 18, 2016), <https://www.childhelp.org/wp-content/uploads/2014/07/CH-Safety-Plan.pdf>.

Childhood abuse and neglect can have short-term and long-term consequences impacting a child physically and mentally.³⁴

Toxic stress can be caused by experiencing ACEs [adverse childhood experiences], including child maltreatment. It can change an individual's brain architecture, which can cause the person's stress response system to be triggered more frequently and for longer periods of time and place him or her at an increased risk for a variety of physical and mental health problems, including cardiovascular disease, depression, and anxiety (National Scientific Council on the Developing Child, 2014). Trauma-informed approaches, however can help improve outcomes for individuals affected by toxic stress, and there is evidence that social and emotional support (e.g., consistent parenting practices, community supports) can alleviate its effects (U.S. Department of Health and Human Services [HHS], Administration for Children and Families [ACF], 2017).³⁵

The effects of the abuse or neglect may impact your representation because it may affect your working relationship with your client and/or how your client can communicate their story with you and/or a decision maker in an interview or hearing. Frequently, it is necessary to have a forensic evaluation conducted by an expert to fully explain how your client's past is impacting their physical and/or mental health.

The Significance of a Trauma-Informed Approach

Many of our clients have experienced past trauma. This could be trauma that occurred in the client's home country, on their journey to the United States, or even once in the United States based on a particular experience, being detained, or separation from family.

Signs of trauma vary person to person, and will also depend on your client's age.³⁶ According to [The National Child Traumatic Stress Network](#),

[t]raumatic reactions can include a variety of responses, such as intense and ongoing emotional upset, depressive symptoms or anxiety, behavioral changes, difficulties with self-regulation, problems relating to others or forming attachments, regression or loss of previously acquired skills, attention and academic difficulties, nightmares, difficulty sleeping and eating, and physical symptoms, such as aches and pains. Older children may use drugs or alcohol, behave in risky ways, or engage in unhealthy sexual activity.

For children in immigration proceedings, there are additional factors to consider when employing a trauma-informed approach including potential difference in language, power dynamics, adjustment to a new culture, placement of your client (i.e. detained, released to family, released to non-family), and potential lack of trust.³⁷

Often the nature of our work requires us to work with clients as they recount prior trauma because it directly relates to the case. Employing a trauma-informed approach to your representation is essential

34 *Impact of Child Abuse & Neglect*, Child Welfare Information Gateway, <https://www.childwelfare.gov/topics/can/impact/> (last visited Aug. 18, 2021).

35 Child Welfare Information Gateway. (2019). *Long-term consequences of child abuse and neglect*. Washington DC: U.S. Department of Health and Human Services (HHS), Administration for Children and Families, Children's Bureau, https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf.

36 *Trauma Informed Care for Children Exposed to Violence Tips for Agencies working with Immigrant Families*, Office of Juvenile Justice and Delinquency Prevention, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/programs/safestart/TipSheetFor_ImmigrantFamilies.pdf (last visited May 18, 2021).

37 Many of the concepts in this section were presented in a CILA Boot Camp training by team members from the Trauma and Grief Center at Texas Children's Hospital/Baylor College of Medicine, *Exploring Trauma and Grief in Children and Teens*, presenters Maria X. Maldonado-Morales, LCSW, MPH and Guadalupe Garcia, LPC, Sept. 25, 2019.

because it is ethically necessary³⁸ and because it is important to treat clients with respect and compassion. Our goal is to reduce re-traumatization of our clients while we work with them on their case.

It is important to remember that “[a]though many immigrant and refugee youth have experienced adversity and hardship, first and foremost, they are people who have also drawn on significant internal and external strengths to have survived their past experiences.”³⁹ In practice, it can be best to apply a strengths-based approach. “[A] strengths-based approach focuses on growth and development and recognizes that acknowledging strengths can build resilience and promote healing. The simple act of identifying and drawing attention to children’s strengths can promote resilience”⁴⁰

TIPS FOR PRACTICING TRAUMA-INFORMED LAWYERING⁴¹

Build trust with your client:

- Build rapport with your client. Get to know their interests and who they are on a personal level.
- Be vulnerable. Share with your client your purpose in doing pro bono work and/or working on their case, as well as a little bit about yourself. This will help create a safe space for them to share information with you.
- Help your client feel comfortable. For example, if possible, try to create an environment where it will be comfortable to talk. Maybe this will be a private room or a room with windows and an easy exit.
- Set the tone from the beginning of a meeting. Be welcoming and friendly by offering water or coffee, for example.
- Think about your language. Use language such as “we” or “us.” For example, “We will work together on this.”
- Go over confidentiality and your role as your client’s attorney.
- Use empathetic listening skills. *See Section II.C.*

³⁸ Rule 1.1 of the ABA Model Rules of Professional Responsibility addresses competence and mandates that “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ABA Model Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” This Model Rule is further explained in comments, which state that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

³⁹ Miller, K. K., Brown, C. R., Shramko, M., and Svetaz, M. V. (2019). *Applying Trauma-Informed Practices to the Care of Refugee and Immigrant Youth: 10 Clinical Pearls*. *Children (Basel, Switzerland)*, 6(8), 94, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6721394/pdf/children-06-00094.pdf>.

⁴⁰ *Id.*

⁴¹ Many of these ideas were represented in Torture Abolition and Survivors Support Coalition (TASSC) International and CLINIC’s webinar, *Developing a Trauma-Informed Consciousness for Legal Practitioners*, Presenter Caitlin Tromiczak, LICSW-C, LCSWC, Moderator Helen Chen, Esq. (Oct. 23, 2019), <https://cliniclegal.org/training/archive/developing-trauma-informed-consciousness-legal-practitioners>. Watch this informative webinar to learn more about trauma-informed lawyering.

Communicate clearly with your client:

- Use basic language that is child-friendly and age appropriate.
- Set expectations from the beginning. For example, give your client an idea of how long the meeting will last so they know there is an end time to talking about the difficult subject. In addition, offer your client a roadmap of the legal case, including a timeline, to the extent you can.
- Inform your client about what is needed to have a successful working relationship, such as being on time to meetings and being honest in communications, for instance. Let your client know of any consequences of not meeting these expectations. For example, if the client is 30 minutes late to an hour meeting, explain that you will only be able to meet for 30 minutes. Keep in mind that some of these expectations are likely new for your client due to the child's age and/or cultural differences. It is also important to recognize you want to allow for some flexibility when setting meeting times. Your child client may not be able to drive or access public transportation alone and therefore may not have much control over when they arrive.
- Set boundaries with your client and be clear about your role. For example, this may be important when referring your client to other community resources such as a counselor or medical resources.
- Explain why you need certain information and how it will help your client's case. For example, explain the importance of including details when your client recounts their story.

Empower your client:

- View your client as a survivor rather than a victim.
- Identify and express your client's strengths.
- Keep in mind that certain behaviors exhibited by your client may be what has served your client well in the past.⁴²
- Help your client exercise control.
 - Give your client some options in the process when you ask your client to talk about difficult subjects. For example, give the client options of how to provide information to you and when.
 - Ask your client if they are willing to share their story.
 - Give your client the option to prepare for the meeting or not prepare. For instance, if you are helping your client with a declaration about a traumatic past event, you can offer the option to write their story in advance or not. For some, this may take some pressure off from recounting details on the spot. On the other hand, writing the story down may be overwhelming for some clients.
 - Offer choices to your client whenever you can. Be sure to remember when offering choices to present them as neutral options without persuasion toward one option over another. Decisions should be made by the client, and your role is to offer them the information they need to make informed decisions, and not to make decisions for them.

⁴² “[Y]outh who have experienced trauma use coping mechanisms to manage chronic stress. These coping mechanisms may have even been adaptive and even necessary for survival in prior circumstances, especially for youth who have experienced extreme violence. However, under less life-threatening circumstances, the coping mechanisms that have served the youth well in the past may create difficulties in the new environment.” Miller, Brown, Shramko, Svetaz, *supra* at 3.1.

Give your client space when talking about tough subjects:

- Prepare your client in advance that you will be talking about difficult topics. Acknowledge that this can be hard.
- Start the conversation with something more light-hearted.
- Try to connect and learn about your client's interests and culture.
- Take the necessary time to listen to your client.
- Observe your client for any signs that your client is getting overwhelmed, starting to get agitated or anxious, or withdrawing from the conversation.
- If the conversation becomes too much for your client, then take a break. Also, you may want to help ground your client, bringing your client back from the past memory to the present. Noting the date, time, and place where you are can be helpful, in addition to affirming to the client that they are safe in your office. See II.C. for more grounding techniques.
- Pace your meetings and offer breaks.
- Offer time to stretch, walk around, or use a stress ball.
- End the conversation with gratitude and by recognizing your client's strengths.
- Keep in mind that you may have to go over details several times if your client has an impaired memory, which can result from experiencing trauma. This may require additional meetings to gather more details.
- It may sometimes help to put situations in general terms. For example, if you are making the recommendation to engage in counseling and/or get a mental health evaluation, you may want to explain that engaging in counseling is common in the United States. Acknowledge that there may be a stigma around it in your client's culture, but counseling is acceptable and common here. Further explain and emphasize how counseling and/or a mental health evaluation could be important for your client's case and that this is something you generally recommend to all of your clients so they do not feel singled out.

SECONDARY TRAUMATIC STRESS

Secondary traumatic stress (aka compassion fatigue) is a common and natural response to exposure to someone else's trauma, injustices, accounts of violence, and other frightening circumstances. "Secondary traumatic stress is the emotional duress that results when an individual hears about the firsthand trauma experiences of another."⁴³ There is a growing acknowledgment of the occurrence of secondary traumatic stress for attorneys, and as such there are more resources available to help as well.⁴⁴ Experiencing secondary traumatic stress could result in changes in your behavior which can come through in many ways, such as irritability, tearfulness, numbness, hypervigilance, sleep disturbance, and nightmares.⁴⁵ It is

⁴³ *Secondary Traumatic Stress*, The National Child Traumatic Stress Network, <https://www.nctsn.org/trauma-informed-care/secondary-traumatic-stress> (last visited May 18, 2021).

⁴⁴ See William C. Silverman, *How to Identify and Address Secondary Trauma*, *The National Law Review* (Feb. 6, 2019), <https://www.natlawreview.com/article/how-to-identify-and-address-secondary-trauma>; Jeena Cho, *When caring costs you: Lawyers can experience vicarious trauma from work*, *ABA Journal* (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/when-caring-costs-you-lawyers-can-experience-vicarious-trauma-from-work>.

⁴⁵ See Christina Rainville, *Understanding Secondary Trauma: A Guide for Lawyers Working with Child Victims*, *ABA* (Sept. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/.

important to take care of yourself and seek support and help if you are experiencing these types of changes. Reach out to friends, family, colleagues, or a counselor. Check in with yourself for signs of vicarious trauma, take breaks, and pace yourself. Consider the strategies for prevention and intervention outlined in The National Child Traumatic Stress Network's *Secondary Traumatic Stress: A Fact Sheet for Child-Serving Professionals*.

Important Resources

- Research any available local mental health referrals for counseling services.
- In most states you can dial **211** to find out about local services such as access to food, housing, and health clinics. This service is confidential and available 24 hours per day, every day. The service is available in 180 languages.
- The Hackett Center for Mental Health's Trauma and Grief Center provides [resources](#) to help children experiencing grief.
- **National Human Trafficking Hotline:** 1-888-373-7888, TTY 711, text (233733), and chat. This service is confidential and available 24 hours per day, every day. The service is available in more than 200 languages.
- **National Suicide Prevention Lifeline:** 1-800-273-8255 (Eng.), 1-800-628-9454 (Esp.), TTY users: 711 and then 1-800-273-8255, and chat. This service is confidential and available 24 hours per day, every day.

Links to Learn More About TRAUMA-INFORMED LAWYERING

- Check out CILA's 101 [webinar](#): *Trauma Informed Lawyering with Unaccompanied Children* (1 hour, 27 minutes).
- View CILA's [training](#) *Trauma-Informed Representation and Advocacy*, ABA Commission on Immigration's *Defend Asylum Together! Essentials of Immigration Law for Effective Pro Bono Representation (Day 2)*, January 2021.
- Check out U.S. Department of Health and Human Services Administration for Children & Families [Resources Specific to Immigrant or Refugee Populations](#).
- Check out the ABA's [Establishing a Trauma-Informed Lawyer-Client Relationship \(Part One\)](#) and [Communicating with Youth who Have Experienced Trauma \(Part 2\)](#), Eliza Patten, JD, CWLS and Talia Kraemer, JD, October and November 1, 2014.
- Check out Casa de Esperanza's [Trauma Informed Principles Through a Culturally Specific Lens](#), Josie Serrata, PhD and Heidi Notario, MA.
- Check out Tend, [Tools to Reduce Vicarious Trauma/Secondary Trauma and Compassion Fatigue](#), Tasha Van Vlack, November 3, 2017.
- Check out the [webinar series](#) created by Houston Immigration Legal Services Collaborative ([HILSC](#)) and member organizations (Tahirih Justice Center, Justice for Our Neighbors, CILA) and Rosalie Hyde, LCSW (Houston Galveston Trauma Institute). The series *Mental Health Evaluations for Immigrant Clients: From your First Interview to the Merits Hearings* covers topics such as listening to client's stories with a trauma-informed lens and setting up forensic evaluations. The webinars are posted on CILA's website.

Links to Learn More About WORKING WITH SURVIVORS OF DOMESTIC VIOLENCE AND/OR CHILD ABUSE

- Check out [NCADV's](#) website with numerous resources and various hotlines.
- Check out National Domestic Violence Hotline's website on [supporting others](#). Their [resource page](#) also includes several resources for teens specifically.
- Look at [WomensLaw.org](#) to find resources such as advocates in domestic violence programs and shelters, legal assistance organizations, courthouse locations for filing a protection order, and sheriff departments across the country. The website is also available in Spanish.
- The NW Network works to end abuse for LGBTQ individuals and provides helpful [resources](#) on their website.
- Check out [ASISTA's](#) website with resources for survivors and advocates.
- Check out the American Academy of Child & Adolescent Psychiatry's *Trauma and Child Abuse Resource Center*.
- Check out Casa de Esperanza's resource *Latina Immigrant Women and Children's Well-Being and Access to Services After Detention*, Laurie Cook Heffron, PhD, LMSW, Josie V. Serrata, PhD, and Gabriela Hurtado, PhD, 2018.

C. Interviewing Tips and Strategies

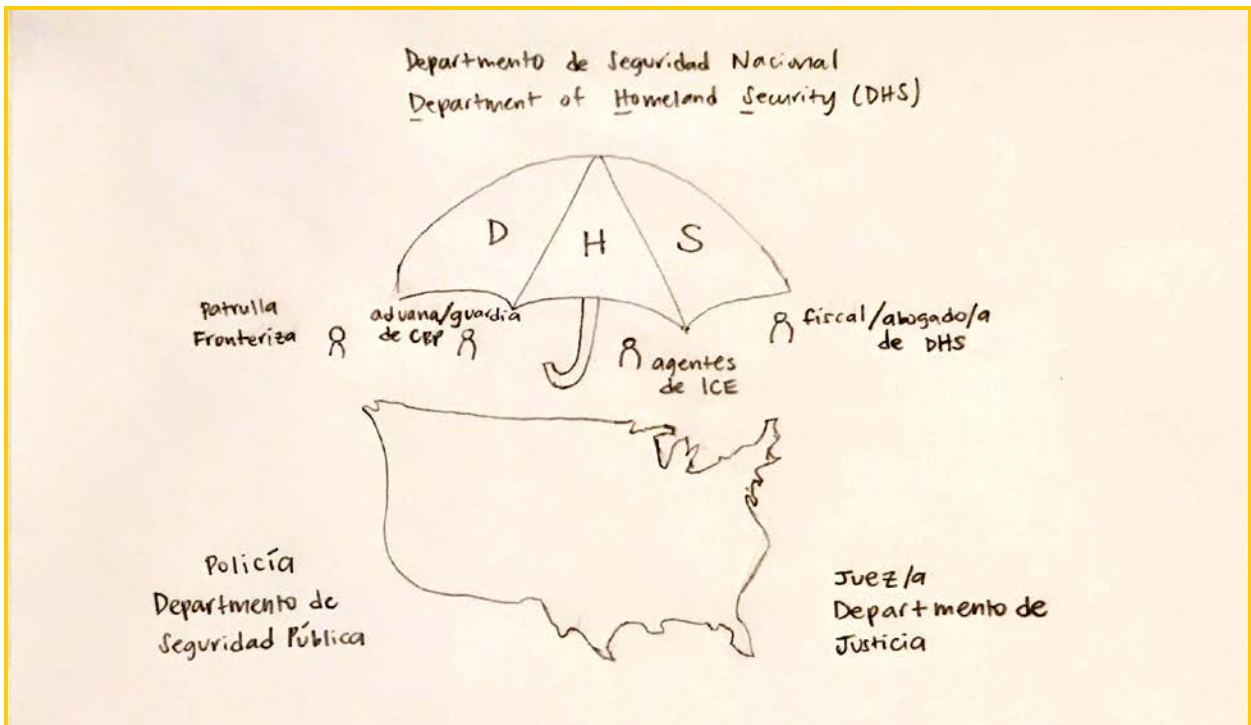
Tips and Strategies to Effectively Interview Children⁴⁶

- **Consider Key Factors When You Plan Your Interview:**
 - **Child's age:** Use age-appropriate language when communicating with your client. This may require more advance preparation than an interview you would have with an adult. Think about what you need to communicate and how you can do so in a way that is simple and easy to understand.

Visuals can be very helpful, so you might consider bringing paper you can draw on. You might use it to explain the agencies involved and the legal process in their case, or to craft a timeline of events in the child's life or a family tree. **Example:** Below is an example of a drawing you can use to explain some of the agencies involved in immigration matters to a child. CILA based this example off of a visual provided to us by South Texas Pro Bono Asylum Representation Project (ProBAR).

This drawing shows that DHS houses border patrol (*patrulla fronteriza*) and customs/guard (*aduanas de CBP/guardia*) both in CBP, ICE agents (*agentes de ICE*), and the government attorney (*fiscal/abogado/a de DHS*). It shows that the immigration judge (*juez/a*) is under the Department of Justice (DOJ) (*Departamento de Justicia*) and that the police/public security department (*policía/Departamento de Seguridad Pública*) is also separate from DHS. To see an example of a drawing showing who will be present in immigration court, please refer to Section IV.B.

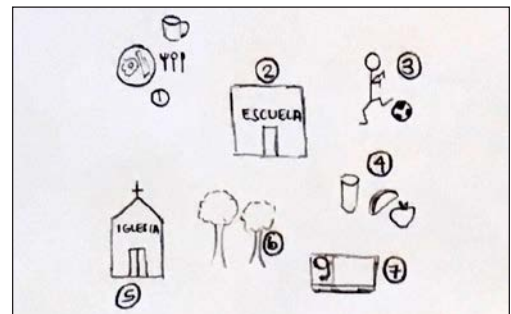
⁴⁶ Many of these ideas were represented in CILA's Boot Camp Training *Child Interviewing Techniques*, presenters Melissa Davila, MSW, KIND and Valeria Olmedo, LMSW, The Young Center for Immigrant Children's Rights, Sept. 25, 2019. You can view an April 2021 recording of this presentation on CILA's website.



- **Child’s developmental stage (emotionally and mentally):** Keep this in mind when deciding what to discuss, how to bring up topics, and what you can cover in a meeting.

Younger children often like to draw, but many times this technique works with older children as well, and you might consider having paper and crayons on hand so that your client can draw a picture and then tell you about it. You might ask your client to draw pictures of how they used to spend an average day in their home country, for instance. This can help you learn about your client and their life, and later, you can use the same technique to gain more information that will pertain to their potential legal relief. Another option is to provide your client with playdough or something else to fidget with while you talk.

Example: To the right is an example of a drawing from hypothetical client, Gregorio. In the drawing, Gregorio drew his typical day noting he usually: (1) eats breakfast; (2) goes to school (escuela); (3) plays soccer; (4) has lunch; (5) goes to church (iglesia) after school; (6) spends time outside; (7) and then goes to bed.



You could also ask your client to draw a family tree with pictures where you or your client can draw little faces or stick people as you review the family members in the child’s life. This can help you lead into other questions to get to know more about your client’s life. You can add onto the family tree notes regarding the youth’s family members’ ages and relationships.

Example: Another drawing, below, from hypothetical client Gregorio shows a family tree. The drawing shows his grandparents (abuelos), parents (padres), and his brother (hermano) and his brother’s wife and kids, who still live in Honduras. He also drew pictures of family members he has in the United States (Estados Unidos) including his aunt and uncle (tía and tío) and his cousins. He included some of their ages in the drawing.



- **Child’s cognitive ability:** Consider this particularly when thinking about the questions you want to ask and the information you need to gather. You may need to check for understanding, by asking the same question in different ways, for example. Use language that is child-friendly, and consider creative analogies for tougher concepts that you need to explain. For example, legal service providers have explained court proceedings to children as analogous to a soccer game, identifying the different “teams” (the client/attorney and the government) and the “umpire” (the judge).
- **Any trauma history:** Prior trauma can have an ongoing impact on children which may affect their ability to communicate and concentrate and impact other aspects of their behavior. Overall, this could affect the quality of an interview. Practice a trauma-informed approach by being aware of the implications of trauma as well as how you can help your client feel more at ease. *See Section II.B.*
- **Interview location:** Consider the interview location, and try to make this a private, comfortable space in which the child feels safe. If you are meeting at your law firm’s office, consider rooms without large interior windows and spaces with comfortable seating like a couch or carpeted flooring.

- **Empathetic Listening:**

- Listen carefully.
- Be patient. Long pauses are okay.
- “Think of yourself as a mirror. Repeat the speaker’s thoughts and feelings back to them.”⁴⁷
- At times, express understanding as your client speaks.
- Be open, not judgmental. Listen without projecting your perspective and opinions onto your client.

- **Grounding Techniques:**

- Let the child fidget with a pipe cleaner or other toy.
- Let the child color, draw, or play with playdough.
- Try out the 5-4-3-2-1 Grounding Technique.⁴⁸

⁴⁷ *Empathetic Listening Going Beyond Active Listening*, MindTools, <https://www.mindtools.com/CommSkll/EmpathicListening.htm> (last visited May 17, 2021).

⁴⁸ See Sara Smith, BSW, *5-4-3-2-1 Coping Technique for Anxiety*, University of Rochester Medical Center’s Behavioral Health Partners Blog (Apr. 2018), <https://www.urmc.rochester.edu/behavioral-health-partners/bhp-blog/april-2018/5-4-3-2-1-coping-technique-for-anxiety.aspx>.

- Practice breathing exercises with your client.⁴⁹

- **Important Tips to Remember:**

- Employ a trauma-informed approach during your interviews. See Section II.B.
- Take the time to build trust with your client. Trust building may take more than one meeting.
- Be warm, friendly, and personable.
- Remember your ethical duties. Try to learn your client's wishes for their case, even if communication is limited due to age. See Section II.E.
- If working with a young child, get on the level of the child physically. Sit on the floor and play with the child as they talk.
- Honesty is essential. Remind your client to tell the truth.
- Remind your client that it is okay to say "I do not know."
- Let your client know that it is okay to say "I do not want to talk about that."
- Remind your client that it is always okay to say "I do not understand" and to ask questions.
- Oftentimes, a client may say, "You know the information already." It can be helpful to explain the importance of hearing their story directly from them in their own words, and that this helps you prepare their case and that it is important because it is their story.
- Remember to check in with your client to see how they are doing from time to time. Offer breaks.
- Read body language and facial expressions. Offer help to deal with any distress they are experiencing during the interview. Perhaps at this time introduce a grounding technique.
- Thank your client for their participation.

Links to Learn More About INTERVIEWING CHILD CLIENTS

- Watch CILA's [training recording](#) *Child Interviewing Techniques* (40 minutes). View the [training](#), *Legal Services for Tender-Age Children and Best Practices When Providing Services Remotely* (56 minutes), for some ideas. ProBAR legal staff presented on the topic at CILA's 3rd Annual Texas Champions for Immigrant Youth Symposium.
- View Stanford's Center for Health Education and UT-RGV excellent four part short [video series](#) on trauma-informed interviewing techniques which provides examples of what to say when interviewing immigrant children: *Trauma-informed Techniques for Interviewing Immigrant Children*.
- Read Society for Research in Child Development's [Questioning Unaccompanied Immigrant Children: Lessons from Developmental Science on Forensic Interviewing](#), October 25, 2019.
- Read the ABA article, [Representing Child Abuse Victims: Forensic Interviewing Tips](#), Claire Chiamulera, November 16, 2017.
- Read *The New Yorker*, "[An Immigration Attorney on What it's like to Represent Small Children Taken from their Parents](#)," Alexandra Schwartz, June 19, 2018.

⁴⁹ See *How to Teach Your Child Calm Breathing*, Anxiety Canada, https://www.anxietycanada.com/sites/default/files/calm_breathing.pdf (last visited May 17, 2021). See also *Breathing Strategy - Flower and Candle*, Momentous Institute, <https://www.youtube.com/watch?v=Wc9pBYI1-Mk> (last visited May 18, 2021); *Roller Coaster breathing*, Logos Academy, <https://www.youtube.com/watch?v=drb-VT9FlwE> (last visited May 18, 2021); *Breathing Hands*, University of Nebraska Medical Center, <https://buffettinstitute.nebraska.edu/-/media/beci/docs/1-15-20-breathing-hands-prek.pdf?la=en> (last visited May 25, 2021).

D. Working with Interpreters and Translators

Tips for Success when Working with Interpreters and Translators

- Remember your ethical duties when working with an interpreter and/or translator. *See* Section II.E.
- Keep in mind your client may prefer working with an interpreter of a particular gender generally or for certain tasks. Ask your client regarding their comfort level and preference.
- Prepare the interpreter/translator for the task by briefly explaining the purpose for the call/meeting.
- Ensure expectations and roles are clearly communicated and identified for both the interpreter and your client.
 - The interpreter should be a neutral party, rather than a family member or friend.
 - The interpreter should interpret exactly what you say and not answer questions themselves or add commentary.
- If possible, in-person interpretation is best.
- Interpretation takes time. Plan accordingly. Be patient.
- Confirm that both the interpreter and child can understand each other.
- Use simple, clear language. Use short sentences.
- Provide explanations of terms and concepts, as needed, to avoid confusion.
- Speak slowly and pause as you go.
- Be respectful of your client and the interpreter. Consider your tone. Try not to interrupt. Ask for clarification if needed.
- Give your client and the interpreter opportunities to take breaks.
- Speak directly to your client. Give your client eye contact and engage with your client rather than the interpreter.
 - Make sure the setup of the room helps facilitate dialogue directly with your client.
- Review confidentiality with your client and the interpreter/translator.
 - Ask the interpreter/translator to sign a statement regarding confidentiality and your client to sign a release.
- Keep in mind you that you will likely need signature(s) and/or statements from the interpreter/translator regarding accuracy of interpretation if they are helping with any immigration forms or other documents that will be formally submitted.
 - For instance, *see* [EOIR Policy Manual, Part II - OCIJ Practice Manual Ch. 3.3\(a\)](#).

Links to Learn More About WORKING WITH INTERPRETERS AND TRANSLATORS

- Check out CILA's [webinar: Making Interpretation Seamless: Best Practices for Attorneys](#) (59 minutes).
- Check out Ayuda's [Working with Interpreters Outside of the Courtroom: A Guide for Attorneys](#), 2016.

E. Ethical Considerations

Considering ethical duties is a daily aspect of any attorney’s practice, but there are several ethical issues that may uniquely arise when working with children and when doing pro bono work. The Guide will address some of the most common ethical issues that come up when representing youth in pro bono cases.

First, it is important to know that attorney conduct is regulated by the Federal Rules of Practitioner Conduct when practicing before the Executive Office for Immigration Review (EOIR) or USCIS.⁵⁰ It is also important to be aware of ethical rules in the state where you are licensed and practicing. The below chart will point primarily to the *ABA Model Rules of Professional Conduct* as an example and guide for how to address some of these common ethical questions.

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
<p>Can I represent a child?</p> <p>Bottomline answer: Yes.</p>	<ul style="list-style-type: none"> • <i>In re Gault</i>, 387 U.S. 1 (1967)—juvenile justice • <i>ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States</i>—Section III.H. Right to Attorney
<p>How do I represent a child? Do I represent the child’s wishes or best interest?</p> <p>Bottomline answer: the child’s wishes.</p>	<ul style="list-style-type: none"> • Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer <ul style="list-style-type: none"> - (a) “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” • Rule 1.14 Client with Diminished Capacity <ul style="list-style-type: none"> - (a) “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” - Comment 1: “For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” • Rule 1.4 Communications • Rule 2.1 Advisor • <i>ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States</i> – Section V.A. The Attorney’s Role

⁵⁰ See 8 C.F.R. §§§§ 1292.3, 292.3, 1003.101, and 1003.102. See also EOIR Policy Manual, Part II OCIJ Practice Manual Ch. 10.4. Also, be aware of the McHenry EOIR Policy Memorandum (PM) 19-06, *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct*, Dec. 18, 2018.

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
<p>Can I share information with a 3rd party?</p> <ul style="list-style-type: none"> • I was referred the case from a non-profit organization and we continue to communicate about the case. • I am working with an interpreter or translator. • How can we keep information confidential and under privilege? 	<ul style="list-style-type: none"> • Rule 1.6 Confidentiality of Information • Rule 1.4 Communications <ul style="list-style-type: none"> - Has the client given informed consent? <i>See</i> 1.0(e) for the definition of “informed consent.” • Rule 5.3 Responsibilities regarding nonlawyer assistance • TIP: Is there a Memorandum of Understanding regarding the working relationship between the attorney and organization? • TIP: Do you have a confidentiality agreement with the interpreter/translator? Do you have a release from your client?
<p>What does representation cover?</p>	<ul style="list-style-type: none"> • Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer <ul style="list-style-type: none"> - What is reasonable? - Has the client given informed consent? • TIP: It is important to define the scope of representation, including whether it will include appellate work. This becomes even more important when only working on a discrete part of a case.
<p>I am new to immigration law, what are my obligations to learn the law?</p>	<ul style="list-style-type: none"> • Rule 1.1 Competence • Rule 1.3 Diligence
<p>I found out the child I represent was abused by their parent; do I have to report this to child protective services?</p>	<ul style="list-style-type: none"> • Look to state law, does the state where you practice or where you are licensed have a duty to report? Is this mandatory? Is this prohibited absent client consent? • Consider questions relating to privilege and confidentiality as well. <ul style="list-style-type: none"> - Rule 1.6 Confidentiality • TIP: If your state has a mandatory duty to report, it helps to talk with your client about this at the beginning of representation and include language regarding this in your engagement letter. Explain what abuse is and your obligations to report.

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
My client asked me to keep something important from the immigration court, what do I do?	<ul style="list-style-type: none"> • Rule 3.3 Candor toward the Tribunal • Rule 1.6 Confidentiality of Information
I would like to represent the child and their parent in state court, is that okay?	<ul style="list-style-type: none"> • Rule 1.7 Conflict of Interest: Current Clients • Rule 1.8 Conflict of Interest: Current Clients: Specific Rules • Rule 1.9 Duties to Former Clients
When is withdrawal allowed?	<ul style="list-style-type: none"> • Rule 1.16 Declining or Terminating Representation • Rule 1.3 Diligence • NOTE: Keep in mind many nonprofit organizations do not have capacity for a case to be given back to them.
I have concerns about my child client's capacity and/or competency. What do I do?	<ul style="list-style-type: none"> • Rule 1.14 Client with Diminished Capacity • Rule 1.2 Scope of Representation & Allocation of Authority Between Client & Lawyer • ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States – Section V.A. The Attorney's Role, Section X.C. Determinations of Competency in Immigration Adjudications • NOTE: When a child client expresses that they want to take a certain course of action that you think is not in their best interest, this in and of itself does not mean that they lack capacity/or competency. <i>See</i> Rule 1.2. • TIP: If you are concerned about the child's ability to make choices and meaningfully participate in their immigration case, you might consider submitting a referral for a child advocate through The Young Center, discussed below. If your client is in removal proceedings, and you are concerned about competency, you may need to raise the issue in immigration court and seek safeguards in line with Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011).

If you think it is necessary to have a [best interest](#) opinion in the case, contact The [Young Center](#) for Immigrant Children's Rights (The Young Center) to [refer](#) a child for the appointment of a child advocate. This is particularly helpful, for example in challenging cases and cases that involve very young children. [EOIR Policy Memorandum \(EOIR PM\) 20-03](#) describes when a child advocate can be appointed. "This

authority to appoint a child advocate exists only for ‘child trafficking victims and other vulnerable unaccompanied alien children’—not for all UAC.”⁵¹ The Young Center provides examples on their website of vulnerable children it may be appointed to serve including: “children who have been abused, infants who are the subject of international custody battles, children who have developmental disabilities, young girls who want to live with their traffickers, those who have lost their parents to violence, and more.”⁵²

If you have an ethics question, after reading your state’s ethics rules, comments, and opinions, then consider consulting with others you trust on the matter including a pro bono coordinating attorney, if there is one at the organization who referred the case to you. Many state bars have an ethics hotline who you can contact for assistance, which is a very helpful tool. Also, look for other helpful resources in your area. For instance, you can reach out to CILA if you are in Texas.

Links to Further Support Your Knowledge of ETHICAL ISSUES IN CHILDREN’S CASES

- Check out CILA’s [101 webinar: Ethical Representation for Unaccompanied Children](#) (1 hour, 11 minutes).
- View CILA’s [webinar: Sticky Issues: Ethical Challenges in Representing Unaccompanied Children](#) (1 hour, 33 minutes). This webinar also points to relevant Texas Disciplinary Rules of Conduct.
- Read Markkula Center for Applied Ethics at Santa Clara University 2018: [A Framework for Ethical Decision Making](#), 2018.
- Review the [ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States](#), August 2018.
- Learn about Cultural Competency with CILA’s Guide: [Cultural Competency and Humility When Representing Unaccompanied Children](#).
- Read Lowenstein Sandler’s Memorandum: [Ethical Obligations in Representing Children Without Capacity in Immigration Proceedings](#), December 13, 2018.
- Check out CILA’s Practice Advisory [Ethical Considerations in Discussing Social Media with your Client and Practical Tips: How to Discuss Social Media with Child Clients](#) by Sarah Howell, LMSW posted on CILA’s website under [Additional Resources](#).

⁵¹ *Child Advocates in Immigration Proceedings*, EOIR PM 20-03 (Nov. 15, 2019).

⁵² *Child Advocate Program*, The Young Center for Immigrant Children’s Rights, <https://www.theyoungcenter.org/child-advocate-program> (last visited May 18, 2021).



III. COMMON FORMS OF RELIEF

A. Asylum

If your client is afraid to return to their country of origin, it is important to discuss the option to apply for asylum. Asylum is a common form of potential relief in many youths' cases because many children are fleeing violence in their country or other dangerous conditions. There are many reasons children flee to the United States and many reasons they fear going home. These reasons are often intersecting.⁵³ The root causes of migration could include targeted violence because of the child or their family's race or ethnicity, religion, sexual orientation, political opinion, refusal to become a gang member or a girlfriend of a gang member, sexual violence or child abuse, or because their parent or caregiver suffered harm. There are many reports on the general conditions in many countries around the world. Every child has a unique story. It is important to discuss these matters in detail, and the option of asylum as a potential form of relief.

[Form I-589, Application for Asylum and for Withholding of Removal](#) is the correct form to use to apply for asylum. Additionally, an asylum applicant may be able to seek employment authorization while their claim is pending after a waiting period has passed.⁵⁴ An asylum seeker can file for an employment authorization document (EAD) using [Form I-765, Application for Employment Authorization](#).

Eligibility Requirements

To be eligible for asylum, an individual must be physically present in the United States and meet the definition of a refugee under the Immigration and Nationality Act (INA) § 101(a)(42)(A). The INA defines a refugee⁵⁵ as:

[a]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A).

⁵³ See United Nations High Commissioner for Refugees (UNHCR) Report, *Children on the Run*, <https://www.unhcr.org/en-us/children-on-the-run.html> (last visited Aug. 18, 2021).

⁵⁴ On June 26, 2020, DHS issued a [final rule](#) changing asylum seekers' ability to seek employment authorization. The rule went into effect on August 25, 2020. In general, the rule changed the amount of time asylum seekers must wait before initially applying for an employment authorization document and limits those who are eligible for work authorization. Following the rule, the U.S. District Court for the District of Maryland issued a [preliminary injunction](#) enjoining provisions of the rule relating to asylum seekers' ability to obtain an employment authorization document as the rules pertain to members of the Asylum Seeker Advocacy Project (ASAP) and CASA de Maryland (CASA). Read more information about the case from ASAP on its webpage regarding [litigation updates](#) and how the ruling affects [its members](#). CASA also provides a helpful [chart](#) comparing the old and new rule and includes information on if/how the new rule applies to members. Both organizations also provide information on becoming class members. Additional information is also on USCIS's [website](#).

⁵⁵ *INS v. Cardoza-Fonseca* says, "[i]n interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on the Procedures and Criteria for Determining Refugee Status (Geneva, 1979)." 480 U.S. 421, 437-39 (1987). The decision also says, "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform." *Id.* at 439, n.22. Notably, UNHCR's *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* states, "As with gender, age is relevant to the entire refugee definition. As noted by the UN Committee on the Rights of the Child, the refugee definition: . . . must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures."

Therefore, to be eligible, an individual must be:

- Unable or unwilling to return to their home country because they
- Either suffered past persecution OR have a well-founded fear of future persecution
- Perpetrated by the government OR an entity the government cannot or will not control
- On account of (nexus) one of the five protected grounds (actual or imputed⁵⁶):
 - Race
 - Religion
 - Nationality
 - Membership in a particular social group (PSG)
 - Political opinion

Asylum Key Sources of Law

- INA § 208; 8 U.S.C. § 1158
- INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A)
- INA § 209; 8 U.S.C. § 1159 (adjustment of status)
- 8 C.F.R. § 208.13
- Case Law—BIA decisions, Circuit Courts of Appeals decisions, Supreme Court decisions
- Persuasive Authorities:
 - Other Circuit Court decisions
 - International law—Treaties
 - [UNCHR Handbook on Procedures and Criteria for Determining Refugee Status & Guidelines on International Protection](#) (Particularly, see *UNHCR Guidelines on International Protection: Child Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* starting on page 145.) See also UNHCR’s *Views on Child Asylum Claims Using International law to support claims from Central American children seeking protection in the US*.
- Field Manuals and Agency Guidelines:
 - [USCIS Policy Manual](#) (replaced the USCIS Adjudicator’s Field Manual)
 - USCIS Asylum Division [Affirmative Asylum Procedures Manual](#)
 - [EOIR Policy Manual](#)
 - Asylum Officer Basic Training Course Lessons Modules. Search for the modules in USCIS’s [Electronic Reading Room](#). Additionally, the *RAIO Combined Training Program Children’s Claims Training Module* is very helpful.

⁵⁶ While most claims involving an imputed protected ground involve political opinion, other protected grounds can be imputed as well. See, e.g., *R-A-E*, AXXX XXX 933 (BIA Dec. 28, 2016) (BIA sustained appeal and granted withholding of removal based on particular social group of “imputed homosexual(s)” for man from El Salvador); *J-C-J*, AXXX XXX 315 (BIA May 29, 2019) (BIA sustained the appeal and remanded for further proceedings, finding a man suffered past persecution on account of an imputed nationality, where he was a Mexican national, but the police might have mistaken him to be a United States citizen).

- Additionally, the individual must merit favorable discretion⁵⁷ and must not be subject to any bars to asylum.

There have been many recent changes and attempted changes⁵⁸ to asylum law. This Guide notes some but not all of the recent proposed changes, and instead accounts for the current state of the law, as of publication. Moreover, it is likely that additional rulemaking⁵⁹ related to asylum is forthcoming. Therefore, it is important to conduct research and consult other resources regarding any updates.

There are **several grounds of ineligibility** to filing for asylum.

- **Previous Asylum Application:** If an individual previously applied for and was denied asylum, they cannot reapply unless there are changed circumstances.⁶⁰ This also applies to unaccompanied children.
- **Safe Third Country:** This is not applicable to unaccompanied children. Typically, an individual can be removed to a country other than their own, in which the United States has a bilateral or multilateral agreement, if the individual's life or freedom would not be threatened on account of one of the five protected grounds in that country. Additionally, the individual must have access to a full and fair procedure to determine asylum or other protection within that country.⁶¹
- **One-Year Filing Deadline:** Generally, asylum applications must be filed within one year after the date the individual arrived in the United States.⁶² However, the one-year filing deadline is not applicable to unaccompanied children.⁶³

57 USCIS issued a policy alert in July 2020 regarding updating the USCIS Policy Manual on “application of discretion in applications.” USCIS, *Policy Alert: Applying Discretion in USCIS Adjudications*, PA-2020-10 (July 15, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>. The update includes a non-exhaustive list of factors for officers to consider. See USCIS Policy Manual Vol. 1, Pt. E, Ch. 8. It is important to consider this section of the USCIS Policy Manual since discretion will be a consideration in asylum claims. For more information, review ILRC’s practice advisory. Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion* (Mar. 2021), <https://www.ilrc.org/uscis-policy-manual-makes-sweeping-changes-discretion>.

58 DHS and DOJ published a *final rule*, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, on December 11, 2020 in the Federal Register, after issuing the *proposed rule* on June 15, 2020. 85 FR 80274; 85 FR 36264. The mammoth rule sought to vastly change asylum and withholding of removal protections including changing key definitions. The rule was scheduled to go into effect on January 11, 2021, but as a result of litigation in *Pangea Legal Services v. DHS*, a *preliminary injunction* enjoined the government from implementing, enforcing, or applying the rule. At the time of publishing, the preliminary injunction is in effect and this rule has not been applied; however, it is important to check for changes to the law. Additionally, CILA has a resource titled *Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?* posted on the *Additional Resources* page of CILA’s website that you can check for more information regarding changes to asylum law. If you would like to access this resource and do not have the password, please contact CILA at cila@abacila.org.

59 On February 2, 2021, President Biden issued Executive Order 14010, “Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border.” In the Executive Order, President Biden instructed the Attorney General and the Secretary of Homeland Security to “conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards.” Additionally, it directs “within 270 days of the date of this order, [to] promulgate joint regulations consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group.’ . . .” See also Aaron Reichlin-Melnick, *Biden Signals Big Changes to Legal Immigration and Asylum Law with Spring Regulatory Agenda*, Immigration Impact, American Immigration Council (Jun 16, 2021), <https://immigrationimpact.com/2021/06/16/biden-changes-legal-immigration-asylum/?emci=06f7bc3c-a3d2-eb11-a7ad-501ac57b8fa7&em-di=db095945-acd2-eb11-a7ad-501ac57b8fa7&ceid=9238371#.YPYriT2SmM->.

60 INA § 208(a)(2)(C)-(D); 8 U.S.C. § 1158(a)(2)(C)-(D).

61 INA § 208(a)(2)(A), (E); 8 U.S.C. § 1158(a)(2)(A), (E).

62 INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B).

63 INA § 208(a)(2)(E); 8 U.S.C. § 1158(a)(2)(E). However, be mindful of the possibility of losing the unaccompanied child designation if the child turns 18 or is reunited with a parent or legal guardian. It may help to review [CLINIC’s Fact Sheet](#) on the J.O.P. litigation and for unaccompanied children who file asylum with USICS while in removal proceedings, if this is an issue in your case.

There are also **several bars** to obtaining asylum.⁶⁴

- **Persecution of Others:** An individual who participated in persecution of others on account of one of the five grounds is barred from obtaining asylum.⁶⁵
- **Particularly Serious Crime Conviction:** An individual who was convicted of a particularly serious crime is barred from obtaining asylum.⁶⁶
- **Nonpolitical Crime:** If there is reason to believe an individual committed a serious non-political crime outside of the United States, the individual is barred from obtaining asylum.⁶⁷
- **Danger to U.S. Security:** If there are reasonable grounds that an individual is a danger to U.S. security, then the individual will be barred from obtaining asylum.⁶⁸

64 Several new bars to asylum were created by rulemaking in 2018 through 2020. However, not all of the rules went into effect as a result of litigation. In July 2019, a new asylum bar was introduced barring asylum protection for individuals who crossed the Southern border on or after July 16, 2019, if they transited through a third country en route to the United States unless they sought and were denied asylum in one of the countries through which they traveled on the way to the United States. The bar also did not apply to victims of severe forms of trafficking as defined in 8 C.F.R. § 214.11 or individuals who “transited en route to the United States through only a country or countries that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT.” Following the *interim final rule* issued in July, litigation ensued. In June 2020, the federal District Court for the District of Columbia ruled in *CAIR Coalition v. Trump* and *I.A. v. Barr*, “that the interim final rule, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) is VACATED.” The Court found that the “Defendants unlawfully promulgated the rule without complying with the APA’s notice-and-comment requirements” and that the proper remedy was to vacate the rule. Then in December 2020, DHS and DOJ issued a final rule on the third country transit ban, with only minor changes to the rule. Litigation continued, and as a result the U.S. District Court for the Northern District of California granted a preliminary injunction and enjoined the rule from taking effect. The Ninth Circuit affirmed the district court’s preliminary injunction. More information regarding the cases can be found on the ACLU’s website regarding *I.A. v. Barr* and *East Bay Sanctuary Covenant v. Garland* and CAIR Coalition’s website regarding *CAIR Coalition et al. v. Trump*. At the time of publishing, the rule regarding the transit ban is not in effect. Additional newly introduced bars in 2020 were regarding criminal offenses and public health concerns. DHS and DOJ published the *final rule, Procedures for Asylum and Bars to Asylum Eligibility*, on October 21, 2020 expanding the bars and eligibility related to *criminal offenses*. 85 FR 67202. As a result of *litigation*, the rule was enjoined and at the time of publication, never went into effect. DHS and DOJ published the *final rule, Security Bars and Processing*, on December 23, 2020. 85 FR 84160. The rule seeks to amend regulations to reflect that emergency public health concerns related to a communicable disease could make an individual ineligible for asylum and withholding of removal based on national security bar. The rule did not go into effect due to a *regulatory freeze pending review*. On March 22, 2021, DHS and DOJ published an *interim final rule* and delayed the effective date to December 31, 2021. 86 FR 15069. The interim final rule also stated, “In addition, in light of evolving information regarding the best approaches to mitigating the spread of communicable disease, the Departments are also considering action to rescind or revise the Security Bars rule.” It is always important to check for changes to the law. CILA has a resource titled *Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?* posted on the *Additional Resources page* of CILA’s website that you can check for more information regarding changes to asylum law.

65 INA § 208(b)(2)(A)(i); 8 U.S.C. § 1158(b)(2)(A)(i).

66 INA § 208(b)(2)(A)(ii); 8 U.S.C. § 1158(b)(2)(A)(ii).

67 INA § 208(b)(2)(A)(iii); 8 U.S.C. § 1158(b)(2)(A)(iii).

68 INA § 208(b)(2)(A)(iv); 8 U.S.C. § 1158(b)(2)(A)(iv).

Asylum Law is a Dynamic Area of Law

- As a result of rulemaking, policy changes, and case law, asylum law is a dynamic area of law.
- Particularly in 2018–2021, asylum law was under attack with frequent changes to curtail and limit the form of protection. The changes sometimes focused on a particular area of the law, and in other instances a rule addressed numerous areas and if implemented, would vastly change asylum and withholding of removal protection. Frequently, litigation followed the change, and in several instances, the proposed changes never took effect because of litigation efforts.
- The Guide presents information on asylum law, current at the time of publication, but it is important to know this is a dynamic area of law with frequent changes. Be aware that the [regulations](#) posted on the government’s [website](#) includes rules that have been [enjoined](#), so practitioners should check other sources for the current law.
- CILA created a resource *Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?* posted on the [Additional Resources page](#) of CILA’s website to help practitioners stay up to date on the status of the changes and know how the changes impact youth.

- **Terrorism-Related Grounds:** An individual can be barred from obtaining asylum based on terrorism-related grounds.⁶⁹
- **Firm Resettlement:** Asylum is barred if an individual firmly resettled in another country prior to arriving in the United States.⁷⁰

BURDENS OF PROOF

An applicant has the burden to prove they are a refugee as defined by the INA.⁷¹ An individual can establish asylum eligibility by proving that they have suffered persecution or that they have a well-founded fear of persecution on account of one of the five protected grounds. If an applicant proves they have suffered past persecution, then it is also presumed that they have a well-founded fear of persecution on that same basis.⁷²

Then it becomes the government's burden to rebut that presumption by showing by a preponderance of the evidence that, "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality"⁷³ or "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality."⁷⁴ Internal relocation must be *reasonable*.⁷⁵ In determining reasonableness, factors such as "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties" should be considered.⁷⁶

CREDIBILITY

Credibility is always at issue in an asylum case. The decision maker will determine your client's credibility by their statements in the I-589 application, declaration, and evidence in the packet submitted. Statements given during any testimony in immigration court or during an asylum interview⁷⁷ will also be assessed to determine your client's credibility. Consistent truthful statements are imperative. An applicant's "own testimony in an asylum case may be sufficient, without corroborative evidence, to prove a well-founded fear of persecution where that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."⁷⁸

It is also important to know there are significant consequences if it is determined that your client has "knowingly made a frivolous application."⁷⁹ In this situation, the applicant will be permanently ineligible

69 INA § 208(b)(2)(A)(v); 8 U.S.C. § 1158(b)(2)(A)(v).

70 INA § 208(b)(2)(A)(vi); 8 U.S.C. § 1158(b)(2)(A)(vi).

71 INA § 208(b)(1)(B); 8 U.S.C. § 1158(b)(1)(B); 8 C.F.R. § 208.13(a).

72 8 C.F.R. § 208.13(b)(1).

73 Keep in mind a change in personal circumstances such as a change in age, for example a change from childhood to adulthood, can be considered a "fundamental change in circumstances." See *Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014).

74 8 C.F.R. § 208.13(b)(1)(i)-(ii).

75 8 C.F.R. § 208.13(b)(3). See also USCIS Refugee, Asylum and International Operations (RAIO) Directorate – Officer Training module for children's claims states, "[i]t is generally not reasonable to expect a child to internally relocate by himself or herself; however, you should examine whether circumstances show that internal relocation would be reasonable." RAIO Directorate, *RAIO Combined Training Program Children's Claims Training Module*, USCIS (Dec. 20, 2019), at 51-52, https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens_Claims_LP_RAIO.pdf; see also UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), <https://www.unhcr.org/50ae46309.html>.

76 8 C.F.R. § 208.13(b)(3).

77 See RAIO Directorate — Officer Training for Children's Claims for credibility considerations for asylum officers. *Supra* note 75 at 38-43. Additionally, the RAIO Directorate — Officer Training manual for children's claims states, "[t]he child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances." *Id.* at 41.

78 *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

79 INA § 208(d)(6); 8 U.S.C. § 1158(d)(6).

from any immigration benefit under the Act, except withholding of removal.⁸⁰ “[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”⁸¹

How the MPP Program is Impacting Unaccompanied Children

- **What is MPP?** Migrant Protection Protocols (MPP) is also known as the “Remain in Mexico” program.
- **What happens in the program?** Asylum seekers on the Southern border must wait in Mexico while their claims are adjudicated.
- **When did the program begin?** The program was implemented in January 2019.
- **Does the MPP program directly apply to unaccompanied children?** No.
- **Has the MPP program affected unaccompanied children?** Yes. There are [instances](#) when children are separated from their family members at the border and the children are processed as unaccompanied children while their family member waits for court in Mexico through the MPP program, making reunification much more difficult. Other children have separated from parents and entered by themselves after being in the MPP program as a family.
- **What has been the result of the program?** Numerous human rights abuses. Human Rights First has issued a [report](#) and published a [database](#) regarding this.
- **Is the MPP program still in place?** This has changed over time. In February 2021 DHS began a [phased approach](#) to process individuals who were placed in the MPP program into the United States to go through immigration proceedings, and on June 1, 2021, DHS [terminated](#) the MPP program. However, as a result of litigation brought by the states of Texas and Missouri, DHS was [enjoined](#) from implementing and enforcing the June 2021 memo and ordered DHS to “enforce and implement MPP in good faith.” On August 24, 2021, the Supreme Court [denied](#) the government’s request for a stay. Therefore, litigation is still ongoing, and at the time of publication, DHS has indicated it will comply with the order in good faith and also plans to issue a new termination memo.
- CILA, in collaboration with CLINIC, co-hosted two webinars to help advocates working with children affected by MPP. The two webinars are titled *Strategies for Working with Children Affected by MPP* and *Strategies for Working with Children Affected by MPP, Part 2: Equitable Tolling, Motions to Reopen, & Motions to Stay* and posted on CILA’s [website](#).

Common Issues Impacting Unaccompanied Children

ONE-YEAR DEADLINE

Generally speaking, applicants must submit an asylum application within one year of entry into the country;⁸² however, the one-year rule does not apply to unaccompanied children.⁸³ If a child loses status as an unaccompanied child, then they also lose this exception. Therefore, it is best practice to submit the asylum application within one year of entry, and if at all possible, before the unaccompanied child turns 18.

⁸⁰ *Id.*

⁸¹ 8 C.F.R. § 208.20. See also *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

⁸² INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B).

⁸³ INA § 208(a)(2)(E); 8 U.S.C. § 1158(a)(2)(E).

If your child client is not designated as an unaccompanied child or loses the unaccompanied child designation⁸⁴ and misses the one-year deadline for the asylum application, then it is important to consider whether there are any exceptions. The exceptions to the one-year filing deadline include “the existence of changed circumstances” (e.g., change in country conditions or a change in the applicant’s circumstances) or “extraordinary circumstances relating to the delay.”⁸⁵ One example of “extraordinary circumstances” in the asylum regulations is a “[l]egal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival.”⁸⁶ It is important to argue age and competency as an extraordinary circumstance as reason for the delay if this situation arises. For more information on the one-year deadline, read ILRC’s Practice Advisory *Unaccompanied Children and the One-Year Filing Deadline*.

WHAT IS PERSECUTION?

Persecution can take many forms and is something that is determined by case law so research is important to make factual comparisons. Generally, persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”⁸⁷ *Matter of Acosta* goes on to say that the “harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”⁸⁸ Persecution can also include physical harm, such as beatings, kidnappings, sexual harm, torture, forced labor, or emotional harm or harm to one’s psychological or emotional health such as threats or bigotry. Depending on your Circuit Court of Appeals jurisdiction, threats without other harm can sometimes be considered past persecution but it is important to consider the surrounding circumstances to prove that it rises to the level of persecution.⁸⁹ An individual could also experience persecution as a result of family members or caregivers being harmed or witnessing others who are close to them being harmed. Also, consider any ongoing emotional trauma or effects of the persecution such as Post Traumatic Stress Disorder (PTSD) symptoms or a diagnosis of a mental health disorder. Persecution can sometimes also be in the form of economic harm. “Nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution.”⁹⁰

84 See the box “Where Should I file the Asylum Application,” *infra* p. 42 to learn more regarding designation issues.

85 INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D). See also 8 C.F.R. § 208.4(a)(4)-(6).

86 8 C.F.R. § 208.4(a)(5)(ii). See also A-D-, AXXX XXX 526 (BIA May 22, 2017) (BIA remanded to consider whether respondent suffered from an extraordinary circumstance, after finding that all applicants under age 18 suffer from a per se “legal disability” and that youth between the age of 18 and 21 is a factor to be considered in whether the extraordinary circumstance exception is met).

87 *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

88 *Id.*

89 See, e.g., *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014) (“This court has declared, however, that credible threats of imminent death or grave physical harm can indeed be sufficient to amount to past persecution, provided they are credible, imminent and severe.” (citation omitted)); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 208 (9th Cir. 2019) (“We have been most likely to find persecution where threats are repeated, specific, and combined with confrontation or other mistreatment” (citation omitted)); *Qorane v. Barr*, No. 17-60394 (5th Cir. 2019) (“We have previously treated death threats as a question of future—not past—persecution.” (citation omitted)).

90 *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007). Additionally, according to UNHCR, “[a] violation of an economic, social or cultural right may amount to persecution . . .” UNHCR’s *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* ¶ 35. Moreover, “[m]easures of discrimination may amount to persecution when they lead to consequences of a substantially prejudicial nature for the child concerned. Children who lack adult care and support, are orphaned, abandoned, or rejected by their parents, are escaping violence in their homes may be particularly affected by such forms of discrimination.” *Id.* at ¶ 36.

Where Should I File the Asylum Application?

An unaccompanied child's I-589 asylum application should be filed with USCIS. This protection was provided for in the TVPRA and allows unaccompanied children to go through a non-adversarial process by interviewing with an asylum officer.

If the unaccompanied child is also in removal proceedings, then you will also likely want to file a copy of the USCIS filing receipt with the immigration court and seek a continuance and request that the case be placed on the status docket¹ for USCIS to have time to process the application.

If a child either turned age 18 or reunified with a parent, then there is debate on who has jurisdiction to decide the child's asylum case. At publishing of this Guide, USCIS follows the "[Kim Memo](#)" from May 2013 regarding procedures for asylum applications filed by unaccompanied children. (USCIS issued the "[Lafferty Memo](#)" in May 2019 reversing the "Kim Memo"; however, USCIS was enjoined from applying the Lafferty Memo as result of litigation in *J.O.P. v. DHS*. Therefore, the "Kim Memo" is still in effect.) Essentially, if a child was already designated an unaccompanied child and that designation is still in place when the application is filed, then the Asylum Office will adopt that decision without further inquiry.

Whereas, immigration judges are bound by a different policy regarding jurisdiction in unaccompanied children's cases as reflected in *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). According to *Matter of M-A-C-O-*, "[a]n Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application." 27 I&N Dec. 477 (BIA 2018).

Take a look at these resources to learn more:

- CLINIC's [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 \(D. Md. filed July 1, 2019\)](#)
- CILA's [Overview of Designation as an "Unaccompanied \[non-citizen\] Child \(UAC\)"](#)
- CILA's [UAC Designation Flow Chart](#)

EXPERIENCING HARM AS A CHILD

Whether an adult or child, the cumulative harm of an individual seeking asylum should be considered when determining whether they had past persecution.⁹¹ Therefore, it is important to raise each harm your client suffered.

⁹¹ "[A noncitizen] who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation on account of his Jewish nationality established that he has suffered harm which, in the aggregate, rises to the level of persecution as contemplated by the Immigration and Nationality Act." *Matter of O-Z- & I-Z-*, 22 I&N Dec. 32 (BIA 1998).

According to the United Nations High Commissioner for Refugees' (UNHCR) *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*:

[w]hile children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that may not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.⁹²

Moreover, many courts have acknowledged that children experience events differently than adults; therefore, the age of a victim is important when determining if the child suffered past persecution. In *Jorge-Tzoc v. Gonzales*, for example the Second Circuit Court of Appeals remanded the case because the immigration judge failed to consider the evidence and harms Jorge-Tzoc and his family faced cumulatively and from the perspective of a small child, also noting that due to his age, he was “necessarily dependent on both his family and his community.”⁹³ “[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.”⁹⁴ It is important to make this point in arguments. You can make this argument even if your client is currently of majority, but experienced prior harm as a child.

HUMANITARIAN ASYLUM

If an applicant suffered past persecution but does not have a well-founded fear of future persecution, the decision maker has discretion to grant asylum if the applicant suffered severe past persecution⁹⁵ or if the applicant shows that there is a reasonable possibility that they may suffer other serious harm⁹⁶ upon removal.⁹⁷ An applicant must still be able to prove the other requirements for asylum including nexus to a protected ground.

If your client suffered past persecution, it is best practice to include an alternative argument for humanitarian asylum in briefing to protect the record.

TIP: Typically, you do not want to make an argument only for humanitarian asylum because if your client suffered past persecution, then it is the government's burden to rebut the presumption of a well-founded fear of future persecution.

WELL-FOUNDED FEAR OF FUTURE PERSECUTION

An applicant must show based on the objective and subjective evidence that “a reasonable person in his circumstances would fear persecution.”⁹⁸ Additionally, “[a]n applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's

92 See UNHCR, *supra* note 75; see also RAI0 Directorate *supra* note 75 at 44-48.

93 *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006).

94 *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007). See also *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004); *Mendoza-Pablo v. Holder*, 667 F.3d 1038 (9th Cir. 2012). See also RAI0 Directorate, *RAIO Combined Training Program Definition of Persecution and Eligibility Based on Past Persecution*, USCIS (Dec. 20, 2019), at 16, https://www.uscis.gov/sites/default/files/files/nativedocuments/Persecution_LP_RAIO.pdf.

95 See *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). See also unpublished opinions *A-A-O-*, AXXX XXX 913 (BIA Apr. 4, 2019) (reversed denial of humanitarian asylum to Nigerian respondent who was physically and sexually assaulted by multiple men); *C-M-J-*, AXXX XXX 286 (BIA Feb. 21, 2019) (remanded to consider humanitarian asylum for Guatemalan respondent who experienced abuse by her father).

96 See *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012).

97 8 C.F.R. § 208.13(b)(1)(iii).

98 See case cited *supra* note 78.

country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all circumstances it would be reasonable to expect the applicant to do so."⁹⁹

TIP: If your client moved to a different area of their home country, but the persecutor still sought after them or harmed them again, this can be helpful evidence to show that they are at risk anywhere in their country. Additionally, if they are sought after or family members are harmed after they came to the United States, this supports the argument that the risk persists and that they have a well-founded fear. If this is the case, you can develop evidence such as letters from family members or neighbors with knowledge that they were being sought after or that further harm occurred to someone close to them.

It is important to note that the standard for a well-founded fear is not "more likely than not;" in fact, if there is a 1 in 10 chance that the event would happen, then this is enough to show a well-founded fear.¹⁰⁰ As you can see, this burden is quite low compared to burdens of proof in other types of cases.

Matter of Mogharrabi presents four criteria that must be shown for an individual to establish an individualized well-founded fear including: "(1) the [applicant] possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the [applicant] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [applicant]; and (4) the persecutor has the inclination to punish the [applicant]."¹⁰¹ The applicant also does not have to show they would be "singled out individually for persecution." It is enough to show a "pattern or practice . . . of persecution of a group of persons similarly situated to the applicant" if the persecution is on account of one of the five protected grounds and they show that they are included in the group of persons so "fear of persecution upon return is reasonable."¹⁰²

WHO IS THE PERSECUTOR: THE GOVERNMENT OR A PRIVATE ACTOR?

When talking with your client, it is important to understand from your client whom they fear and who is the persecutor. Is it the government or an employee of the government? Is it someone else like a gang member or family member? Or does your client fear both the government and a private (non-governmental) actor? If your client fears a private actor, then the question becomes whether the government in their country of origin is able and willing to control the persecutor.¹⁰³

Here, country conditions reports and perhaps a country conditions expert become important because you must establish that the government is unable or unwilling to control the persecutor. Country conditions reports and articles showing evidence of corruption, impunity, pervasive problems, inadequate protection, lack of enforcement, and other government-involved criminal acts and violence are important to prove this element.¹⁰⁴

⁹⁹ 8 C.F.R. 208.13(b)(2)(ii).

¹⁰⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

¹⁰¹ *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

¹⁰² 8 C.F.R. § 208.13(b)(2)(iii).

¹⁰³ The Attorney General's certified decision *Matter of A-B-* issued in June 2018 included dicta attempting to change this standard to *complete helplessness* of the government, but the standard remains the same. To be successful in a case involving a private actor, you must be able to show that the government is unable or unwilling to control the persecutor. Following the issuance of *Matter of A-B-*, DHS implemented new expedited removal policies (which do not apply to unaccompanied children since they are entitled to go through removal proceedings rather than expedited removal procedures) based on *Matter of A-B-*. The ACLU and Center for Gender and Refugee Studies (CGRS) filed a lawsuit to stop implementation of these policies in a case called *Grace v. Whitaker* in which the D.C. District Court found several policies to be arbitrary, capricious and in violation of the immigration laws as applied to the credible fear process. While this case applies to a different process, the arguments can still be used in cases before the Asylum Office and immigration court. See Karen Musalo, *New Guidance to IJs and AOS pursuant to Grace v. Whitaker*, LexisNexis Legal News Room (Jan. 14, 2019), <https://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/posts/new-guidance-to-ijs-and-aos-pursuant-to-grace-v-whitaker>. Also, keep in mind that *Matter of A-B- I* and *II* were vacated in June 2021. See *infra* p. 47.

¹⁰⁴ Also, keep in mind that adjudicators often question whether an individual reported a past harm. While this information is relevant to a claim, reporting a past harm is not required. The RAI0 Directorate — Officer Training for Children's Claims provides a list of "[r]easonable explanations for why a child did not seek protection includ[ing] evidence that: The applicant was so young that he or she would not have been able to seek government protection, The government has shown itself unable or unwilling to act in similar situations, or The applicant would have increased his or her risk by affirmatively seeking protection." *Supra* note 75 at 49-50.

NEXUS AND MIXED MOTIVES

Nexus is the connection between the persecution/harm feared and the protected ground. It is the “why,” the “because of,” the “on account of.” You must prove the connection; how your client knows or believes the past persecution or feared persecution is because of the protected ground.¹⁰⁵ The persecutor can have mixed motives for causing harm to the applicant. The law requires that one of the five protected grounds “be at least one central reason for persecuting the applicant.”¹⁰⁶

CRAFTING A PSG

Generally¹⁰⁷, a PSG¹⁰⁸ delineation requires:

- Members of the group share an immutable characteristic¹⁰⁹
- The group must be defined by particularity¹¹⁰
- The group must be socially distinct within the society in question¹¹¹

If you are in immigration court, then you must “clearly indicate” before the immigration judge “the exact delineation of any particular social group(s) to which she claims to belong”¹¹² or generally¹¹³ it cannot be considered on appeal by the Board of Immigration Appeals (BIA). Even if you are filing the application with USCIS, it is best practice to delineate the PSGs. When proposing that your client suffered or fears future harm based on a PSG, it is important to protect the record. In order to do this, you may want to delineate several PSGs for the decision maker to consider. It is important to brief them all to support your arguments.

105 “[S]ome evidence of it [the persecutor’s motive], direct or circumstantial” is required. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The RAI0 Directorate — Officer Training for Children’s Claims states asylum officers should consider a child’s age and maturity when assessing how they articulate their claims and includes the possibility that children will have a lack of understanding of the situation or an inability to articulate nexus during testimony. In this case, evidence other than the child’s testimony will be necessary, such as supporting letters, country conditions evidence, and/or expert testimony and/or declaration. See *supra* note 75 at 52-53.

106 INA § 208(b)(1)(B)(i); 8 U.S.C. § 1158(b)(1)(B)(i).

107 Keep in mind if you are in the Seventh Circuit that the United States Court of Appeals for the Seventh Circuit Court has deferred to the Board’s approach in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) rather than using social distinction/visibility and particularity tests. See *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013). See also *W.G.A. v. Sessions*, 900 F.3d 957 (7th Cir. 2018).

108 See discussion *supra* note 59.

109 *Matter of Acosta* defines this as “a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not to be required to be changed.” 19 I&N Dec. 211 (BIA 1985).

110 “The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” *Matter of W-G-R*, 26 I&N Dec. 208 (BIA 2014).

111 *Matter of M-E-V-G* clarifies “that literal or ‘ocular’ visibility is not required” and that “a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.” 26 I&N Dec. 227 (BIA 2014).

112 *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018). See also *Cantarero-Lagos v. Barr*, No. 18-60115 (5th Cir. 2019).

113 But see *Arevalo Quintero v. Garland*, No. 19-1904 (4th Cir. 2021). See Daniel Kowalski, *Blockbuster CA4 Decision: Arevalo Quintero v. Garland*, LexisNexis Legal News Room (May 26, 2021), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insideneews/posts/blockbuster-ca4-decision-arevalo-quintero-v-garland>.

COMMON ISSUES
IN CHILDREN'S
CASES THAT
MAY LEAD TO AN
ASYLUM CASE

INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH
FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A
STARTING POINT.

Family-Based Claims

Family-based PSGs were long-considered a quintessential PSG until an Attorney General certified decision *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) was decided in July 2019. After this decision, PSGs based on family became more difficult. Immigration law advocates recommended attorneys still raise the argument for the issue to be determined on a case by case basis and to preserve the record for appeal. Fortunately, on June 16, 2021, Attorney General certified case was issued in *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) by Attorney General Garland. This decision vacated the July 2019 *Matter of L-E-A-* decision in its entirety “pending completion of the ongoing rulemaking process and the issuance of a final rule addressing the definition of ‘particular social group.’” The decision noted the inconsistency of the July 2019 *Matter of L-E-A-* decision with multiple courts of appeals and discussed that the preferable administrative process to determine such issues was through rulemaking. With this positive development, advocates should continue to articulate and argue family-based PSGs. Also, consider whether any additional relevant rulemaking has occurred.

See [information and resources](#) from the The National Immigrant Justice Center relating to *Matter of A-B-* and *Matter of L-E-A-* specifically regarding impacts in the Seventh Circuit. Contact [CGRS](#) for more information regarding representing a client with a family-based PSG.



COMMON ISSUES
IN CHILDREN'S
CASES THAT
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ASYLUM CASE

INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH
FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A
STARTING POINT.

Domestic Violence &
Child Abuse Claims

Child abuse PSGs historically track domestic violence cases, but there is not clear case law like there is for partner violence.

Attorney General Sessions certified decision *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) decided in 2018 set back years of progress in domestic violence cases and overruled *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which found “married women in Guatemala who are unable to leave their relationship” as a cognizable PSG. Following *Matter of A-B-*, some cases where the harm related to domestic violence still had success, but overall, it was more difficult. Many advocates still raised arguments because cases should be determined on a case by case basis and to preserve the record for appeal. In January 2021, a second Attorney General certified decision was issued in *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) by Acting Attorney General Rosen in an attempt to clarify and reiterate aspects of the first Attorney General decision.

Fortunately, on June 16, 2021, a third Attorney General certified case was issued in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) by Attorney General Garland. The decision stated *A-B- I* “threaten[ed] to create confusion and discourage[d] careful case-by-case adjudication of asylum claims” and *A-B- II* did not involve a thorough consideration of the issues. Now, “[i]nstead, pending forthcoming rulemaking, immigration judges and the Board should follow pre-*A-B- I* precedent, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).” With this positive development, advocates should continue to articulate and argue domestic violence and child abuse related PSGs. Also, consider whether any additional relevant rulemaking has occurred.

Claims may also be formulated as gender-based claims. Additionally, remember to raise all potential arguments you have. Sometimes these cases include facts that make political opinion a viable protected ground in addition to raising the PSG argument.

Contact [CGRS](#) for more information regarding representing a client with a domestic violence or child abuse PSG.

COMMON ISSUES IN CHILDREN'S CASES THAT MAY LEAD TO AN ASYLUM CASE	INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.
Gender-Based Claims	<p>In <i>Matter of Acosta</i>, 19 I&N Dec. 211 (BIA 1985), the BIA found that gender alone may form the basis for a PSG.</p> <p>In <i>Matter of Kasinga</i>, 21 I&N Dec. 357 (BIA 1996), the BIA found that gender, along with other characteristics, may form the basis for a PSG. The BIA recognized “young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice” as a PSG.</p> <p>Unpublished BIA decisions remand for the courts to consider whether gender + nationality is a cognizable PSG: <i>Y-M-L-</i>, AXXX XXX 294 (BIA Sept. 10, 2019) regarding women in Guatemala; <i>X-G-C-D-</i>, AXXX XXX 474 (BIA Dec. 11, 2018) regarding women in Mexico.</p>



<p>COMMON ISSUES IN CHILDREN'S CASES THAT MAY LEAD TO AN ASYLUM CASE</p>	<p>INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.</p>
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<p>Gang-Related Claims</p>	<p>There is a lot of negative case law regarding gang-related PSGs so it will be important to know those cases and try to raise different arguments and distinguish your facts. There are also some positive cases, so it is important to make the necessary arguments.</p> <p><i>Matter of S-E-G-</i>, 24 I&N Dec. 579 (BIA 2008)—“Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities nor the family members of such Salvadoran youth constitute a ‘particular social group.’”</p> <p>In <i>Matter of H-L-S-A-</i>, the BIA found “[i]ndividuals who cooperate with law enforcement may constitute a valid particular social group under the Immigration and Nationality Act if their cooperation is public in nature, particularly where testimony was given in public court proceedings, and the evidence in the record reflects that the society in question recognizes and provides protection for such cooperation.” 28 I&N Dec. 228 (BIA 2021).¹¹⁴</p> <p>Unpublished cases with PSGs relating to being a witness: <i>M-S-</i>, AXXX XXX 870 (BIA Sept. 27, 2019) and <i>D-R-M-</i>, AXXX XXX 606 (BIA July 16, 2019). See also <i>Henriquez-Rivas v. Holder</i>, 707 F.3d 1081 (9th Cir. 2013).</p> <p><i>Martinez v. Holder</i>, 740 F.3d 902 (4th Cir. 2014)—found that the “proposed particular social group of former MS-13 members from El Salvador is immutable” and remanded on this basis.</p> <p>Additionally, remember to raise all potential arguments you have. Sometimes these cases include facts that make religion or political opinion a viable protected ground. See unpublished case <i>V-R-F-</i>, AXXX XXX 637 (BIA May 31, 2019)—where the successful protected ground was religion.</p> <p>Consider analogous arguments when looking at case law. For instance, has the court in your jurisdiction found a PSG when there has been resistance to another group or practice in other countries, such as resistance to the FARC?¹¹⁵</p>
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<p>LGBTQ Claims</p>	<p><i>Matter of Toboso-Alfonso</i>, 20 I&N Dec. 819 (BIA 1990)—The BIA found that sexual orientation may form the basis for persecution on account of a PSG.</p>
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¹¹⁴ See Joanna Mexicano Furmanska, *BIA Rules on Witnesses’ Eligibility for Asylum as PSG*, CLINIC (Feb. 22, 201), <https://cliniclegal.org/resources/asylum-and-refugee-law/bia-rules-witnesses-eligibility-asylum-psg>.

¹¹⁵ See NIJC’s *Practice Advisory: Applying for Asylum After Matter of A-B-*, updated Jan. 2019 which explores this strategy idea on page 20 and references Seventh Circuit law.

TIPS WHEN CRAFTING A PSG

- When thinking about how to delineate your PSG, consider why the applicant was targeted. Consider all PSG delineations.
- Generally, do not define the group by the harm suffered. Try to avoid circular arguments, and instead articulate a PSG with characteristics of why they were originally targeted. However, there might be situations where including the past harm is necessary because the past harm causes the individual to be at risk for the future harm.
- Common PSGs relating to children include: family-based claims, domestic violence/child abuse claims, gender-based claims, and gang-related claims. Do not limit yourself to these, but it helps to have a starting point.
- Look for ways to frame your case based on an *established* PSG based on case law.
- Remember you can (and likely should) propose several PSGs. It is also okay to propose several delineations of a PSG.
- Also, look for ways to frame your case based on one of the other four protected grounds (i.e., nationality, race, political opinion, and/or religion). PSG is the broadest protected ground so there is more room to make an argument, but it is often more challenging to be successful on this basis. Therefore, it is important to consider if another protected ground also applies.

TIPS TO DEVELOP AN ASYLUM CASE

Know the Facts:

- Review the file. Do your due diligence to check the facts. Consider conducting Freedom of Information Act (FOIA) requests or reviewing the court's file, if applicable. *See* Section IV.B. for more information and resources on conducting FOIAs.
- Conduct research regarding your client's country of origin to have context for your meetings and to support their case. For example, conduct research on issues and trends that shed light on the risks and potential harms your client faces in their country of origin.
- Meet several times to develop rapport and trust with the child.
- Draft a declaration with the child. Give your client a choice whether to write the first draft of the declaration on their own or with you. Remember to consult the Guide for tips on trauma-informed lawyering and interviewing skills. *See* Sections II.B. and C.

Develop the Legal Theory:

- Is there past persecution?
 - What harm has your client suffered?
- Does your client have a well-founded fear of persecution?
 - What specifically is your client afraid will happen to them?
- Who is the actor involved in the harm or potential harm? A governmental actor or a non-governmental actor?
- Why was your client targeted? Why was your client specifically at risk for harm?
- What is the protected ground?
 - If PSG, what is that exactly?

TIPS TO DEVELOP AN ASYLUM CASE

Drafting the Application:

- Be prepared to file the I-589 and all submissions as soon as you can.
- Look at [USCIS's website](#) for the current I-589 application and instructions. Be sure to read the instructions. They are helpful!
- Do not leave any required aspect of the application blank. Use N/A, None, and Unknown as relevant. Additionally, if you indicate you are including an attachment, do not forget it. See USCIS's instructions. Previously, in 2019 through late 2020, USCIS rejected I-589 applications as incomplete if they had any blank areas. As a result of [litigation](#), USCIS stopped this practice but warns that leaving a *required* space blank, failing to respond to filing requirement related questions, or omitting any evidence may still lead to rejection or delay the case.
- If you need extra space, simply include this information in an attached addendum. You can use one of the government's forms or type this up on your own. Make sure your supplemental sheet has the client's name, A#, signature, and date and be clear about what question you're answering.¹¹⁶
- Double-check the application after finishing to confirm it is in final form.
 - Review the application a final time with your client to confirm information.
 - Ensure no aspect of the application is blank.¹¹⁷
 - Ensure you checked the box to also apply for withholding of removal under the Convention Against Torture (CAT) on the front page to preserve this option for your client. To learn more about Withholding of Removal and CAT relief, see Section III.B.
 - Ensure the application is signed and dated by the applicant and person who prepared the application.
 - Ensure you have attached all documents you indicated you would attach.
 - Remember everything must be in English and contain any necessary interpretation and translation certificates.¹¹⁸
 - Ensure you have attached a photograph to Part D.
 - Include all necessary copies of the application.

116 See I-589 instructions. *I-589, Application for Asylum and for Withholding of Removal*, USCIS, <https://www.uscis.gov/i-589> (last reviewed/updated July 7, 2021).

117 Previously, beginning in 2019, many asylum applications were rejected as being *incomplete*. This included questions where an appropriate response was "none," "unknown," or "N/A." In April 2021, USCIS announced that the "blank space" criteria would no longer apply. However, it also stated, "applicants should be aware that we may reject these forms, or it might create delays in their case, if the applicant: Leaves required spaces blank; Fails to respond to questions related to filing requirements; or Omits any required initial evidence." Despite this updated guidance, it is still best practice, to complete all spaces on the form including using "none," "unknown," or "N/A," where relevant.

118 See *EOIR Policy Manual*, Part II - OCIJ Practice Manual, Ch. 3.3(a), App. G.

TIPS TO DEVELOP AN ASYLUM CASE

Drafting the Client's Declaration:

- This should be a statement signed and dated by your client.
- Honesty is paramount as your client's credibility will be assessed.
- The statement should provide details regarding the basis of their asylum claim regarding any past harm your client suffered and what they fear will occur if they return. Consider supporting each element of asylum (e.g., why is your client afraid? who does your client fear? why is your client particularly at risk?). The statement should be detailed enough to instill confidence in the decision maker of the credibility of the facts, but not so detailed as to set your client up for inconsistent testimony later. This document requires a balancing act and how you draft it may depend on the individual client's ability to recall certain kinds of detail.
- Remember the statement must be submitted to the Asylum Office or immigration court in English and contain any necessary interpretation and translation certificates.¹¹⁹ Additionally, it is helpful to include a copy of the declaration in the child's best language in the official record in case you need to refresh your client's recollection during testimony in immigration court or in an Asylum Office interview.



¹¹⁹ *Id.*

TIPS TO DEVELOP AN ASYLUM CASE

Developing the Supporting Evidence: You will want to gather as much supporting evidence as possible to verify your client's testimony and familiarize yourself with the specific requirements under the Real ID Act.¹²⁰ As relevant and if applicable to the claim, consider the following documentary evidence to support your client's story:

- What documents does your client have to prove identity such as a birth certificate, passport, ORR documentation, etc.?
- What documents can your client gather regarding other individuals on which your client's case is premised, such as a birth certificate, death certificate, marriage or divorce papers, etc.? (E.g. if your client's case is based on their maternal grandfather's death, try to obtain their mother's birth certificate and grandfather's death certificate to establish the familial relationship and substantiate his death and circumstances surrounding the death.)
- Are there news articles to show that your client or their family suffered harm?
- Are there health records to support the harm your client suffered? This could be physical health or mental health records including counseling records.
- Are there photos of injuries or scarring showing past harm your client or their family suffered?
- Are there school records to show that the child was missing school or struggling in school or getting help from a teacher or counselor?
- Can you get death certificate(s) to show that the death(s) your client informs you of occurred?
- Are there police reports to verify your client's story? If not, what were the barriers to making a police report? Is there evidence to show that as well? (E.g. statements, country conditions evidence, expert statements, etc.)
- Can you get statements from friends, neighbors, family, witnesses to corroborate your client's story?
- Is there evidence to support that your client's family owned a business that was being extorted?
- Is there evidence that your client's family owned land?
- Is there evidence to show that your client's family was known in the community?
- Is there evidence to support that your client or their family was involved in a political party? Evidence regarding the party's goals? Party membership cards/certificates? Pamphlets regarding the party?
- Is there evidence to support that your client was a member of that religion? Baptism or communion photos or certificates? Evidence of other religious participation?
- Is there evidence to show your client's race/ethnicity whether perceived by others or as your client personally identifies?
- Asylum claims are discretionary.¹²¹ If there are negative factors, is there any evidence to show that your client has positive equities that might sway an adjudicator?

¹²⁰ See Immigration Equality, *Asylum Manual*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-real-id-act/> (last visited July 7, 2021).

¹²¹ See information *supra* note 57.

TIPS TO DEVELOP AN ASYLUM CASE

Country Conditions Evidence: Include articles and country-specific reports to support your main points. For example, consider:

- Past persecution/well-founded fear of persecution: Is there evidence to support that the type of harm your client suffered or is afraid of occurs within the country?
- Is there evidence to support that there is impunity or corruption within the country?
- Nexus and protected ground:
 - Is there evidence to support why your client was targeted?
 - What were the persecutor's statements to your client?
 - Is there evidence to support members of that political party were targeted for harm?
 - Is there evidence to support members of that religion were targeted for harm?
 - Is there evidence to show that business owners were targeted for extortion?
 - Is there evidence to show that your client was persecuted or could be persecuted as an indigenous person?
- Internal relocation:
 - Is there evidence to show that the harm your client suffered or is afraid of is widespread in the country?
 - Is there evidence to show that your client's country of origin is too small to make relocation worthwhile?
- If you are making a humanitarian asylum argument based on *other serious harm*, is there additional evidence you should submit to make that argument?

Country Conditions Experts:

- Is there an expert that can opine on any country conditions relevant to your client's claim and thereby strengthen your case? View [CGRS's Expert Witness Database](#) to find an expert.
- Is there a subject matter expert that can provide expertise regarding a relevant issue in the case? For example, is there an expert that can provide an opinion on domestic violence and gender issues in context of that country or an expert on child development or mental health? Consider what would be helpful for your case.

Forensic Evaluations:

- If your client suffered past persecution, it may help to get a forensic evaluation to document any past trauma your client suffered; a physical evaluation to document any signs of beatings or torture such as scars, other injuries or female genital mutilation; or a mental health evaluation to assess the psychological impact of trauma.
- If you need help locating a physician to conduct a forensic evaluation, contact [Physicians for Human Rights](#) to request a forensic evaluation.

Fact-Gathering and Developing Evidence Internationally

If you need support or a connection internationally to conduct service or obtain a document, for example, then you may want to contact an organization such as [Justice in Motion](#) or [Keep Families Together](#) to assist. CILA's resource [Highlight on Resources & Services to Support Pro Bono Attorneys](#) provides more information about both programs.

BENEFITS OF AN APPROVED ASYLUM APPLICATION

There are many benefits to being granted asylum. For instance, benefits include authorization to work,¹²² the ability to seek derivative status for certain family members,¹²³ a pathway to adjustment of status, and then citizenship. After one year in the United States, an asylee can apply for lawful permanent residency (a green card) using [Form I-485, Application to Register Permanent Residence or Adjust Status](#).¹²⁴ Generally, a lawful permanent resident can apply for U.S. citizenship after five years; however, an asylee can apply for citizenship after four years because their admission to lawful permanent resident is retroactive to the date of approval for asylee status.¹²⁵ Asylees are also eligible for other services and benefits for a limited period through ORR. View the [ORR website](#) for more information regarding these benefits.

Links to Help You with YOUR CLIENT'S ASYLUM CASE

- Check out CILA's 101 [webinar: Introduction to Asylum for Unaccompanied Children](#) (56 minutes).
- Watch CILA's [webinar A Deep Dive Into Current Conditions in El Salvador, Guatemala, & Honduras with the Experts](#) (1 hour, 54 minutes).
- View CILA's resource: [Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?](#) posted on the [Additional Resources page](#) on CILA's website for more information regarding recent changes in asylum law.
- Use CILA's Asylum Case Theory and Evidence Matrix chart posted on the [Additional Resources page](#) on CILA's website to help you stay organized and create a case strategy.
- View recordings of the two day training *Defend Asylum Together! Essentials of Immigration Law for Effective Representation* hosted by the ABA Commission on Immigration (COI), CILA and our COI sister projects, South Texas Pro Bono Asylum Representation Project (ProBAR) and the Immigration Justice Project (IJP). View [Day 1](#) and [Day 2](#) recordings.
- Read CILA's [Highlight on Resources & Services to Support Pro Bono Attorneys](#) to learn more about helpful resources to help you develop the record and locate supporting evidence internationally, such as working with organizations like [Justice in Motion](#) and [Keep Families Together](#).
- Contact [CGRS](#) for a copy of their *Children's Asylum Manual*, other helpful country conditions, and expert documentation.
- Read the USCIS's Refugee, Asylum and International Operations (RAIO) Directorate – Officer Training module for children's claims: [RAIO Combined Training Program Children's Claims Training Module](#),

122 "If you are granted asylum you may work immediately. Some asylees choose to obtain Employment Authorization Documents (EADs) for convenience or identification purposes, but an EAD is not necessary to work if you are an asylee." *Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (last reviewed/updated July 6, 2021).

123 INA § 208(b)(3); 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 208.21.

124 INA § 209(b); 8 U.S.C. § 1159(b).

125 *Id.* INA § 316(a); 8 U.S.C. § 1427(a); 8 C.F.R. § 209.2.

December 20, 2019.

- Check out the *Self Help Asylum Guide: Seeking Protection in the United States 2020* created by University of Maine's School of Law's Refugee and Human Rights Clinic, Penn State Law Center for Immigrants' Rights Clinic, Immigrant Legal Advocacy Project, and THRIVE International Programs.
- Review NIJC's *Basic Procedural Manual for Asylum Representation Affirmatively and In Removal Proceedings*, July 2021, IL.
- For more country conditions information on El Salvador, Guatemala, and Honduras, review Temple University Beasley School of Law and Washington Office on Latin America (WOLA)'s [Annotated Table of Contents](#). The Annotated Table of Contents includes resources covering topics such as state complicity and small business owners fleeing persecution. Additionally, visit Temple University Library's [Asylum Practicum—Country Conditions Research](#) for a helpful list of country condition sources.
- Check out Immigration Equality and Midwest Immigrant and Human Rights Center's *Preparing LGBTQ and HIV Asylum, Withholding and CAT Claims Manual (Asylum Manual)*.
- If your client was granted asylum, check out this information regarding benefits for asylees: USCIS webpage [Benefits and Responsibilities of Asylees](#) and [Family of Refugees and Asylees](#).

B. Withholding of Removal and Protection Under the Convention Against Torture

Withholding of removal and protection under the CAT¹²⁶ are similar to asylum since they are fear-based claims and the applicant also uses the [Form I-589, Application for Asylum and for Withholding of Removal](#) to apply for the relief. Additionally, some of the recent proposed changes to asylum law also impact withholding of removal claims making them more difficult.¹²⁷ While many of these changes have been halted as a result of litigation, it is important to check the current status of the law. Also, with any increase in the bars to asylum, it becomes more important to pursue withholding of removal and protection under the CAT. However, the claims have significant differences in eligibility requirements and potential benefits.

First and foremost, these are defensive claims so only an immigration judge can adjudicate these claims, not the Asylum Office. That said, it is good practice to check the box on the front page of the Form I-589 to also “apply for withholding of removal under the Convention Against Torture” to protect your client's options. If the Asylum Office denies your client's asylum application, the case will be referred to immigration court.¹²⁸ If this box was not checked or, when you review the I-589, it does not properly address questions about torture, then you should consider submitting supplemental filings with the court to provide this information.

These are also mandatory forms of relief. There is no discretion for the decision maker like there is in asylum; if the requirements are met, your client is eligible.

Overall, there are more benefits to winning asylum than withholding of removal or protection under the CAT because winning asylum can lead to lawful permanent residence and ultimately citizenship. There is no equivalent pathway to citizenship for withholding of removal or protection under the CAT. However, these forms of relief can be a critical protection for applicants who are otherwise barred from asylum. For

¹²⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

¹²⁷ See *supra* p. 38 Box: “Asylum Law is a Dynamic Area of Law.”

¹²⁸ 8 C.F.R. § 208.14(c)(1); USCIS, *Affirmative Asylum Procedures Manual*, Pt. II.N.2.b. (May 2016), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf>. Additionally, if your client is in removal proceedings and the immigration judge redetermines your client's unaccompanied child status (because the child turned 18 or reunified with a parent prior to filing the asylum application), then the judge may assert jurisdiction over the case per *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018).

instance, neither withholding of removal or protection under the CAT require the applicant to file within one year of entry.¹²⁹

For children’s cases in particular, guidance used in asylum cases to look at the case from the perspective of a child can also be argued to apply to children’s withholding of removal and CAT cases. *See* Section III.A. regarding resources for children’s based asylum cases.

The information below will cover the differences and similarities between withholding of removal under the INA and protection under the CAT (withholding of removal under the CAT and deferral of removal under the CAT).

Withholding of Removal Under the INA

APPLYING FOR RELIEF

According to 8 C.F.R. § 1208.3(b), “[a]n asylum application shall be deemed to constitute at the same time an application for withholding of removal” Therefore, when an I-589 application is filed, a withholding of removal claim will also be considered for a decision.

ELIGIBILITY REQUIREMENTS

Like with asylum, you must be able to show past persecution or a well-founded fear of future persecution with a connection/nexus to one of the five protected grounds: race, religion, political opinion, nationality, or PSG. Generally, the protected ground must be one central reason for the persecution—the same standard applied in asylum, except in the Ninth Circuit, where the standard lessens to “a reason”¹³⁰ rather than “one central reason.”¹³¹ If you are able to prove past persecution, the burden shifts to the government to rebut that presumption. The burden of proof for the possibility of future persecution is higher for withholding of removal than asylum. In withholding of removal, there must be a clear probability, or that it is more likely than not, that your client will suffer future persecution.

Withholding of Removal under the INA Key Sources of Law

- [Article 33 of the 1951 Convention on the Status of Refugees](#)
- [INA § 241\(b\)\(3\); 8 U.S.C. § 1231\(b\)\(3\)](#)
- [8 C.F.R. § 208.16](#)

COMPARING THE BARS OF ASYLUM, WITHHOLDING OF REMOVAL UNDER THE INA, WITHHOLDING OF REMOVAL UNDER THE CAT, AND DEFERRAL OF REMOVAL UNDER THE CAT

As the below chart illustrates, there are more bars to asylum than there are to withholding of removal, which sometimes leaves this form of relief as the only potential option.

¹²⁹ While the one-year filing deadline is not applicable to unaccompanied children, this becomes important if a youth’s unaccompanied child status is re-terminated by an immigration judge.

¹³⁰ *Barajas-Romero v. Lynch*, 846 F.3d 351, 358 (9th Cir. 2017).

¹³¹ *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

BAR	ASYLUM	WITHHOLDING OF REMOVAL UNDER INA	WITHHOLDING OF REMOVAL UNDER CAT	DEFERRAL OF REMOVAL UNDER CAT
One Year filing deadline	X			
Firm resettlement	X			
Prior denial of an asylum application by EOIR	X			
Safe Third Country	X			
Persecutor of others	X	X	X	
Terrorism	X	X	X	
Nazi persecution or genocide	X	X	X	
Convicted of a particularly serious crime ^{132*}	X	X	X	
Commission of serious non-political crime outside the United States	X	X	X	
Danger to the security of the United States	X	X	X	

BENEFITS OF AN APPROVED CLAIM FOR WITHHOLDING OF REMOVAL UNDER THE INA

If granted, a removal order will simultaneously be issued and withheld, meaning that your client will not be deported. This approval will not lead to permanent residence and citizenship, but the individual will be able to apply for an EAD. This claim is country-specific so if there is more than one potential country of removal, then you must prove withholding for each country. There is no option to have derivatives, so each individual must have their own application for withholding. Unlike asylum, there is no option to bring family to the United States after a grant on this basis.¹³³ There is no right to travel and reenter the United States. This claim has limited benefits, but it does provide your client with protection and ability to stay in the United States, which can be very important when your client is facing severe injury and/or death upon return to their country of origin.

Protection Under the Convention Against Torture

The United States is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or Convention). The United States signed the Convention in 1988 under

¹³² “Particularly serious crime” is more stringently defined in the asylum context (*see* INA § 208(b)(2)(B)(i); 8 U.S.C. § 1158(b)(2)(B)(i)) than in withholding of removal (*see* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3)(B))

¹³³ However, learn more about the Central American Minors (CAM) refugee and parole program in [Section III.D. U and T Visas](#).

President Ronald Reagan, ratified it in 1994, and it was codified into United States law in 1998. Article 3 of the CAT includes a non-refoulement provision, “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹³⁴

There are two relating claims for relief: withholding of removal under the CAT and deferral of removal under the CAT. Withholding of removal under the CAT is a more secure form of relief than deferral of removal, but deferral of removal has no bars so depending on the circumstances, it is sometimes a necessary option for clients. The requirements are the same for both claims, but the bars and benefits differ. See above chart.

APPLYING FOR RELIEF

As stated above, to apply for either withholding or deferral of removal under the CAT, you should check the box on the front page of the Form I-589.

ELIGIBILITY REQUIREMENTS

An important distinction between CAT cases and asylum is that in CAT cases, there is no requirement to connect the harm to one of the five protected grounds (nexus). In a successful CAT claim, you must prove it is more likely than not¹³⁵ that your client will face torture. This standard will not be met if the circumstances giving rise to torture are speculative or generalized. Rather, you must address each link in the chain of events that would lead to torture with facts and evidence that each link is more likely than not. Torture is defined as severe pain or suffering that is either physical or mental.¹³⁶ The BIA has defined torture as “an extreme form of cruel and inhuman treatment” and not lesser forms.¹³⁷ Harm should be considered in the aggregate so all forms of harm your client fears should be raised and argued.

According to 8 C.F.R. § 208.18(a)(1):

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Protection under the Convention Against Torture Key Sources of Law

Withholding of Removal under the CAT:

- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)
- [8 C.F.R. § 208.16](#)
- [8 C.F.R. § 208.18](#)

Deferral of Removal under the CAT:

- [8 C.F.R. § 208.17](#)
- [8 C.F.R. § 241.4\(b\)\(3\)](#)

¹³⁴ See CAT *supra* note 126 at art. 3.

¹³⁵ In the Seventh Circuit, they consider more likely than not in terms of “a substantial risk” rather than in the quantitative sense reflecting the language of the Convention itself rather than the regulations. See *Arrazabal v. Lynch*, 822 F.3d 961 (7th Cir. 2016).

¹³⁶ See CAT *supra* note 126 at art. 1. See also [8 C.F.R. § 208.18\(a\)](#).

¹³⁷ *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

When breaking this down and looking at other aspects of “torture” in the regulations, the requirements include:

- **What?** An act—severe pain or suffering—that is either physical or mental
- **Intent?** That is intentionally inflicted
- **Why/Purpose?** For such purposes as listed above (i.e., “obtaining from him or her or a third person information or a confession,” etc.) or something similar
- **By Whom?** The act was done by OR at the instigation of whom OR with the consent or acquiescence of a public official or other person acting in an official capacity
- **ALSO** Act is against a person in offender’s custody or physical control¹³⁸
- **NOT** Act is not arising out of a lawful sanction¹³⁹

Looking at the *by whom?* question a little closer, it is important to know that the actor can be either a government actor or a non-governmental actor, but there must be some involvement by the government. This could be any type of public official—low or high level, local, state or federal public official, etc.

Generally, “acquiescence of a public official” is more difficult to prove than the standard seen in asylum—unable or unwilling to protect. The regulations require: the official “must prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”¹⁴⁰ Awareness includes actual knowledge and willful blindness.¹⁴¹ It depends on case law and which Circuit Court of Appeals you are in to see how this is assessed.

The case *Matter of O-F-A-S-* looked at the issue of when a person is “acting in an official capacity” and found that cases should be analyzed by whether the person was acting “under the color of law” as seen in cases under the Civil Rights Act.¹⁴² This is a fact-intensive inquiry and both direct and circumstantial evidence should be considered when determining if the individual was acting in an official capacity.”

BUILDING THE CASE

According to the regulations, the burden of proof is on the applicant and all evidence relevant to the possibility of future torture shall be considered. “The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”¹⁴³

The regulations also provide a non-exhaustive list of evidence to consider, none of which are individually determinative, including evidence of:

- Past torture
- That the applicant could relocate to another part of the country and not be tortured
- Gross, flagrant, or mass violations of human rights within the country of removal
- Relevant information regarding country conditions

138 This is a requirement included in the regulations but not in the CAT itself. The Ninth Circuit has reversed denials of CAT on this basis. See *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004); *Azanor v. Ashcroft*, 364 F.3d 1013, 1019–20 (9th Cir. 2004).

139 For instance, the death penalty is a lawful sanction; therefore, this is not considered torture. However, under 8 C.F.R. § 208.18(a)(3), “a government cannot exempt itself from obligations under the CAT by defining acts that would constitute torture as lawful forms of punishment.” Case law research will be important in cases with this issue.

140 8 C.F.R. § 208.18(a)(7).

141 The BIA case *Matter of S-V-* required “willful acceptance” to meet acquiescence but this has been largely rejected by Circuit Courts of Appeals, which instead condone the “willful blindness” standard. 22 I&N Dec. 1306 (BIA 2000).

142 *Matter of O-F-A-S-* states “[t]he ‘under color of law’ standard draws no categorical distinction between the acts of low- and high-level officials. A public official, regardless of rank, acts ‘under color of law’ when he ‘exercise[s] power ‘possessed by virtue of . . . law and made possible only because [he was] clothed with the authority of . . . law.’ *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020).

143 8 C.F.R. § 208.16(c).

8 C.F.R. § 208.16(c). Therefore, it is important to consider all potential evidence that could show your client will more likely than not be tortured in the potential country of removal. Usually generalized country conditions evidence alone is insufficient to meet an applicant's burden of demonstrating the individualized risk of torture necessary to win a CAT claim.¹⁴⁴ Expert testimony can be instrumental in establishing the future risk an individual faces based on the case facts and context within their country of origin.

CONSIDER WHEN PREPARING A CASE

- Does the I-589 application include the necessary information regarding the torture your client fears?
- Are you asking your client the pertinent questions when drafting the declaration to support a CAT case?
- Does your documentary evidence help prove each element of a CAT case?
 - Evidence of any past harm, torture, threats done to your client and/or family members
 - Statements from community members, neighbors, family, etc.
 - Documentary support showing related human rights abuses by the government of their country? Torture committed by government officials? Evidence of corruption? Impunity? Inadequate response by the government in relation to the harm that is feared?
 - Country conditions expert statement to help make a connection between the general country conditions evidence to your client
- Are you asking your client and/or witness(es) the pertinent questions in testimony that relate to a CAT claim?

MAKING THE ARGUMENT THAT AGE MATTERS IN CAT CASES

- You can look to international guidance to make the argument that age matters in CAT cases. The U.N. Committee Against Torture interprets and monitors the CAT. General Comments Nos. 2¹⁴⁵ and 4¹⁴⁶ have helpful language to make the argument that age matters. If gender is an important factor in your case, the General Comments also provide helpful language regarding this issue.
- For example, you could make the argument that similar to asylum, where a lesser harm experienced by a child could be considered persecution comparatively to an adult, argue that a lesser act should be considered torture for a child, even if it would not for an adult.
- Keep in mind that torture can be either physical or mental severe pain or suffering. 8 C.F.R. § 208.18(a)(4) covers what constitutes torture for mental pain or suffering—including a threat of imminent death or a threat that another person will be subject to death, severe physical pain or suffering. Again, you may want to make an analogous argument using guidance from asylum cases. In asylum cases, there is support that a child, because of age, will react differently than an adult when a caregiver or close family member suffers harm. Also, remember to argue and show by any available documentary evidence any ongoing or lasting psychological impact.

144 See *Pieschacon-Villegas v. Att'y Gen.*, 671 F.3d 303, 312–13 (3d Cir. 2011); *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 160 (2d Cir. 2005).

145 General Comment No. 2 states, “[t]he protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status” U.N. Committee against Torture, *General Comment No. 2 on implementation of article 2 by States parties*, CAT/C/GC/2 (Jan. 24, 2008), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11.

146 General Comment No. 4 states, “severe pain or suffering cannot always be assessed objectively. It depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age, and state of health and vulnerability of the victim and any other status or factors.” U.N. Committee against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, CAT/C/GC/4 (Sept. 4, 2018), https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf.

Check out CILA's resources listed below to help you further strategize and support your case with documentary evidence.

Withholding of Removal Under the CAT & Deferral of Removal Under the CAT

The requirements for withholding of removal under the CAT and deferral of removal under the CAT are the same.¹⁴⁷ As the above chart regarding bars illustrates, the difference between withholding of removal under the CAT and deferral of removal under the CAT is that there are no bars to relief for deferral of removal; whereas, there are bars for withholding of removal under the CAT.¹⁴⁸ See above chart for information relating to bars for withholding of removal under the CAT.

BENEFITS OF AN APPROVED CLAIM FOR WITHHOLDING OF REMOVAL UNDER THE CAT

The benefits and limitations for withholding of removal under the CAT are the same as they are for withholding of removal under the INA. See above.

BENEFITS OF AN APPROVED CLAIM FOR DEFERRAL OF REMOVAL UNDER THE CAT

Similar to withholding of removal under the INA and withholding of removal under the CAT, if deferral of removal is granted, a removal order will be issued.¹⁴⁹ Simultaneous with the grant, the removal order will be deferred. This approval will not lead to permanent residence and citizenship. The individual can apply for an EAD, but it will not be automatically granted. Discretionary factors such as good moral character, positive contributions, ties to the United States, economic necessity, dependent family members, etc. are considered when making a decision on the EAD. Deferral of removal can be terminated by a motion from the government or if the Secretary of State receives diplomatic assurances.¹⁵⁰ Additionally, an individual is not exempt from detention despite an approval on this basis.

Similar to withholding of removal under the INA and withholding of removal under the CAT, a claim for deferral of removal is country-specific so if there is more than one potential country of removal, then you must prove deferral of removal for each country. There is no option to have derivatives so each individual must have their own application for deferral of removal, and there is no option to bring family after receiving an approval on this basis. There is no right to travel and reenter the United States.

Therefore, this is a more precarious and limited form of relief than withholding of removal under the INA and withholding of removal under the CAT, but it can be an important option for protection for your client if there are barriers to alternative forms of relief.

Links to Help You with YOUR CLIENT'S WITHHOLDING OF REMOVAL OR CAT CASE

- Check out CILA's [webinar](#): *Overview of Withholding of Removal and Protection under the Convention Against Torture for Unaccompanied Children* (60 minutes).
- Review CILA's resources [Case Evidence List](#) and [Developing Your Case Chart](#) which are linked under the webinar *Overview of Withholding of Removal and Protection under the Convention Against Torture for Unaccompanied Children* posted on CILA's website. They are also found on CILA's [Additional Resources page](#).
- Check out Immigration Equality and Midwest Immigrant and Human Rights Center's *Preparing*

¹⁴⁷ 8 C.F.R. § 208.17(a).

¹⁴⁸ *Id.* 8 C.F.R. § 208.16(d).

¹⁴⁹ 8 C.F.R. § 208.17.

¹⁵⁰ 8 C.F.R. § 208.17(d).

LGBTQ and HIV Asylum, Withholding and CAT Claims Manual (Asylum Manual).

- Take a look at ILRC’s practice advisory *Qualifying for Protection Under the Convention Against Torture*, Aruna Sury, April 2020.

C. Special Immigrant Juvenile Status and Adjustment of Status

Special Immigrant Juvenile Status (SIJS) is a form of humanitarian protection available for juveniles who need intervention from a state court because of abuse, neglect, or abandonment by a parent. The question of whether the juvenile has been abused, neglected, or abandoned (or a similar basis under state law) must be determined by a state court with jurisdiction over the care and custody of children.

There are three key phases of a SIJS case: obtaining a custody or dependency order from a state court, then submitting the Special Immigrant Juvenile petition for a decision from USCIS, and then applying for lawful permanent residence (either with USCIS or the immigration judge). Keep in mind that you will likely need to be barred in the state where the state court order is obtained, although you can be barred in any state to petition with USCIS or appear in immigration court.

THREE PHASES OF A SIJS CASE



SIJS Eligibility Requirements: The applicant must:¹⁵¹

- Be under 21 on the date of filing [Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant](#);
- Be physically present in the United States through adjudication of SIJS;
- Be unmarried through the adjudication of the SIJS petition;
- Have a valid state court order with certain determinations;
- Have USCIS consent to the grant of SIJS;
- And, if in ORR custody, may also require specific consent from the Secretary of HHS.

¹⁵¹ INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

Special Immigrant Juvenile Status and Adjustment of Status Key Sources of Law

- INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J)
- 8 C.F.R. § 204.11¹
- USCIS Policy Manual Volume 6 Immigrants - [Part J Special Immigrant Juveniles](#)
- Administrative Appeals Office (AAO) Adopted Decisions:
 - [Matter of D-Y-S-C-](#), Adopted Decision 2019-02 (AAO Oct. 11, 2019)
 - [Matter of A-O-C-](#), Adopted Decision 2019-03 (AAO Oct. 11, 2019)
 - [Matter of E-A-L-O-](#), Adopted Decision 2019-04 (AAO Oct. 11, 2019)
- INA § 245(h); 8 U.S.C. § 1255(h) (adjustment of status)
- 8 C.F.R. § 245.1(e)(3)² (adjustment of status)
- USCIS Policy Manual [Volume 7](#) Adjustment of Status - Part A - Adjustment of Status Policies and Procedures and Part F Special Immigrant-Based (EB-4) Adjustment - [Chapter 7 Special Immigrant Juveniles](#) (adjustment of status)
- William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008; 8 U.S.C. § 1232

***** State law also impacts SIJS eligibility, often in the areas of child welfare, family law, and juvenile justice law, so this will vary per jurisdiction. This will require research and preparation outside the scope of this Guide as the Guide focuses on issues that are nationally applicable.*****

Phase 1: State Law Portion: Obtain State Court Order

For USCIS to grant SIJS, there are five requirements for the state court order. The order must:¹⁵²

1. Be valid;
2. Contain a judicial determination about custody or dependency;
3. Include a determination about parental reunification;
4. Contain a best interest determination; and
5. Warrant DHS consent by providing the factual basis for the determinations made under state law, either in the court order or other documents submitted to the court.

¹⁵² *Id.*

VALID COURT ORDER

In order for a court order to be valid, it must be issued under state law.¹⁵³ Determinations in the state court order should be based on state law.¹⁵⁴

TIP: Therefore, arguments in pleadings should only be based on state law, not immigration law.

Additionally, the state court must have continuing jurisdiction during the filing of the petition through adjudication of the petition.¹⁵⁵ There are exceptions to this rule, for instance, if a petitioner is adopted or placed in permanent guardianship or if a petitioner was subject to a valid order that was later terminated based on age before or after filing the SIJS petition.¹⁵⁶ If a petitioner relocates, USCIS may not require a new state court order unless the petitioner is no longer living with the placement from the court order. In that case, a new court order may be necessary or additional evidence must be provided to show continuing jurisdiction.¹⁵⁷



JUDICIAL DETERMINATION ABOUT CUSTODY OR DEPENDENCY

The state court order must include a determination about either custody or dependency.¹⁵⁸ There must be a state law basis for the custody or dependency determination.¹⁵⁹ The state court order should not be temporary or expire before the child reaches the age of majority.¹⁶⁰ Every state's laws regarding custody and dependency are different so be sure to identify the laws that apply in the state where you are obtaining a state court order. Some states have statutes that are specific to SIJS. **Keep in mind:**

- **Custody:**
 - The state court order must include both legal and physical custody.
 - If custody is granted to an individual, the name of that individual should be included.
- **Dependency:**
 - The state court order must declare dependency OR legal commitment/placement under the custody of a state agency, department, entity, or individual.
 - *Matter of E-A-L-O-* requires intervention by the state court through determination on care/custody and/or child welfare services.¹⁶¹ Child welfare services could include psychiatric, educational, occupation, medical or social services, protection against domestic violence or human trafficking, or other supervision by a court or a court-appointed entity.

JUDICIAL DETERMINATION ABOUT PARENTAL REUNIFICATION

The judge must also determine that reunification with a parent is not possible.¹⁶² This should be based on a determination of abuse, neglect, or abandonment (or a similar basis under state law) by that parent.

¹⁵³ USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.

¹⁵⁴ Keep in mind that state laws differ, and some states will consider youth under 18 for a state court order while other states will consider youth under age 21.

¹⁵⁵ USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.1.

¹⁵⁹ When you submit the I-360 packet to USCIS, the state law basis for the custody or dependency determination can be shown by either the order or in the evidence submitted to obtain the state court order. See USCIS Policy Manual Vol. 6, Pt. J, Ch. 3.A.4.

¹⁶⁰ USCIS Policy Manual Vol. 6, Pt. J, Ch. 3.A.2.

¹⁶¹ *Matter of E-A-L-O-*, Adopted Decision 2019-04 (AAO Oct. 11, 2019).

¹⁶² INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

Reunification cannot be possible until the child ages out of the court’s jurisdiction. Termination of the parent’s rights is not required.¹⁶³

The USCIS Policy Manual provides information regarding determining parentage and states in a footnote, “[i]n circumstances where the judge does not make a final determination on parentage or makes a determination as to alleged or purported parentage, the order will not meet the statutory requirements for SIJ classification.”¹⁶⁴

JUDICIAL DETERMINATION ABOUT BEST INTEREST

The best interest of a child is regularly considered in custody or dependency proceedings, but the best interest finding here is a little different. Here, the emphasis is on best interest of the child regarding placement specifically. There must be a judicial determination that it is not in the best interest of the child to be returned to the country of nationality or last habitual residence of the petitioner or her parents.¹⁶⁵ This typically fits within the traditional best interest analysis done by the judge in child welfare and custody proceedings. According to the USCIS Policy Manual, “USCIS generally defers to the court on matters of state law and does not go behind the state court to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, abandonment, or a similar basis under state law.”¹⁶⁶

WARRANT DHS CONSENT

The Secretary of DHS must consent to the grant of SIJS.¹⁶⁷ This involves a question of whether the state court order was bona fide and sought to protect the child from abuse, abandonment, or neglect and was not solely for an immigration benefit.¹⁶⁸ To meet this requirement, the order should state the factual basis for the legal determinations made under state law. If the order does not provide a factual basis, when you submit the petition packet to USCIS, this can be evidenced by other state court documents such as the petition, evidence submitted, court transcript or if not available, an affidavit by the attorney or client summarizing what was submitted to the court.¹⁶⁹

¹⁶³ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.C.2.

¹⁶⁴ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2, note 20.

¹⁶⁵ INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(6).

¹⁶⁶ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2. Moreover, the USCIS Policy Manual goes on to say, “if for example the court places the child with a person in the United States pursuant to state law governing the juvenile court dependency or custody proceedings, and the order includes facts reflecting that the caregiver has provided a loving home, bonded with the child, and is the best person available to provide for the child, this would likely constitute a qualifying best interest finding with a sufficient factual basis to warrant USCIS consent. The analysis would not change even if the chosen caregiver is a parent.” USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.C.3.

¹⁶⁷ INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J). In March 2021, USCIS updated the USCIS Policy Manual based on a settlement agreement from *Saravia v. Barr*, 3:17-cv-03615 (N.D. Cal. January 14, 2021), that impacts “the application of the USCIS consent function as well as the grounds upon which the agency may revoke an SIJ petition.” USCIS, *Policy Alert: Special Immigrant Juvenile Classification and Saravia v. Barr Settlement*, PA-2021-03 (Mar. 18, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210318-SIJ.pdf>. Accordingly, USCIS “will not refuse its consent to a request for SIJ classification based in whole or in part on the fact that the state court did not consider or sufficiently consider evidence of the petitioner’s gang affiliation when deciding whether to issue a predicate order or in making its determination that it was not in the best interest of the child to return to his or her home country. . . ? *Id.* See also USCIS Policy Manual Vol. 6.

¹⁶⁸ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 2.D.

¹⁶⁹ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 3.A.3.

TIPS TO OBTAIN THE STATE COURT ORDER

Be familiar with your state's laws regarding custody and dependency. Talk to family, child welfare, or juvenile law practitioners. Draft your documents in the form locally accepted in the court you will enter.

Include references to state law, not immigration law.

It may help to have a "findings" section in the order to ensure there is a place to include determinations regarding parental reunification and best interest.

Learn about/initiate service of process. You will need to serve the respondents in the case, typically the parents of the child, and possibly other individuals. Oftentimes, one or both of the parents will be living abroad. This may present unique challenges that should be navigated using the rules of service in your state and any applicable international treaties.¹⁷⁰

Gather evidence to show the judge that there was abuse, neglect, and/or abandonment by one (or both) of the child's parents. Evidence could include medical records, school records, an affidavit by the child, and affidavits from the petitioner or others who know about the harm the child suffered.

Research the issues and consult available resources on SIJS to double check that you have everything you need to move forward to obtain the state court order. Read the USCIS Policy Manual on SIJS before going to state court (not after!).

Prepare yourself and your client for a hearing in state court to obtain a final order. Request a court reporter so you can obtain a court transcript of the hearing. After the hearing, obtain a certified copy of the final order to submit to USCIS.

Common Issues

DEATH AS ABANDONMENT OR NEGLECT

It is sometimes viable to argue that the death of a parent results in constructive abandonment or neglect because the parent failed to plan for that scenario and the child was left without provision or care, if the parent did not have a will or sufficient resources. It is important to tie this to neglect and/or abandonment as defined in your state's law. The USCIS's Policy Manual states, "[t]he fact that one or both parents is deceased is not itself a similar basis to abuse, abandonment or neglect under state law. A legal conclusion from the state court is required that parental death constitutes abuse, neglect, abandonment, or is legally equivalent to a similar basis under state law."¹⁷¹

PARENTAGE

The establishment of parentage can be complex, especially when you are looking to the laws of the country where a child was born. Oftentimes, parents in your case may not be married or otherwise subject to

¹⁷⁰ For example, you may need to consider the Hague Service Convention or Inter-American Convention on Letters Rogatory. A helpful starting point for research is the DOJ website. See *Service Requests*, DOJ, <https://www.justice.gov/civil/service-requests> (last updated Apr. 12, 2021). If you are practicing in Texas, you may want to consult Burta Rhoads Raborn Inns of Court Team 4's decision tree on *How to Serve the Respondent Successfully* posted on CILA's website under *Additional Resources*, <http://www.cilacademy.org/resources/additional-resources/>.

¹⁷¹ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 3.A.1.

presumptions of parentage under the laws of your state. Additionally, some clients may have other relatives on their birth certificate in the absence of a father. Be sure to review the child's birth certificate for both a mother and father. USCIS notes that if the parent who has mistreated the child is not on the child's birth certificate, they will look to the order for a determination of parentage of that person. If the identity of the father is unknown, you may be able to make findings against an unknown father.¹⁷²

EXAMPLE SIJS CASE STUDY: COMPARING APPROACHES IN TEXAS AND WASHINGTON

Hypothetical Case Facts:

Samuel's biological father abandoned Samuel and his mother, Juliana, when Samuel was a newborn baby. After they were abandoned, Juliana suffered from extreme mental illness, though never formally diagnosed. About five years ago, Juliana was hit by a car, and she died as a result of the injuries she sustained. Samuel grew up with his great-grandmother and his little brother, Cristian Leonardo. Samuel's great-grandmother is in her seventies. Samuel's uncles supported the family with money. When Samuel was about thirteen years old, he started having problems with gang members. Samuel was beaten up frequently, and the gang told Samuel that if he did not join them, he would be killed.

Approach in Texas

ADDITIONAL FACT: Samuel is currently residing in Houston in the care of his uncle, Jose. Samuel would like to remain with his uncle.

Samuel needs a custody order. His uncle Jose would be able to file for legal conservatorship of Samuel after six months of taking care of Samuel. He would file a "Suit Affecting the Parent Child Relationship" (SAPCR). He would need to serve Samuel's father with notice of the lawsuit. If there is no way to determine the father's whereabouts, he can use service of citation by publication which requires the appointment of an attorney ad litem to ensure the father cannot be found. As the basis for the SAPCR, Jose would show that it is in Samuel's best interest for Jose to have sole managing conservatorship because his father abandoned him and his mother neglected and abandoned him before she passed away. The court would find that there was no possibility of reunifying with his deceased and estranged parents, and that it was not in his best interest to return to live with his elderly great-grandmother who could not protect him from the gangs.

Approach in Washington

ADDITIONAL FACT: Samuel is currently residing in Seattle in the care of his aunt, Maria. Samuel would like to remain with his aunt.

Samuel can file a petition for dependency. In Washington, any person may file a petition to seek dependency for the child so the child can self-petition for dependency. He would need to serve his father with notice of the lawsuit. Service must comply with any relevant treaties regarding service of process for the country of Samuel's father. Service of process by an alternative means, including by publication is possible if it is allowed by the court. If Samuel does not know his father's current whereabouts, this is a likely option to complete service. In the petition, Samuel would seek dependency because his father abandoned him and his mother neglected and abandoned him before she passed away. The court would find that there was no possibility of reunifying with his deceased and estranged parents, and that it was not in his best interest to return to live with his elderly great-grandmother who could not protect him from the gangs.

¹⁷² See Administrative Appeals Office (AAO) non-precedential decisions: [Matter of A-S-F-D-](#), ID #2118258 (AAO Dec. 27, 2018); [Matter of A-V-F-D-](#), ID# 2118279 (AAO Dec. 27, 2018); [Matter of E-R-F-D-](#), ID# 2118354 (AAO Dec. 27, 2018); [Matter of N-A-F-D-](#), ID# 2118313 (AAO Dec. 27, 2018); [Matter of B-E-G-P-](#), ID# 1523093 (AAO Apr. 15, 2019).

Phase 2: USCIS Portion: File for Special Immigrant Juvenile Status (I-360)

Once the state court order is obtained, the child can file a petition for an immigrant visa under the SIJS classification. The child can apply for SIJS by filing Form I-360 with USCIS.¹⁷³

FILING THE PETITION

Form I-360 is the required form for applying for SIJS. The I-360 is used for several types of immigration relief so be sure to only fill out those portions of the form relevant to SIJS.

To also show eligibility for SIJS, in addition to the form, it is important to also include the following information:¹⁷⁴

- Cover letter detailing how the client meets the eligibility requirements
- Certified copy of the state court order
- Proof of age—commonly done with a birth certificate

CILA has resources available to review as guidance for filling out the I-360: *Form I-360 Review Guidance* and *I-360 Contents Checklist and Where to File* handout found on CILA's website on the [Additional Resources page](#).

The petition will be adjudicated at the National Benefits Center (NBC).¹⁷⁵ It is possible for the NBC to schedule an interview regarding the petition at a local field office, but currently this rarely occurs. The law requires USCIS to adjudicate the petition within 180 days.¹⁷⁶ Processing times for SIJS petitions are not currently published. After reviewing the petition and supporting evidence, USCIS may issue: an approval, denial, Request for Evidence (RFE), or Notice of Intent to Deny (NOID).

OPTIONS IF YOUR CLIENT RECEIVES A RFE, NOID, OR DENIAL

- If your client receives a RFE → The notice will give a time frame to respond to provide additional information and/or documentation. The time frame will not exceed twelve weeks.¹⁷⁷
- If your client receives a NOID → The deadline to respond cannot exceed 30 days.¹⁷⁸
- If your client receives a denial¹⁷⁹ → There are options to appeal. Your client can appeal to a

Resources Regarding the Administrative Appeals Office (AAO)

[CLINIC Index of Unpublished Administrative Appeals Office Decisions on Special Immigrant Juvenile Status](#)
[CILA Webinar Immigration Legal Research and AAO Appeals](#)

¹⁷³ 8 C.F.R. § 204.11(b).

¹⁷⁴ 8 C.F.R. § 204.11(d).

¹⁷⁵ According to the USCIS website, “[s]tarting on November 1, 2016, USCIS will centralize the Special Immigrant Juvenile (SIJ) program. This means SIJ-based Form I-360 petitions and Form I-485 applications will primarily be adjudicated at one location, the National Benefits Center (NBC),” <https://www.uscis.gov/archive/uscis-centralize-processing-special-immigrant-juvenile-cases> (last updated Nov. 1, 2016). To learn more about the NBC, visit the USCIS website, <https://egov.uscis.gov/office-locator/#/nbc> (last visited July 21, 2021).

¹⁷⁶ See *supra* note 6 at Section 235(d)(2); 8 U.S.C. § 1232(d)(2).

¹⁷⁷ 8 C.F.R. § 103.2(b)(8)(iv). With COVID-19, USCIS provided some flexibility regarding timelines to respond to certain USCIS actions such as requests for evidence and notices of intent to deny. However, the flexibility only temporarily applies. See USCIS, *USCIS Extends Flexibility for Responding to Agency Requests* (June 24, 2021), <https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-5>.

¹⁷⁸ *Id.*

¹⁷⁹ USCIS Policy Manual, Vol. 6, Pt. J, Ch. 5.

federal court or the AAO.¹⁸⁰ Additionally, there is the option to file a motion to reopen or motion to reconsider with USCIS.

IMPACT OF AN APPROVED SIJS PETITION

Benefits:

- Approved SIJS provides a pathway to apply for permanent residence and then citizenship.

Limitations:

- SIJS provides a lawful status for the child, but the child is still in “limbo” until the child obtains residency. SIJS alone, without adjustment of status, does not constitute relief from removal. See more information below regarding how an approved SIJS petition impacts children in removal proceedings.
- SIJS does not grant work authorization.
- SIJS does not grant re-entry to the United States if the child leaves. There is no option for travel.
- Child must remain unmarried until the child obtains permanent residence.
- Neither parent of the SIJS petitioner can obtain immigration status through their child.¹⁸¹

CLIENT IN REMOVAL PROCEEDINGS AND HAS PENDING SIJS PETITION

You may find yourself in immigration court with a client who either has a pending SIJS petition or an approved SIJS petition awaiting visa availability to adjust status. Immigration judges do not have jurisdiction to make decisions about the SIJS petition, or to adjust status until there is a visa available (see more below). If there is no other relief before the immigration judge (like asylum), there are a few procedural options to consider including to seek prosecutorial discretion, seek administrative closure,¹⁸² or to file a motion to continue or to place the case on the status docket¹⁸³ until the SIJS petition is adjudicated by USCIS or a visa becomes available to adjust status.

SIJS Policy Change Efforts

- Learn more about the issues in the ABA [Commission on Immigration blog post *A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation*](#).
- Learn more about the policy efforts in the ABA Journal’s [ABA House of Delegates calls for changes in country’s immigration system](#).

¹⁸⁰ 8 C.F.R. § 103.3. Consult the USCIS AAO Practice Manual if you plan to appeal to the AAO. See AAO Practice Manual, USCIS (Apr. 2018), <https://www.uscis.gov/ao-practice-manual>.

¹⁸¹ INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

¹⁸² In July 2021, Attorney General Garland certified to himself *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). The decision overruled the July 2018 decision *Matter of Castro-Tum*, which had limited judges’ ability to manage their dockets finding that the use of administrative closure was not authorized, noting that *Castro-Tum* “departed from long-standing practice.” Now, immigration judges should follow the precedents in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) and *Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017), at least pending the reconsideration of a 2020 rule (*Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*) that involved administrative closure but was preliminarily enjoined from taking effect. See also Emma Winger, *Attorney General Garland Brings Back Administrative Closure for Immigration Judges*, Immigration Impact (July 16, 2021), <https://immigrationimpact.com/2021/07/16/garland-brings-back-administrative-closure/#.YPyI0bqSk2w>.

¹⁸³ Keep in mind, not all immigration courts utilize status dockets; therefore, this may not be an option in some courts.

In the summer of 2021, new [interim guidance](#) was announced regarding the use of prosecutorial discretion¹⁸⁴ in removal proceedings. The guidance is very favorable to youth seeking SIJS.¹⁸⁵ Litigation is ongoing regarding the use of DHS enforcement priority guidelines issued in the beginning of 2021.¹⁸⁶ Despite this litigation, OPLA continues to have longstanding authority to exercise prosecutorial discretion in removal proceedings. However, depending on the current litigation status and whether there are updates in this area, advocates will want to consider whether they rely on language in the May 2021 interim guidance when making their arguments or whether they rely on their case facts and OPLA's longstanding authority to exercise prosecutorial discretion. No matter the approach, advocates will likely want to consider seeking prosecutorial discretion for their clients as a part of case strategy.

Current guidance gives more authority to immigration judges to grant a continuance or place a case on the status docket when a I-360 petition is pending for a decision with USCIS rather than when a I-360 has been approved. In that situation, the judge often indicates the priority date is too remote and it will take too long for a visa number to become available. You may have to return to court several times to seek a continuance. For more about this topic, CLINIC has an excellent [Practice Advisory: Matter of L-A-B-R-](#), 27 I&N Dec. 405 (A.G. 2018).

TIP: Emphasize to the immigration judge that SIJS is a humanitarian form of relief and that a state court judge determined that it is not be in the child's best interest to return to their home country.

Additionally, *see* Section [IV.B](#). Introduction to Immigration Court for more information to learn more about these immigration court procedural strategy options.

Also, know that ICE issued a [directive](#), *Using a Victim-Centered Approach with Noncitizen Crime Victims* (1005.3) in August 2021, which affects civil enforcement of petitioners and beneficiaries of several victim-based immigration benefits including U visas, T visas, VAWA, and SIJS.¹⁸⁷ The directive also includes a non-exhaustive list of the types of civil enforcement action this directive affects, and some actions on the list include decisions whether to issue or cancel a Notice to Appear, detain or release from custody, grant deferred action or parole, and execute a final order of removal.

Phase 3: File for Adjustment of Status

Once a child has an approved I-360 petition, the child is eligible to apply for lawful permanent residence. However, the child may apply for adjustment of status only once a visa number is available. The child should apply using USCIS [Form I-485](#), *Application to Register Permanent Residence or Adjust Status*.

184 *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities*, ICE (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf. *See Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (OPLA)*, ICE, https://www.ice.gov/about-ice/opla/prosecutorial-discretion?fbclid=IwAR15PORvZtufWHWRdqinUdElUjJfEqBxQzFFMSEk-uPoxCX-pAT_cFeOODJ4 (last updated Aug. 23, 2021). *See Effect of Department of Homeland Security Enforcement Priorities*, EOIR PM 21-25 (June 11, 2021). Learn more in practice advisories. *See Biden Administration Announces New Prosecutorial Discretion Policy*, CLINIC (June 28, 2021), <https://cliniclegal.org/resources/removal-proceedings/biden-administration-announces-new-prosecutorial-discretion-policy>; *Practice Alert: Advocating for Clients in Removal Proceedings Using the OPLA Prosecutorial Discretion Memo*, NIPNLG, ILRC (June 21, 2021), https://www.ilrc.org/sites/default/files/resources/nipnlg-ilrc_practice_alert_opla_pd_memo.pdf; *Enforcement Priorities Litigation Update: September 2021*, ILRC (Sept. 23, 2021), <https://www.ilrc.org/enforcement-priorities-litigation-update-september-2021>.

185 Notably, the [interim guidance](#) states, “[w]hen a noncitizen has a viable avenue available to regularize their immigration status outside of removal proceedings, whether through temporary or permanent relief, it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body.” The interim guidance then includes examples including: “a child who appears prima facie eligible to pursue special immigrant juvenile status under INA section 101(a)(27) and 8 C.F.R. § 204.11.” The fact that SIJS is specifically addressed and the language refers to prima facie eligibility rather than a filed or approved I-360 petition is significant.

186 On August 19, 2021, the United States District Court for the Southern District of Texas [issued](#) a nationwide preliminary injunction in *Texas v. United States*, stopping implementation of interim enforcement priority guidelines in the DHS January 20, 2021 [memo](#) and ICE February 18, 2021 [memo](#). Then on August 25, 2021, the Fifth Circuit [granted](#) an administrative stay in the case until further order by the court. On September 16, 2021, the Fifth Circuit [stayed](#) the district court's order, except for narrow aspects of the order, so as of publication the memos are largely still in effect.

187 *See* Kate Goettel, *ICE Announces New Victim-Centered Policy, Showing a Favorable Shift Toward Vulnerable Immigrants*, Immigration Impact (Aug. 13, 2021), <https://immigrationimpact.com/2021/08/13/ice-abuse-victim-policy/#.YR2HrXySk2w>; Rebecca Beitsch, *ICE directed to avoid deportation of victims of crime*, The Hill (Aug. 12, 2021), <https://thehill.com/policy/national-security/567670-ice-directed-to-avoid-deportation-of-victims-of-crime>.

There is a filing fee¹⁸⁸ associated with Form I-485, but a fee waiver¹⁸⁹ using [Form I-912, Request for Fee Waiver](#) can be filed with USCIS. Additionally, there are some inadmissibility grounds that do not apply to Special Immigrant Juveniles or that may be waived.¹⁹⁰

WHERE SHOULD MY CLIENT FILE THE APPLICATION?

The child should file this application with USCIS if they are not in removal proceedings, or if they are in removal proceedings but are considered an “arriving alien” (entered through a port of entry).¹⁹¹ If the child is not considered an “arriving alien” and is in removal proceedings which have not been dismissed, then the child should file the application with the immigration court. Also check out CILA’s [blog post](#) on the topic *Adjusting Without Jurisdiction: A Cautionary Tale*.

WHEN SHOULD MY CLIENT FILE THE APPLICATION?

If a visa number is available, and is not in removal proceedings or is an arriving alien, then the child can file the I-485 with the I-360 to USCIS for concurrent processing. However, for the most common countries of origin (Mexico, Honduras, El Salvador, and Guatemala), visa numbers may not currently be available due to backlogs.

HOW DO I KNOW IF A VISA NUMBER IS AVAILABLE?

Check your client’s I-360 Receipt Notice from USCIS to find your client’s priority date, the date USCIS received the petition. This is the date you use when checking the Visa Bulletin for visa availability. Special Immigrant Juveniles fit into the 4th preference employment-based (EB-4) category. The Department of State (DOS) issues a [Visa Bulletin](#) monthly to show available visas. You should check the Visa Bulletin regularly to see if there has been any movement in visa availability and whether a visa number is available for your client.

Additionally, every month USCIS publishes a [Filing Chart](#) regarding when USCIS will begin accepting applications for that particular country. It does not necessarily align with the information in the DOS’s Visa Bulletin. For instance, even if a visa number is not available according to the Visa Bulletin, USCIS may still accept the application. It varies each month, which requires monitoring of these sources. When filing in immigration court, you must always wait for a visa to become available under the DOS Visa Bulletin.

For an example of how to do this, watch CILA’s 101 [webinar](#): *Introduction to Special Immigrant Juvenile Status* (49 minutes)—this discussion begins at timestamp 32:05.

IS THERE AN AGE LIMIT FOR SIJS-BASED ADJUSTMENT OF STATUS?

According to the USCIS Policy Manual, “[t]here is no age limit for SIJ-based applicants for adjustment of status. In cases where an SIJ petitioner is under 21 years of age on the date of proper filing of the SIJ petition, USCIS does not deny an SIJ-based adjustment application solely because the applicant is older than 21 years of age at the time of filing or adjudication of the Form I-485.”¹⁹²

188 *G-1055, Fee Schedule*, USCIS, <https://www.uscis.gov/g-1055> (last reviewed/updated May 17, 2021).

189 *Additional Information on Filing a Fee Waiver*, USCIS, <https://www.uscis.gov/feewaiver> (last reviewed/updated Feb. 1, 2021).

190 See INA § 245(h); 8 U.S.C. § 1255(h); 8 C.F.R. § 245.1(e)(3).

191 See 8 C.F.R. § 1.2.

192 USCIS Policy Manual, Vol. 7, Pt. F, Ch. 7.

SIJS-BASED ADJUSTMENT OF STATUS ELIGIBILITY REQUIREMENTS

To be eligible for adjustment of status, your client must:

- Have an approved I-360 petition;
- Have no bars to adjustment;
- Be admissible or qualify for a waiver; and
- Merit a favorable exercise of discretion.¹⁹³

APPROVED I-360 PETITION

At this stage, if the adjustment of status application is sent to USCIS, they will verify continued eligibility for SIJS, which means it is possible that a I-360 could be revoked. There are some grounds for automatic revocations, including: marriage of the petitioner, reunification by court order, or reversal of best interest determination by the court.¹⁹⁴ If the revocation is not automatic but USCIS finds that the applicant is no longer eligible for SIJS, USCIS will send a Notice of Intent to Revoke (NOIR).

If the adjustment of status application is being submitted to the immigration court, the court does not have authority to re-adjudicate the SIJS petition.

NO BARS TO ADJUSTMENT—WHAT BARS TO ADJUSTMENT APPLY TO SPECIAL IMMIGRANT JUVENILES?

The only applicable bar for adjustment of status for Special Immigrant Juveniles is the terrorist-related bar.¹⁹⁵

IS THE CHILD ADMISSIBLE OR DOES THE CHILD QUALIFY FOR A WAIVER?

To be eligible for adjustment of status, the child must be admissible. Grounds of inadmissibility are reasons why a person can be refused admission and/or removed from the United States including on health-related grounds, economic grounds, criminal grounds, etc.

There are certain grounds of inadmissibility that are inapplicable to Special Immigrant Juveniles and so will not affect their admissibility for their application for adjustment of status.¹⁹⁶ No waiver is necessary.

INADMISSIBILITY GROUNDS THAT ARE INAPPLICABLE TO SPECIAL IMMIGRANT JUVENILES (NO WAIVER NECESSARY)

INA § 212(a)(4) Public charge

INA § 212(a)(5)(A) Labor certification

¹⁹³ USCIS issued a policy alert in July 2020 regarding updating the USCIS Policy Manual on “application of discretion in applications.” USCIS, *Policy Alert: Applying Discretion in USCIS Adjudications*, PA-2020-10 (July 15, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>. The update includes a non-exhaustive list of factors for officers to consider. See USCIS Policy Manual Vol. 1, Pt. E, Ch. 8. Then, in November 2020, USCIS issued another policy alert with additional information regarding discretion for adjustment of status cases. USCIS, *Policy Alert: Use of Discretion for Adjustment of Status*, PA-2020-22 (November 17, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201117-AOSDiscretion.pdf>. See USCIS Policy Manual Vol. 7, Pt. A, Ch. 1 and 10. For more information, review ILRC’s practice advisory. Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion*, ILRC (Mar. 2021), <https://www.ilrc.org/uscis-policy-manual-makes-sweeping-changes-discretion>.

¹⁹⁴ 8 C.F.R. § 205.1(a)(3)(iv).

¹⁹⁵ INA § 245(c)(6); 8 U.S.C. § 1255(c)(6).

¹⁹⁶ INA § 245(h)(2)(B); 8 U.S.C. § 1255(h)(2)(B); 8 C.F.R. § 245.1; USCIS Policy Manual, Vol. 7, Pt. F, Ch. 7.

INADMISSIBILITY GROUNDS THAT ARE INAPPLICABLE TO SPECIAL IMMIGRANT JUVENILES (NO WAIVER NECESSARY)

INA § 212(a)(6)(A) Aliens present without admission or parole

INA § 212(a)(6)(C) Misrepresentation, including false claim to U.S. citizenship

INA § 212(a)(6)(D) Stowaways

INA § 212(a)(7)(A) Immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document

INA § 212(a)(9)(B) Aliens unlawfully present

Many grounds of inadmissibility which do apply to Special Immigrant Juveniles can be waived¹⁹⁷ with the submission of [Form I-601](#), *Application for Waiver of Grounds of Inadmissibility* and accompanying evidence. There are more generous waivers for Special Immigrant Juveniles seeking adjustment of status than the regular waivers of inadmissibility grounds. The standard for the SIJS-specific waiver is whether it should be granted “for humanitarian purposes, family unity, or when it is otherwise in the public interest.”¹⁹⁸

INADMISSIBILITY GROUNDS THAT ARE APPLICABLE TO SPECIAL IMMIGRANT JUVENILES BUT WAIVABLE (USING FORM I-601)

INA § 212(a)(1) Health-related grounds

INA § 212(a)(2)(D) Prostitution and commercialized vice

INA § 212(a)(2)(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

INA § 212(a)(2)(G) Foreign government officials who have committed particularly severe violations of religious freedom

INA § 212(a)(2)(H) Significant traffickers in persons

INA § 212(a)(2)(I) Money laundering

INA § 212(a)(3)(D) Immigrant membership in a totalitarian party

INA § 212(a)(3)(F) Association with terrorist organization

INA § 212(a)(5)(B) Unqualified physicians

INA § 212(a)(5)(C) Uncertified foreign health care workers

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

INADMISSIBILITY GROUNDS THAT ARE APPLICABLE TO SPECIAL IMMIGRANT JUVENILES BUT WAIVABLE (USING FORM I-601)

INA § 212(a)(6)(B) Failure to attend removal proceedings

INA § 212(a)(6)(E) Smugglers

INA § 212(a)(6)(F) Subject of civil penalty

INA § 212(a)(6)(G) Student visa abusers

INA § 212(a)(7)(B) Nonimmigrants

INA § 212(a)(8) Ineligible for citizenship

INA § 212(a)(9)(A) Certain aliens previously removed

INA § 212(a)(9)(C) Aliens unlawfully present after previous immigration violations

INA § 212(a)(10) Miscellaneous grounds (polygamists, unlawful voters, etc.)

There are also some inadmissibility grounds that apply to Special Immigrant Juveniles that cannot be waived under the SIJS-specific waiver, but they may be waivable under a different statutory authority.¹⁹⁹ The [USCIS Policy Manual](#), Vol. 9 provides additional information on waivers.

INADMISSIBILITY GROUNDS THAT ARE APPLICABLE TO SPECIAL IMMIGRANT JUVENILES BUT NOT WAIVABLE UNDER SIJS-SPECIFIC WAIVER

INA § 212(a)(2)(A) Conviction²⁰⁰ of certain crimes

INA § 212(a)(2)(B) Multiple criminal convictions, aggregate sentences 5 years or more

INA § 212(a)(2)(C) Controlled substance traffickers (anyone who the Attorney General has “reason to believe” is a trafficker (i.e., does not require a “conviction” in adult court or a juvenile delinquency disposition))

INA § 212(a)(3)(A) Entrance to engage solely, principally, or incidentally in unlawful activity, particularly espionage.

¹⁹⁹ See [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7, note 28.

²⁰⁰ The USCIS Policy Manual states, “[f]indings of juvenile delinquency are not considered criminal convictions for purposes of immigration law.” [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7. The Manual goes on to say, “[h]owever, certain grounds of inadmissibility do not require a conviction. In some cases, certain conduct may be sufficient to trigger an inadmissibility ground. Furthermore, findings of juvenile delinquency may also be part of a discretionary analysis” *Id.* It is important to read the Manual further if your client has any criminal history or arrests and explore the issue. Based on INA § 245(h)(2)(B); 8 U.S.C. § 1255(h)(2)(B) and INA § 212(h); 8 U.S.C. § 1182(h) non-waivable bars do not include the portion “related to a single offense of simple possession of 30 grams or less of marijuana.” See *Matter of Moradel*, 28 I&N Dec. 310 (BIA 2021). See also Kathy Brady, Zachary Nightingale, Matt Adams, *Immigrants and Marijuana*, ILRC (May 2021), <https://www.ilrc.org/immigrants-and-marijuana>.

INADMISSIBILITY GROUNDS THAT ARE APPLICABLE TO SPECIAL IMMIGRANT JUVENILES BUT NOT WAIVABLE UNDER SIJS-SPECIFIC WAIVER

INA § 212(a)(3)(B) Terrorist activities

INA § 212(a)(3)(C) Serious adverse foreign policy consequences

INA § 212(a)(3)(E) Participants in Nazi persecutions, genocide or the commission of any act of torture or extrajudicial killing

MERITS EXERCISE OF FAVORABLE DISCRETION

In addition to ensuring the applicant meets all requirements to file, the USCIS officer will also determine if the individual merits favorable discretion in approving the application or not.²⁰¹

TIP: Always include positive discretionary factors in your evidence and testimony for adjustment of status if needed to outweigh any negative discretionary factors.

FILING THE ADJUSTMENT OF STATUS APPLICATION

The application packet should include:²⁰²

- Form I-485, *Application to Register Permanent Residence or Adjust Status*
- Appropriate fee OR [Form I-912, Request for Fee Waiver](#)
- Copy of the receipt or approval notice (Form I-797) for the applicant's SIJS petition (unless the applicant is filing the petition together with Form I-485)
- Two passport style photos
- Copy of government issued identity document with photograph (if available)
- Copy of birth certificate
- [Form I-693, Report of Medical Examination and Vaccination Record](#) completed by a civil surgeon—Check USCIS's website to [find a doctor](#).

Juvenile Records

State laws often prioritize the confidentiality of juveniles' delinquency records, but it is important to keep in mind how USCIS will address the issue when adjudicating an application for adjustment of status.

The [USCIS Policy Manual](#) Vol. 7, Pt. F, Ch. 7 provides important information regarding what USCIS is looking for if the youth has juvenile delinquency. For example, the Manual states:

- “[A]n adjustment applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition.”
- “In the event that an applicant is unable to provide such records because the applicant's case was expunged or sealed, the applicant must provide information about the arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction.”

²⁰¹ See [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7.

²⁰² *Id.* See [Checklist of Required Initial Evidence for Form I-485 \(for informational purposes only\)](#), USCIS, <https://www.uscis.gov/i-485Checklist> (last reviewed/updated Jan. 11, 2021).

- **TIP:** Do not get the medical examination done immediately. Check out [USCIS's Special Instructions](#) regarding Form I-693 and the [USCIS Policy Manual](#) Volume 8, Part B, Chapter 4 regarding this issue to ensure results are valid and timely.

- Certified police and court records of juvenile delinquency findings, criminal charges, arrests, or convictions (if applicable)
- Form I-601, *Application for Waiver of Grounds of Inadmissibility* (if applicable). This form also has a fee so you should include it in the request for a fee waiver, if necessary.

Additionally, an applicant has the option to seek an EAD by filing [Form I-765, Application for Employment Authorization](#) and/or a travel document by filing [Form I-131, Application for Travel Document](#).

FILING THE APPLICATION WITH USCIS

At the time of publication, adjustment of status applications filed with USCIS should be filed with the Chicago Lockbox address and will be adjudicated by the NBC. If necessary, an interview will be scheduled for the applicant at a local field office. The application could either be approved or denied by USCIS.

If the application is denied, an applicant can appeal to the AAO, file a motion to reopen/reconsider, or re-apply at a later time. It is also possible for USCIS to issue a NTA and initiate removal proceedings for the child. If this occurs, the child can renew their I-485 application before the immigration court.

FILING THE APPLICATION IN IMMIGRATION COURT

If the child is in removal proceedings, then the court will decide their application for adjustment of status. In this situation, the applicant should:

- Provide an appropriate fee OR request to waive I-485 filing fee and biometrics fee. See Chapter 3.4 of the [EOIR Policy Manual](#), Part II - OCIJ Practice Manual for instructions.
- Submit the immigration judge's order waiving fees along with a copy of the I-485 and [pre-hearing instructions](#) to the Texas Service Center.
- Once the Texas Service Center issues a Receipt Notice, you can submit a copy of that along with the adjustment of status packet you have prepared to the immigration court.
 - You can also use the Receipt Notice to file for an EAD with USCIS. This is important if there is a lengthy time period before your client's individual hearing.
- The USCIS Service Center will issue a biometrics appointment notice. Your client must attend the appointment.
- Before the individual hearing, it is recommended that you follow up with the Office of the Principal Legal Advisor (OPLA) to ensure that the background check has been completed before the individual hearing.
- At the individual hearing, the immigration judge will adjudicate the I-485 application packet.
- Following the hearing, if the application is approved, follow the [post-order instructions](#) to assist your client in obtaining a green card which is processed by USCIS.
- If the application is denied, your client can appeal to the BIA, but that is the last level of appeal. There is no option to appeal to federal court.

IMPACT OF AN APPROVED²⁰³ APPLICATION

RIGHTS OF LAWFUL PERMANENT RESIDENCE	RESPONSIBILITIES OF LAWFUL PERMANENT RESIDENCE
Live and work permanently in the United States	Maintain a current address with USCIS
Leave and return to the United States under certain conditions	ObeY all federal, state, and local laws
Attend college or join the U.S. Armed Forces	Pay federal, state, and local income taxes
Apply for citizenship once eligible (after 5 years)	Register with the Selective Service if a male between 18 and 26 years of age
Petition for certain relatives (not parents)	Maintain lawful immigration status

Links to Help You with YOUR CLIENT'S SPECIAL IMMIGRANT JUVENILE CASE

- Check out CILA's 101 [webinar: Introduction to Special Immigrant Juvenile Status](#) (49 minutes).
- View CILA's [webinar: Introduction to Unaccompanied Children and Special Immigrant Juvenile Status](#) (58 minutes).
- Review CILA's blog post [Analysis of SIJS updates to the USCIS Policy Manual](#), December 11, 2019 to get an overview of changes made to the USCIS Policy Manual regarding SIJS in 2019.
- Use CILA's SIJS Case Theory and Evidence Matrix chart posted on CILA's website on the [Additional Resources page](#) to help you stay organized and create a case strategy.
- In some instances, state court judges seek proof of international law, CILA and Justice in Motion in collaboration, released affidavit packets regarding paternity law in El Salvador, Guatemala, and Honduras. Check out the resource on CILA's [Additional Resources page](#).
- If you are in California, ILRC's Practice Advisory [Guidance for SIJS State Court Predicate Orders in California: What You Need to Know in 2021](#) by Katie Annand (KIND), Ashley Melwani (Legal Services for Children), & Rachel Prandini (ILRC), June 2021, may be of help to you.
- Watch CILA's [webinar Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on SIJS](#) to learn more about filing for adjustment of status. Also, review CILA's resource [Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigrant Juvenile Status \(SIJS\)](#) posted on CILA's [Additional Resources page](#).
- Review CILA's SIJS Adjustment of Status Inadmissibility Chart posted on CILA's website on the [Additional Resources page](#).
- Depending on your case, CILA's [webinar Common Crime Based Inadmissibility Grounds for SIJ in Texas](#) might be a great resource (1 hour, 31 minutes).
- Learn more about SIJS and filing for adjustment of status with ILRC's [Humanitarian Forms of Relief Part II: Asylum & SIJS](#), Veronica Garcia, August 2019 and [Changes to the Form I-485, Application for Adjustment of Status](#), January 2018.

²⁰³ *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, USCIS, <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-a-green-card-holder-permanent-resident> (last reviewed/updated July 15, 2015).

- View CILA’s flowchart [Petition for Special Immigrant Juvenile Status Across Systems](#) to see a visual of the course of a SIJS case through the different stages which can be helpful in explaining the process to your client.
- Read ILRC’s Practice Advisory [Special Immigrant Juvenile Status & Visa Availability](#), Rachel Prandini, January 2021.
- Learn more about visa availability with CILA’s resource [Quick Reference Guide – SIJ Status and EB-4 Immigrant Visa Availability](#), April 2018.
- Read ILRC’s Practice Advisory [What are the Immigration Consequences of Delinquency?](#), Rachel Prandini, March 2020 if delinquency is an issue in your case.
- View the CILA-NILA [webinar: Litigating SIJS Delay Cases: Mandamus and APA](#) (53 min.) & review the accompanying [Mandamus and APA Actions for Special Immigrant Juvenile Petitions](#) Practice Advisory and Example Template Complaint for SIJS Delay Cases.

D. U and T Visas

U Visas

Generally, U visas are available for victims of certain crimes who are helpful to law enforcement or other authorities in the investigation or prosecution of the criminal activity. If you think your client is eligible to file for a U visa, this is something to explore more closely. This Guide only gives an overview of the option for relief to get you started.

U Visa Key Sources of Law

- INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U)
- INA § 212(d)(14); 8 U.S.C. § 1182(d)(14) (inadmissibility waiver)
- INA § 214(p); 8 U.S.C. § 1184(p)
- INA § 245(m) 8 U.S.C. § 1255(m) (adjustment)
- 8 C.F.R. § 212.17
- 8 C.F.R. § 214.14
- 8 C.F.R. § 245.24 (adjustment)
- Victims of Trafficking and Violence Protection Act of 2000 (TVPA) and reauthorizations
- Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) and reauthorization

ELIGIBILITY REQUIREMENTS

To be eligible for a U visa, an individual must meet the following criteria:²⁰⁴

- A victim of a designated crime (qualifying crime) that occurred in the United States or violated U.S. law

²⁰⁴ INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U).

- Cooperation with law enforcement or other government authorities investigating or prosecuting the criminal activity
 - Possesses information about the crime
 - Has been, is being, or is likely to be helpful in investigation or prosecution
- Suffered “substantial physical or mental abuse” as result of crime
- Applicant is admissible or eligible for a waiver

A victim can be the direct victim, or at times an indirect victim.²⁰⁵

The law provides for designated criminal activities that can serve as a qualifying crime. The list includes:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes²⁰⁶

The criminal activity can include “one or more of the following or any similar activity in violation of Federal, State, or local criminal law,” so the advocate must identify the designated criminal activity and law that was violated.²⁰⁷

Keep in mind that if the victim is under age 16, then “the parent, guardian, or next friend” of the child may meet the requirements for cooperation.²⁰⁸

TIP: Keep in mind that there is no temporal requirement between when the crime occurred and when the petitioner files for a U visa. The crime could have occurred many years ago. Additionally, there is no requirement that criminal charges were pursued or that there was a conviction. However, some law enforcement agencies may resist certifying a more remote crime, so be prepared to make as many persuasive arguments that you can.

FILING THE U VISA PETITION

- **Certification of Helpfulness:** After assessing eligibility for your client, one of the first steps is to get a signature from a certifying agency on the required [Form I-918, Supplement B, U Nonimmigrant Status Certification](#). This form certifies your client’s possession of information relating to the criminal activity, as well as helpfulness and cooperation with authorities. The certifying agency can be a local, state, or federal judge, law enforcement agency, or prosecutor for instance.²⁰⁹
 - **TIP:** This can sometimes be a difficult process so it may be best to talk with local advocates for any feedback regarding where to start when asking for a signature. Of course, you will be limited by the facts of the case so ensure you have relevant documents regarding your client’s situation so you can effectively advocate for a signature.

It is important to remember that if you get the I-918 Supplement B signed, the certification only lasts 6 months after the signature, meaning you will need to file the U visa petition before the

²⁰⁵ See 8 C.F.R. 214.14(a)(14); Federal Register, Vol. 72, No. 179, 53016-53017 (Sept. 17, 2007) regarding indirect and bystander victims.

²⁰⁶ INA § 101(a)(15)(U)(iii); 8 U.S.C. § 1101(a)(15)(U)(iii).

²⁰⁷ *Id.*

²⁰⁸ 8 C.F.R. § 214.14(c)(2)(ii).

²⁰⁹ 8 C.F.R. § 214.14(a)(2)-(3).

certification expires.²¹⁰ Otherwise, you will have to get the form signed again by the certifying agency, which can prove to be difficult.

- **Necessary Forms:** In addition to the I-918, Supplement B, you will need to file the primary form for the petition, [Form I-918, Petition for U Nonimmigrant Status](#). If your client has any derivatives, you need to file [Form I-918, Supplement A, Petition for Qualifying Family Member of U-1 Recipient](#) for each qualifying family member. The [USCIS website](#) provides a checklist of suggested evidence of what to send with your petition. If your client has inadmissibility grounds at issue, you should also file [Form I-192, Application for Advance Permission to Enter as a Nonimmigrant](#) to apply to waive those grounds of inadmissibility.
 - **TIP:** Know that one benefit to U visas is that many grounds of inadmissibility can potentially be waived.
 - **TIP:** Previously, in 2019 through late 2020, USCIS rejected I-918 U visa petitions as incomplete if they had any blank areas.²¹¹ As a result of [litigation](#), in early 2021, [USCIS](#) stopped this practice, but also stated, “we may reject your form or your case might take more time if you leave required spaces blank, if you do not respond to questions related to filing requirement, or if you omit any required initial evidence, as indicated in the form instructions or regulations.”²¹² Keep this in mind when filling out Form I-918.
- **Derivatives:** A principal petitioner who is under age 21 may petition for a spouse,²¹³ children, parents, and unmarried siblings under age 18.²¹⁴ A principal petitioner who is age 21 or older may petition for a spouse and children.²¹⁵
- **Wait Times:** There is a cap on the number of principal petitioners (not derivatives) that can be granted a U visa each year.²¹⁶ The cap is 10,000, and far more individuals than that apply annually.²¹⁷ In a welcome change, on June 14, 2021, USCIS²¹⁸ modified²¹⁹ their procedures to evaluate U visas in the [USCIS Policy Manual](#). The new guidance pertains to all Form I-918 petitions currently pending and those filed on or after June 14, 2021. In the new process, USCIS will do an initial review of the petition to determine if they should be granted a bona fide determination (BFD).²²⁰ If granted, then the petitioner and their qualifying family members may receive a BFD EAD and deferred action for four years. This analysis will be less intensive than the full waiting list adjudication; however, for those

210 8 C.F.R. § 214.14(c)(2)(i).

211 See *Practice Advisory: USCIS Form Alert - Blank Spaces on Form I-918, Petition for U Nonimmigrant Status*, ASISTA, <https://asistahelp.org/wp-content/uploads/2020/02/I-918-Practice-Alert-3.pdf> (Feb. 2020); *Practice Advisory: Insight into USCIS's Application of the "No-Blanks" Policy to U-Visa Petitions*, ASIS-TA, <https://asistahelp.org/new-practice-advisory-insight-into-uscis-application-of-the-no-blanks-policy-to-u-visa-petitions/> (Nov. 23, 2020).

212 See *USCIS Confirms Elimination of "Blank Space" Criteria*, USCIS, <https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria> (last reviewed/updated April 1, 2021).

213 In *Medina Tovar v. Zuchowski*, the Ninth Circuit Court of Appeals, found that it was an arbitrary and capricious requirement for the spousal relationship to have to exist at the time of filing the U visa petition. Now, USCIS is applying the decision nationwide, and the decision will apply to both U and T visas. In a June 2021 USCIS Policy Alert regarding U visas, USCIS stated, “[t]herefore, when confirming a relationship between the principal petitioner and the qualifying family member which is based on marriage, USCIS will evaluate whether the relationship existed at the time the principal petition was favorably adjudicated, rather than when the principal petition was filed.” See also ILRC, ASISTA, and CLINIC, *Updated Practice Alert: U Visa and T Visa “After-Acquired Spouse” Cases* (June 11, 2021), <https://cliniclegal.org/resources/humanitarian-relief/u-visas/updated-practice-alert-u-visa-and-t-visa-after-acquired>.

214 INA § 101(a)(15)(U)(ii)(I); 8 U.S.C. § 1101(a)(15)(U)(ii)(I).

215 INA § 101(a)(15)(U)(ii)(II); 8 U.S.C. § 1101(a)(15)(U)(ii)(II).

216 INA § 214(p)(2); 8 U.S.C. § 1184(p)(2).

217 *Id.*

218 USCIS, *Policy Alert: Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners*, PA-2021-13 (June 14, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>.

219 Previously, USCIS did not have the bona fide determination procedure. While petitioners could be placed on the waiting list and be granted deferred action or parole and obtain an EAD while waiting for a final decision and a visa to become available, the issue was it often took many years to simply be placed on the waiting list. Now, the hope is that with a less intensive initial review, it will be a faster process for petitioners to receive deferred action and an EAD, and thus, in return they will have more stability and financial security for themselves and their families.

220 Learn more from CLINIC’s *Bona Fide U Status Petitioners to be Given Deferred Action and EADs* by Sarah Bronstein, June 28, 2021 and ASISTA’s *Policy Alert: Bona Fide Employment Authorization for U Visa Petitioners*, June 2021.

that do not receive a BFD, they will proceed to the full waiting list adjudication. A BFD is sufficient to show to ICE and EOIR that the “petitioner is also considered to have established a prima facie case for approval within the meaning of INA 237(d)(1).”²²¹

In the waiting list assessment, if the petition is found to be approvable, then the petitioner will be placed on the waiting list. Principal petitioners and qualifying family members on the waiting list are eligible for deferred action and an EAD, valid for four years, or potentially parole. The USCIS Policy Manual includes a helpful flowchart²²² regarding the process in an Appendix.

According to USCIS’s [website](#), processing time for Form I-918s pending before the Vermont Service Center “calculated under the pre-BFD process, marking the time from initial filing to waiting list determination, was 60.5-61 months.”²²³ As a result of the growing number of petitions, the waiting time estimate for an individual who recently applied, is much longer. Based on USCIS data, as of September 2020, there were 153,142 total petitions for principals pending for a decision.²²⁴

Also, keep in mind, that USCIS had a [2018 Notice to Appear \(NTA\) Policy Memorandum](#) allowing for the issuance of NTAs based on denials for certain petitions such as U visas and T visas.²²⁵ However, that policy was rescinded in a January 2021 DHS memorandum on the [Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities](#). This change impacts the risk calculation that potential U visa applicants must consider prior to filing the petition with USCIS. It is also important to know this prior practice, considering that the policy could change again in the future.

Update for Practitioners Working on a Family Case

Information About the Central American Minors (CAM) Refugee and Parole Program

- In March 2021, the DOS announced the reopening of the CAM program.
- This program could impact many families in different contexts including individuals with a pending U visa or with deferred action.
- According to [USCIS](#), “the CAM refugee and parole program provides certain qualified children who are nationals of El Salvador, Guatemala, and Honduras, as well as certain family members of those children, an opportunity to apply for refugee status and possible resettlement in the United States.”
- In June 2021, [DOS](#) announced the second phase of the CAM reopening expanding the number of qualifying individuals who can petition to include legal guardians and parents “who are in the United States pursuant to any of the following qualifying categories: lawful permanent residence; temporary protected status; parole; deferred action; deferred enforced departure; or withholding of removal. In addition, this expansion of eligibility will now include certain U.S.-based parents or legal guardians who have a pending asylum application or a pending U visa petition filed before May 15, 2021.” Find more information about the program including common questions on [DOS’s website](#).”

221 USCIS Policy Manual Vol. 3, Pt. C, Ch. 5.

222 USCIS Policy Manual Vol. 3, Pt. C, Ch. 4. App.

223 *Check Case Processing Times*, USCIS, <https://egov.uscis.gov/processing-times/> (last visited Aug. 15, 2021).

224 *Number of Form I-918, Petition for U Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2009-2020*, USCIS, https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2020_qtr2.pdf (last visited July 22, 2021).

225 See also *Notice to Appear Policy Memorandum*, USCIS, <https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum> (last reviewed/updated June 14, 2021).

BENEFITS OF AN APPROVED U VISA PETITION

If your client is successful, then they are eligible for employment authorization and lawful non-immigrant status for four years.²²⁶ After three of the four years in U visa status, they can apply for lawful permanent residence.²²⁷ Derivatives are also eligible for the same benefits.²²⁸

CLIENT IN REMOVAL PROCEEDINGS AND HAS PENDING U VISA

If your client is in removal proceedings²²⁹ and has a pending U visa, you may want to file a motion for a continuance, seek prosecutorial discretion to dismiss the claim, seek administrative closure,²³⁰ or request that the case be placed on the status docket while your client is waiting for a decision on the U visa. In the summer of 2021, new [interim guidance](#) was announced regarding the use of prosecutorial discretion²³¹ in removal proceedings. The guidance is favorable to individuals seeking a U visa.²³² Litigation is ongoing regarding the use of DHS enforcement priority guidelines issued in the beginning of 2021.²³³ Despite this litigation, OPLA continues to have longstanding authority to exercise prosecutorial discretion in removal proceedings. However, depending on the current litigation status and whether there are updates in this area, advocates will want to consider whether they rely on language in the May 2021 interim guidance when making their arguments or whether they rely on their case facts and OPLA's longstanding authority to exercise prosecutorial discretion. No matter the approach, advocates will likely want to consider seeking prosecutorial discretion for their clients as a part of case strategy. *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) and *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020) are two important cases to consult in addition to *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) when drafting a motion for a continuance. You may also want to review [ASISTA's Practice Advisory](#) issued following *Matter of L-N-Y-*. Review Section [IV.B. Introduction to Immigration Court](#) to learn more about these immigration court procedural strategy options.

Also, know that ICE issued a [directive](#), *Using a Victim-Centered Approach with Noncitizen Crime Victims* (11005.3) in August 2021, which affects civil enforcement of petitioners and beneficiaries of several victim-based immigration benefits including U visas, T visas, VAWA, and SIJS.²³⁴ The directive also includes a non-exhaustive list of the types of civil enforcement action this directive affects, and some actions on the list include decisions whether to issue or cancel a Notice to Appear, detain or release from custody, grant deferred action or parole, and execute a final order of removal.

It is also important to know; however, that a client can seek a U visa while abroad. If the U visa petition is approved, then the individual would have to consular process to enter the United States.

226 8 C.F.R. § 214.14(c)(6)-(7), (g)(1).

227 INA § 245(m); 8 U.S.C. § 1255(m); 8 C.F.R. § 245.24.

228 8 C.F.R. §§ 214.14(f), 245.24(g). See information *supra* note 213.

229 In 2020 through 2021, there was ongoing litigation in *ASISTA v. Johnson*, No. 3:20-cv-00206-JAM (D. Conn.) impacting U visa petitioners in removal proceedings. ASISTA and Sanctuary for Families wrote a [Practice Update: ICE Agrees Not to Remove, Deny Requests for Stay of Removal, or Oppose Continuances for U Visa Petitioners for 90 days](#) detailing a stay of proceedings with specific conditions, that was extended to August 27, 2021. The parties stipulated to dismiss the case on August 27, 2021 after ICE issued ICE Directive 11005.3 regarding *Using a Victim-Centered Approach with Noncitizen Crime Victims*.

230 See discussion *supra* note 182.

231 See information *supra* note 184.

232 Notably, the [interim guidance](#) says “[w]hen a noncitizen has a viable avenue available to regularize their immigration status outside of removal proceedings, whether through temporary or permanent relief, it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body.” Then in footnote eighteen, the guidance points out that, “DHS regulations expressly contemplate joint motions to terminate removal proceedings in appropriate cases in which the noncitizen is seeking to apply for U nonimmigrant status. See 8 C.F.R. § 214.14(c)(1)(i).”

233 See discussion *supra* note 186.

234 See articles *supra* note 187.

T Visas

Generally, T visas are available for victims of severe forms of sex or labor trafficking. If you think your client is eligible to file for a T visa, this is something to explore more closely. This Guide only gives an overview of the option for relief to get you started.

ELIGIBILITY REQUIREMENTS

To be eligible for a T visa, an individual must:²³⁵

- Be a victim of a severe form of trafficking in persons
- Be physically present in the United States on account of trafficking
 - **TIP:** Any exit from the United States after trafficking may affect eligibility.
- Have complied with any reasonable request for assistance in the investigation of trafficking or be less than 18 years of age
 - **TIP:** It is common that the trafficking victim has not made a report of the trafficking, and you can help facilitate making a report. The decision whether to report or not, and to which agency to report to, will need be made on a case-by-case basis. You could consider reporting to a Human Trafficking Task Force, Regional Federal Bureau of Investigation, ICE Homeland Security Investigations, or Department of Labor office, or local law enforcement agencies. For a child under 18 years of age, this is not required so you will need to assess whether or not to report in your particular case. The possibility of having more derivatives may be a consideration when making this decision. See below for more information. Additionally, reporting the trafficking and seeking assistance with [Form I-914](#), Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons* could help you assess the strength of the case.
- Demonstrate that they would suffer extreme hardship involving unusual and severe harm upon removal
- Applicant must be admissible or eligible for a waiver

²³⁵ INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T); 8 C.F.R. § 214.11(b).

T Visa Key Sources of Law

- INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T)
- INA § 214(o); 8 U.S.C. § 1184(o)
- INA § 212(d)(13); 8 U.S.C. § 1182(d)(13) (inadmissibility)
- INA § 245(l); 8 U.S.C. § 1255(l) (adjustment)
- 8 C.F.R. § 212.16
- 8 C.F.R. § 214.11
- 8 C.F.R. § 245.23 (adjustment)
- 8 C.F.R. § 1214.2
- 28 C.F.R. § 1100.35
- Victims of Trafficking and Violence Protection Act of 2000 (TVPA) and reauthorizations
- Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) and reauthorization

Severe forms of trafficking can either be sex trafficking or labor trafficking.

Sex Trafficking: “[S]ex 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.”²³⁶ When working with children under age 18 who have been sex trafficked, you do not have to show force, fraud, or coercion, just that the sex act occurred. Furthermore, “[t]he term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”²³⁷

Labor Trafficking: Can be “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.”²³⁸

Common forms of severe trafficking that affect youth include: sex trafficking (18 U.S.C. § 1591), forced labor (18 U.S.C. § 1589), and involuntary servitude (18 U.S.C. § 1592).

FILING THE T VISA APPLICATION

- **Necessary Forms:** You must provide evidence that your client meets all of the eligibility requirements for a T visa.²³⁹ [Form I-914, Application for T Nonimmigrant Status](#) is the primary form used for this application. If your client has any derivatives, you need to file [Form I-914, Supplement A, Application for Family Member of T-1 Recipient](#) for each qualifying family member. If applicable, you may also file [Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons](#) or other evidence can also suffice to support that you have complied with any reasonable request to

²³⁶ 22 U.S.C. § 7102(11)(A).

²³⁷ 22 U.S.C. § 7102(12).

²³⁸ 22 U.S.C. § 7102(11)(B).

²³⁹ You might want to check out the USCIS informational checklist of required initial evidence found on USCIS's webpage. See *I-914, Application for T Nonimmigrant Status*, USCIS, <https://www.uscis.gov/i-914> (last reviewed/updated June 14, 2021).

assist law enforcement.²⁴⁰ The [USCIS website](#) provides alternative example evidence that can be used. If your client has inadmissibility grounds at issue, you should also file [Form I-192, Application for Advance Permission to Enter as a Nonimmigrant](#) to apply to waive those grounds of inadmissibility.

- **Derivatives:** A principal petitioner who is under age 21 may petition for a spouse,²⁴¹ children, parents, and unmarried siblings under age 18.²⁴² A principal petitioner who is age 21 or older may petition for a spouse and children.²⁴³ Additionally, there are more categories for derivatives of a T visa if there is a present danger of retaliation because of the principal's "escape from the severe form of trafficking or cooperation with law enforcement."²⁴⁴
- **Wait Times:** The amount of T visas that can be issued each year for principal applicants is capped at 5,000.²⁴⁵ To date, this cap has not been met so there is no waiting period other than USCIS's processing time.²⁴⁶
- **OTIP letter:** If you see evidence that the youth has an Office on Trafficking in Persons (OTIP) Eligibility Letter this does not mean the child has a T visa or is necessarily eligible for a T visa. A child can receive an OTIP letter even if the child was trafficked outside the United States; whereas, a T visa requires trafficking that occurred in the United States, or that the applicant is present in the United States on account of the trafficking. Having an OTIP letter can prove beneficial for a child because it can be used as evidence of T visa eligibility and it qualifies the child for certain benefits.²⁴⁷

BENEFITS OF AN APPROVED T VISA APPLICATION

Individuals who have received a T visa approval are eligible for lawful status and employment authorization for four years.²⁴⁸ For principals, the EAD is automatically given without the need to file [Form I-765, Application for Employment Authorization](#), but derivatives must file Form I-765 to get work authorization.²⁴⁹ After three years, the principal and any derivatives can apply for adjustment of status to get a green card.²⁵⁰ T visa recipients are also eligible for some public benefits.²⁵¹

Links to Help You with YOUR CLIENTS' U AND T VISA CASES

- Check out CILA's 101 [webinar: Options for Child Survivors of Crimes, Including Trafficking](#) (43 minutes).
- Watch [Identifying and Filing T Visa Claims for Youth Clients: The Flags You May Be Missing training](#) presented at CILA's Third Annual Texas Champions for Immigrant Youth Symposium, May 2021.
- Check out ILRC's Practice Advisory [Humanitarian Forms of Relief Part I: U, T, VAWA](#), Veronica Garcia, June 2019.
- Read ILRC's Practice Advisory [Special Considerations When Screening Youth for T Visa Eligibility](#),

240 Unlike the certification required in U visa cases, this form is not required in order to secure a T visa, though it can be very helpful. For example, if your client reports to a law enforcement agency, but the agency declines to investigate, you can include evidence of the report (email, etc.) without the Form I-914B declaration.

241 See information *supra* note 213.

242 INA § 101(a)(15)(T)(ii)(I); 8 U.S.C. § 1101(a)(15)(T)(ii)(I).

243 INA § 101(a)(15)(T)(ii)(II); 8 U.S.C. § 1101(a)(15)(T)(ii)(II).

244 INA § 101(a)(15)(T)(ii)(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(III); 8 C.F.R. § 214.11(a)(3), (k)(1)(iii).

245 INA § 214(o)(2); 8 U.S.C. § 1184(o).

246 *Number of Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2008-2020*, USCIS (Apr. 14, 2020), https://www.uscis.gov/sites/default/files/document/data/I914t_visastatistics_fy2020_qtr2.pdf.

247 Learn more about Office on Trafficking in Persons (OTIP) eligibility letters. See *Child Eligibility Letters*, HHS OTIP, <https://www.acf.hhs.gov/otip/victim-assistance/child-eligibility-letters> (last visited Sept. 29, 2021). Additionally, you can view a HHS webinar on the topic once a month online. See *Monthly Webinars: Responding to Child Victims of Trafficking*, HHS OTIP, <https://www.acf.hhs.gov/otip/resource/monthlywebinars> (last reviewed June 2, 2021.)

248 8 C.F.R. §§ 214.11(c)(1)-(2), (d)(9), (d)(11), 245.23.

249 8 C.F.R. § 214.11(d)(11), (k)(10).

250 8 C.F.R. § 245.23.

251 See *Victims of Human Trafficking: T Nonimmigrant Status*, USCIS, <https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-human-trafficking-t-nonimmigrant-status/victims-human-trafficking-t-nonimmigrant-status> (last reviewed/updated May 10, 2018).

Andrew Craycroft and Nithya Nathan-Pineau, July 2021.

- Review ILRC’s Practice Advisories *Identifying Humanitarian Forms of Relief For Derivatives – U Non-immigrant Status*, Veronica Garcia, December 2019 and *A Guide to State Laws on U Visa and T Visa Certifications*, Alison Kamhi and Sarah Lakhani, April 2020.
- The Coalition to Abolish Slavery and Trafficking (CAST) provides a host of resources on their [website](#) regarding T visas including online courses and practice advisories including the practice advisory *“Physical Presence on Account of Trafficking” Eligibility Requirement for T Visa Applicants*, November 2020. CAST also provides a [table](#) of AAO opinions relating to T visas.
- ASISTA has a [resource library](#) with information regarding U visas and T visas amongst other topics and offers [technical assistance](#) to members with case-specific questions. Review ASISTA’s Practice Pointer: *What If You Do Not Receive an RFE or Denial Notice?*, 2020.
- Consult ILRC’s Practice Advisory *U Visa Derivatives Age-Out*, Angel Graf and Alison Kamhi, June 25, 2021.
- Check out the DOJ [webpage](#) regarding Human Trafficking *Key Legislation* and DOS’s [webpage](#) *International and Domestic Law* from the Office to Monitor and Combat Trafficking in Persons.

E. Family-Based Cases and VAWA Self-Petitions

Family-Based Cases

Family-based immigration is the primary form of immigration in the United States.²⁵² United States citizens²⁵³ and lawful permanent residents²⁵⁴ can petition for certain family members to gain legal status in the United States and become lawful permanent residents. When reviewing family-based immigration options, they can be broken down into immediate relatives and family preference categories, which are reviewed further below. It is important to screen your client to see if they have a family-based option to get a green card. This Guide provides a general overview of this potential option to get you started.

Family-Based Cases Key Sources of Law

- INA § 101(b); 8 U.S.C. § 1101(b) (definition of “child”)
- INA § 201; 8 U.S.C. § 1151 (worldwide level of immigration)
- INA § 203(a); 8 U.S.C. § 1153(a) (preference allocation for family-sponsored immigrants)
- INA § 212(a); 8 U.S.C. § 1182(a) (classes of individuals ineligible for visas or admission)
- INA § 245; 8 U.S.C. § 1255 (adjustment of status)
- 8 C.F.R. § 204 Subpart A (immigrant visa petitions)
- 8 C.F.R. Part 245 (adjustment of status)
- USCIS Policy Manual, Volumes 7 - Adjustment of Status, 8 - Admissibility, 9 - Waivers

252 See *How the United States Immigration System Works*, American Immigration Council (Sept. 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

253 To learn more about family-based immigration options for United States citizens, view USCIS’s webpage on the topic. See *Family of U.S. Citizens*, USCIS, <https://www.uscis.gov/family/family-us-citizens> (last reviewed/updated Mar. 23, 2018).

254 To learn more about family-based immigration options for lawful permanent residents, view USCIS’s webpage on the issue. See *Family of Green Card Holders (Permanent Residents)*, USCIS, <https://www.uscis.gov/family/family-green-card-holders-permanent-residents> (last reviewed/updated July 14, 2015).

WHO QUALIFIES FOR A FAMILY-BASED VISA?

Immediate Relatives: There are an unlimited number of visas available for immediate relatives, so immediate relatives typically do not have to wait for a visa (except for processing times).²⁵⁵

A U.S. citizen can petition for the following immediate relatives:

- A spouse²⁵⁶
- Unmarried children under age 21 of U.S. citizen
- Parents of U.S. citizen, if the U.S. citizen petitioner is at least 21 years old

Family Preference Categories: The United States gives preference to certain family relationship categories²⁵⁷ over others, ranking them F1-F4, with F1 being the top priority.

- F1: unmarried sons and daughters (over age 21) of U.S. citizens
- F2: A) Spouses²⁵⁸ and minor children of lawful permanent residents
B) Unmarried sons and daughters over age 21 of lawful permanent residents
- F3: Married sons and daughters of U.S. citizens and their spouses and minor children
- F4: Brothers and sisters of U.S. citizens and their spouses and minor children, if the U.S. citizen petitioner is at least 21 years old

As you may be able to tell from the lists above, neither U.S. citizens or lawful permanent residents can petition for grandparents/grandchildren, aunts/uncles, in-laws, or cousins. Lawful permanent residents cannot petition for their married children, parents, or siblings.

TIP: It is important to screen your client for a potential family-based immigration option. For instance, it is important to know if your client:

- Has a mother or father who became a lawful permanent resident or U.S. citizen
- Has a step-parent²⁵⁹ who is a lawful permanent resident or U.S. citizen
- Married a U.S. citizen²⁶⁰ or lawful permanent resident
- Has a U.S. citizen sibling (F4)

FILING A FAMILY-BASED PETITION FOR A VISA

- **Wait Times:** The total number of family-based preference visas is capped at 480,000 each fiscal year.²⁶¹ Additionally, there are some limits per preference category²⁶² and each country can have roughly 7% of the number of visas each year.²⁶³ This creates a longer waitlist for those in the least preferred categories, as well as longer waitlists for individuals from certain countries like Mexico. The number of family-based visa petitions filed per year far exceeds the cap, causing long waitlists for a visa.²⁶⁴

255 INA § 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i).

256 8 C.F.R. § 204.2(a)(1).

257 INA § 203(a); 8 U.S.C. § 1153(a).

258 8 C.F.R. § 204.2(a)(1).

259 According to INA § 101(b)(1)(B); 8 U.S.C. § 1101(b)(1)(B) a child can be a stepchild “whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.”

260 Note that marriage will disqualify your client for SIJS relief.

261 INA § 201(c)(1)(A)(i); 8 U.S.C. § 1151(c)(1)(A)(i).

262 INA § 203(a); 8 U.S.C. § 1153(a).

263 INA § 202(a)(2); 8 U.S.C. § 1152(a)(2).

264 Read more about the numbers and wait times in CLINIC’s article. Charles Wheeler, *Backlogs in Family-Based Immigration: Shedding Light on the Numbers*, CLINIC (Mar. 1, 2019), <https://cliniclegal.org/resources/family-based-immigrant-law/backlogs-family-based-immigration-shedding-light-numbers>.

- **Snapshot of the Process:**

- Step 1: Submit [Form I-130, Petition for Alien Relative](#) to USCIS²⁶⁵ to petition for a visa for a family member. This places the beneficiary into their eligibility group of either immediate relative or family preference category. Once approved, those placed in a family preference category are placed on a waitlist and given a priority date, the date the petition was received by USCIS. If they are an immediate relative, the applicant can go to step 2 immediately after receiving an approval of the I-130. If they are not an immediate relative, there will be a waiting period. The DOS issues a Visa Bulletin²⁶⁶ each month, which is an updated waitlist based on priority date per country.
- Step 2: To get a visa, the individual can file [Form I-485, Application to Register Permanent Residence or Adjust Status](#) to USCIS²⁶⁷ or consular process by going to the United States Consulate's office in their home country to apply for a visa using [Form DS-260, Immigrant Visa Electronic Application](#).²⁶⁸ When determining whether an individual can adjust status by applying with USCIS or if they will need to consular process, the answer often stems on where the individual is located, when they filed their I-130 petition, whether the individual entered with inspection or not, their eligibility group, and whether they have any other inadmissibility issues or not.

- **Potential Need for a Waiver of Inadmissibility:**

- Grounds of Inadmissibility: There are many grounds of inadmissibility including unlawful presence, criminal issues, public health issues, misrepresentation/fraud, smuggling, prior removal orders, etc. which must be explored when your client is applying for lawful permanent residence. Drug offenses, for instance, are generally not waivable except if the offense was for marijuana, and there was only a single offense for simple possession of 30 grams or less.²⁶⁹
- Unlawful Presence: It is important to know how your client entered the United States (via a port of entry or between ports of entry) and the number of entries your client has had. Unlawful presence is not accrued until after reaching the age of 18.
 - * If a child unlawfully entered the country one time, then the child may be able to consular process. A waiver is required if the youth accrued unlawful presence.
 - * If a child entered the United States more than one time, you must then know how long the child stayed in the United States after entering. If the child entered the country illegally, stayed longer than one year, and then left the country and re-entered, the child will be subject to the “permanent bar.”²⁷⁰ It is commonly referred to as the “permanent bar” because it cannot be waived with a waiver, but the bar can be overcome by staying outside of the United States for ten years and then applying for permission to re-enter the United States.

- **Waivers:** Sometimes an individual can file a waiver to waive a ground of inadmissibility. Some of the forms used to file for a waiver include [Forms I-601A, Application for Provisional Unlawful Presence Waiver](#), [Form I-601, Application for Waiver of Grounds of Inadmissibility](#), and [Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal](#) depending

²⁶⁵ To find out more information regarding the process of filing a Form I-130 with USCIS, you may want to read USCIS's webpage on the topic. See *I-130, Petition for Alien Relative*, USCIS, <https://www.uscis.gov/i-130> (last reviewed/updated Aug. 23, 2021). The Department of State (DOS) also provides information on their webpage regarding this part of the process. See *Immigrant Visa Process*, DOS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html> (last visited July 27, 2021).

²⁶⁶ The DOS Visa Bulletin is issued each month on DOS's website. See *The Visa Bulletin*, DOS, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last visited July 27, 2021).

²⁶⁷ To find out more information regarding the process before USCIS, you may want to read USCIS's webpage on the issue. See *Green Card for Family Preference Immigrants*, USCIS, <https://www.uscis.gov/greencard/family-preference> (last reviewed/updated Mar. 19, 2021).

²⁶⁸ To find out more information regarding consular processing, visit the DOS's webpage on the issue. See *Immigrant Visa Process*, DOS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition/step-2-begin-nvc-processing.html> (last visited July 27, 2021).

²⁶⁹ See also Kathy Brady, Zachary Nightingale, Matt Adams, *Immigrants and Marijuana*, ILRC (May 2021), <https://www.ilrc.org/immigrants-and-marijuana>.
²⁷⁰ INA § 212(a)(9)(c); 8 U.S.C. § 1182(a).

on the circumstance. This chart gives a quick break-down of instances when you would use each of these particular forms. You would need to consult instructions and guidance for how to file each of them and for a full list of instances when you can use Form I-601.

FORM I-601A, APPLICATION FOR PROVISIONAL UNLAWFUL PRESENCE WAIVER	FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY (EXAMPLE LIST) ²⁷¹	FORM I-212, APPLICATION FOR PERMISSION TO REAPPLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL
Previous unlawful presence INA § 212(a)(9)(B) <u>ONLY</u>	Previous unlawful presence INA § 212(a)(9)(B)	Previously removed INA § 212(a)(9)(A)
	Immigration Fraud and misrepresentation INA § 212(a)(6)(c)	Unlawfully present after previous immigration violations INA § 212(a)(9)(C)
	Certain criminal grounds INA § 212(a)(2)	
	Health-related grounds INA § 212(a)(1)	
	Immigrant membership in totalitarian party INA § 212(a)(3)	
	Smuggling INA § 212(a)(6)(E)	
	Subject to civil penalty INA § 212(a)(6)(F)	

CLIENT IN REMOVAL PROCEEDINGS AND HAS PENDING FAMILY-BASED VISA PETITION

If your client is in removal proceedings and has a pending family-based visa petition, you may want to file a motion for a continuance, seek prosecutorial discretion²⁷² to dismiss the claim, seek administrative closure,²⁷³ or request that the case be placed on the status docket while your client is waiting for a decision on their petition. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) and *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) are important cases to consult when drafting your motion for a continuance when your client's case is in this procedural situation. Additionally, see Section IV.B. Introduction to Immigration Court for more information regarding motions for a continuance in immigration court.

²⁷¹ See the Form I-601 instructions for further guidance on use of the I-601 to waive inadmissibility grounds. *I-601 Application for Waiver of Grounds of Inadmissibility*, USCIS, <https://www.uscis.gov/i-601> (last reviewed/edited July 26, 2021).

²⁷² See discussion *supra* note 184.

²⁷³ See discussion *supra* note 182.

Moreover, it is important to know there are instances when your client can seek adjustment of status before the court, and other times when the client does not qualify for adjustment of status and must instead go through consular processing.

TIP: If your client will need to consular process, but is currently in removal proceedings and has no other legal claim for relief, your client may want to consider the option of voluntary departure. It is important for your client to resolve their removal proceedings before leaving the country to consular process. Voluntary departure²⁷⁴ can be a tricky subject so it is important to study this option and review it carefully with your client, but if your client follows the voluntary departure instructions, this can be a better option than getting a removal order. This will be up to your client.

Also, know that ICE issued a [directive](#), *Using a Victim-Centered Approach with Noncitizen Crime Victims* (11005.3) in August 2021, which affects civil enforcement of petitioners and beneficiaries of several victim-based immigration benefits including U visas, T visas, VAWA, and SIJS.²⁷⁵ The directive also includes a non-exhaustive list of the types of civil enforcement action this directive affects, and some actions on the list include decisions whether to issue or cancel a Notice to Appear, detain or release from custody, grant deferred action or parole, and execute a final order of removal.

Violence Against Women Act Self-Petitions

The Violence Against Women Act (VAWA)²⁷⁶ provides a way for an abused spouse, child, or parent to self-petition for legal status when they have suffered abuse by a U.S. citizen or lawful permanent resident family member. Despite the name, protection is available to both females and males and to adults and children. A child can self-petition directly or be a derivative on an abused parent's petition.

According to [Esperanza United](#), an organization dedicated to working with Latin@s in the United States and to end domestic violence, there are additional tactics abusive partners sometimes take to assert control over their immigrant partners including isolation, threats, intimidation, manipulation regarding getting immigration status, economic abuse, and threatening the potential loss of their children if authorities are called. Due to this particular susceptibility for abuse, the option to self-petition through VAWA is critical. This Guide provides a general overview regarding VAWA self-petitions to get you started if this is an option for your client.

VAWA Self-Petitions Key Sources of Law

- INA § 101(a)(51); 8 U.S.C. § 1101(a)(51)
- INA § 204(a); 8 U.S.C. § 1154(a)
- INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2) (cancellation of removal)
- 8 C.F.R. § 204.1
- 8 C.F.R. § 204.2
- Violent Crime Control and Law Enforcement Act of 1994 (VAWA) and reauthorizations

²⁷⁴ See Immigration Equality, *Asylum Manual*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-voluntary-departure/> (last visited July 27, 2021). See also *Practice Advisory Voluntary Departure: When the Consequences of Failing to Depart Should and Should Not Apply*, American Immigration Council (Dec. 21, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/voluntary_departure_when_the_consequences_of_failing_to_depart_should_and_should_not_apply.pdf.

²⁷⁵ See articles *supra* note 187.

²⁷⁶ To learn more about the relevant legislation and regulations relating to VAWA, review the DOJ Office on Violence Against Women's *Legislation and Regulations* webpage.

VAWA ELIGIBILITY REQUIREMENTS

An individual can self-petition if they are the victim of battery or extreme cruelty committed by:²⁷⁷

- A U.S. citizen or lawful permanent resident spouse or former spouse
- A U.S. citizen or lawful permanent resident parent
- A U.S. citizen son or daughter

Therefore, a child (unmarried and under age 21)²⁷⁸ can be a direct self-petitioner or a derivative on a parent's VAWA petition.

In addition to a qualifying familial relationship (as listed above), other eligibility requirements for self-petitioners include:²⁷⁹

- Suffered battery or extreme cruelty by U.S. citizen or lawful permanent resident family member (one of the qualifying familial relationships listed above)
 - Additionally, parents can file if their U.S. citizen or lawful permanent resident spouse abused their child
- Resides (or resided) with the abusive individual
- If the child is petitioning based on abuse of a parent, the child must reside in the United States
- If familial relationship is based on marriage, the marriage must have been entered in good faith and not solely for immigration purposes
- Individual must be person of good moral character (if a child is self-petitioning, this requirement only applies to children over age 14 because younger children are presumed to be persons of good moral character)

VAWA self-petitioners may be able to seek waiver of certain inadmissibility grounds. There are also specific inadmissibility exceptions for VAWA self-petitioners including being present without admission or parole (INA § 212(a)(6)(A)(i)),²⁸⁰ and public charge (INA § 212(a)(4)(E)(i)),²⁸¹ where a waiver is not necessary.

FILING THE VAWA SELF-PETITION

- **Confidentiality:** Self-petitions should be filed with the Vermont Service Center. Congress has created some important confidentiality protections for individuals with pending or approved U, T, and VAWA self-petitions to protect individuals.²⁸² This is important for safety reasons. *See Section II.B.*
- **Necessary Forms:** *Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant* is used to file for VAWA.²⁸³ If the abuser is a U.S. citizen, then the applicant can concurrently file *Form I-485, Application to Register Permanent Residence or Adjust Status* for adjustment of status. If the abuser is a lawful permanent resident, then the individual will have to wait for their priority date to become current prior to filing for adjustment of status. It will be important to check the DOS Visa Bulletin to see if their priority date is current. *See Section III.C.*

A petitioner must submit evidence to show they meet the requirements for a VAWA self-petition (and

277 INA § 204(a); 8 U.S.C. § 1154(a). *See also Questions and Answers: Battered Spouses, Children and Parents under the Violence Against Women Act (VAWA)*, USCIS, <https://www.uscis.gov/humanitarian/battered-spouse-children-parents/questions-and-answers-battered-spouses-children-and-parents-under-violence-against-women-act-vawa> (last reviewed/updated July 15, 2015).

278 Children can also file if they are between the ages of 21-24 if they can demonstrate that abuse was the main reason for delay in filing the petition. *See* INA § 204(a)(1)(D)(v); 8 U.S.C. § 1154(a)(1)(D)(v).

279 INA § 204(a); 8 U.S.C. § 1154(a); 8 C.F.R. § 204.2.

280 INA § 212(a)(6); 8 U.S.C. § 1182(a)(6).

281 INA § 212(a)(4); 8 U.S.C. § 1182(a)(4).

282 INA § 239(e); 8 U.S.C. § 1229(e); 8 U.S.C. § 1367.

283 8 C.F.R. § 204.2.

adjustment of status when filing the I-485). The USCIS website has an informational [checklist](#) of evidence to provide with the petition. After filing an I-360, unless there is an issue, an individual should get a prima facie notice, which can be used to obtain some public benefits.

BENEFITS OF AN APPROVED VAWA SELF-PETITION

An individual who has an approved I-360 VAWA self-petition or is a derivative of an approved petition will be eligible for an EAD.

TIP: Even if your client is too young to work, it is oftentimes a good idea to go ahead and file the Form I-765 for an EAD because this can serve as a helpful ID for the child.

If your client has an approved I-360 but does not have legal status because they are in a preference category as a spouse or child of a lawful permanent resident, so there is a waiting period for their visa priority number to become available, then they may be placed in deferred action to allow them to stay in the United States while waiting to adjust status. The timing of being able to get a green card will vary depending on whether your client's abusive family member was a lawful permanent resident or U.S. citizen.

CLIENT IN REMOVAL PROCEEDINGS

If your client is in removal proceedings, then your client would want to consider VAWA Cancellation of removal as a form of relief in immigration court. When determining whether to file a VAWA case before USCIS or VAWA cancellation of removal in immigration court, it is going to depend on the facts of the case. There are certain instances when a youth can qualify for VAWA cancellation of removal but not VAWA. The eligibility requirements for VAWA cancellation of removal include:²⁸⁴

- Has been battered or subject to extreme cruelty by a U.S. citizen or lawful permanent resident spouse²⁸⁵ or parent (or a parent of a child who either currently or previously was battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse);
- Has been physically present in the United States for a continuous period of at least three years;
- Has been a person of good moral character;
- Is not admissible or deportable based on certain grounds; and
- Can show that removal would result in extreme hardship to the applicant, their child, or their parent.

It is also important to know that there is a 4,000 cap per year for those who can be approved for VAWA cancellation of removal.²⁸⁶ Your client can file for VAWA cancellation of removal by filing [Form EO-IR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents](#) and other necessary documents with the immigration court.

Links to Help You with YOUR CLIENTS' FAMILY-BASED IMMIGRATION AND VAWA CASES

- Check out CILA's 101 [webinar: Family-Based Immigration and VAWA for Unaccompanied Children](#) (44 minutes).
- [Family-Based Cases](#): If you are representing a LGBTQ client who is seeking a petition on marriage, you may want to review ILRC's Practice Advisory *Family-Based Petitions for LGBTQ Couples: Considerations When Documenting a Bona Fide Marriage*, Em Puhl, January 2020. Also, review ILRC's Chapter 1: *Qualifying Family Relationships and Eligibility for Visas*, September 2017. Review CLINIC's

²⁸⁴ INA § 240A(b); 8 U.S.C. § 1229b(b).

²⁸⁵ See *Matter of L-L-P-*, 28 I&N Dec. 241 (BIA 2021). See also Joanna Mexicano Furmanska, *BIA Provides Guidance on Special Rule Cancellation Eligibility*, CLINIC (Mar. 22, 2021), <https://cliniclegal.org/resources/humanitarian-relief/bia-provides-guidance-special-rule-cancellation-eligibility>.

²⁸⁶ INA § 240A(e)(1); 8 U.S.C. § 1229b(e)(1).

resources *Beware the Dangers of Naturalization for Child Beneficiaries*, Charles Wheeler, May 27, 2021 and *Five Things to Know about Fraud and Marriage-Based Petitions*, Elizabeth Carlson, April 26, 2021.

- Waivers: CLINIC provides several resources pertaining to preparing an extreme hardship waiver, December 9, 2018.
- Inadmissibility Grounds: Review ILRC's Practice Advisories: *Immigrants and Marijuana*, Kathy Brady, Zachary Nightingale, and Matt Adams, May 21, 2021. *Community Handout on Public Charge*, available in English and Spanish, April 2021 and *Public Charge Safe to Use List*, available in English and Spanish, May 24, 2021. *Understanding Unlawful Presence Under INA § 212(A)(9)(B) and Waivers of Unlawful Presence, I-601 and I-601A*, March 2019. Learn more about public charge issues from CLINIC.
- VAWA: Check out ILRC's Practice Advisory *Humanitarian Forms of Relief Part I: U, T, VAWA*, Veronica Garcia, June 2019. Review ILRC's Practice Advisory *Document Gathering Guide for VAWA Self-Petitioners*, Veronica Garcia, January 2021. Learn more in ILRC's Practice Advisory *Applying for Adjustment of Status Through VAWA*, June 2021.
- VAWA Cancellation of Removal: Learn more about VAWA cancellation of removal by reading American University Washington College of Law, NIWAP, and Legal Momentum's *VAWA Cancellation of Removal*, Rebecca Story, Cecilia Olavarria, and Moira Fisher Preda, 2015.



IV. PRACTICAL POINTERS

A. Research Tips

There are many sources of law governing immigration matters. Consult these primary and secondary sources of law to get you started in your research. [A full chart with links to resources can be found on CILA's website.](#)

SOURCES OF LAW

Main Statute: Immigration and Nationality Act (INA) codified in Title 8 of the U.S. Code

Title 8 of the Code of Federal Regulations (C.F.R.), as well as other titles, contain provisions relating to immigration. Title 6 contains the functions of the Office of Refugee Resettlement (ORR).

Most judicial decisions relating to immigration come from federal Courts of Appeals. There are also U.S. Supreme Court decisions relating to immigration.

Administrative decisions are decided in immigration courts and at USCIS/the Asylum Office. When immigration court cases are appealed, they go to the Board of Immigration Appeals (BIA). The Attorney General can also certify cases to himself.

Precedent BIA Case [List & Chart](#)

Non-precedent BIA Cases: via FOIA; available by paid subscription through [Immigrant & Refugee Appellate Center](#)

When cases are appealed from USCIS, they go to the Administrative Appeals Office (AAO).

[Precedent AAO Decisions](#)

[Non-Precedent AAO Decisions](#)

International Law – Treaties

United Nations (UN) Convention & 1967 UN Protocol Relating to the Status of Refugees

Universal Declaration of Human Rights (right to seek asylum)

UNHCR Handbook and Guidelines

The Supreme Court in *INS v. Cardoza-Fonseca*, stated that the UNHCR Handbook “provides significant guidance.” [UNCHR Handbook on Procedures and Criteria for Determining Refugee Status & Guidelines on International Protection](#)

Immigration attorney conduct is regulated by the Federal Rules of Practitioner Conduct when practicing in front of USCIS or EOIR.

8 C.F.R. §§§§ 1292.3, 292.3, 1003.101, and 1003.102. *See also* [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 10.4.

SOURCES OF LAW

Field Manuals and Agency Guidelines

CBP Field Manual

USCIS Policy Manual

Adjudicator's Field Manual (many parts superseded by the USCIS Policy Manual)

Affirmative Asylum Procedures Manual

Asylum Officer Basic Training Course Lesson Modules

[EOIR Policy Manual](#)

[Immigration Judge Bench Book](#)

DHS and DOJ Memoranda

Links to Help GET YOU STARTED IN YOUR RESEARCH

- Check out CILA's 101 [webinar: Research Tips and CILA Resources](#) (36 minutes). View the CILA-NILA [webinar: Advanced Immigration Legal Research](#) (1 hour).
- As mentioned above, CILA has an extensive [chart](#) on our website listing helpful resources to help get you started in your research.
- Check out Georgetown Law Library's [Immigration Law \(U.S.\) Research Guide](#).
- Review the [Ninth Circuit Immigration Outline](#) prepared by the Office of Staff Attorneys of the United States Courts for the Ninth Circuit, February 2021.
- View HILSC's webpage [Legal Resources, by Subject Matter](#).
- Check out the ILRC's compilation of resources: [Unaccompanied Immigrant Children Resources](#), September 2014.
- Be aware of EOIR's [Virtual Law Library](#) and though now archived, the [Immigration Judge Bench Book](#).
- Access the USCIS site for links to [Laws and Policy](#), including handbooks and guides used by immigration officers in performing their job.

B. Introduction to Immigration Court

Immigration court is known as the Executive Office for Immigration Review (EOIR). The EOIR is an agency within the DOJ. EOIR states its mission “is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”²⁸⁷

Immigration courts are Article II courts under the Executive Branch. Immigration judges are hired by the DOJ. Judicial authority is delegated by the Attorney General. Immigration judges have less judicial independence because they are under the Executive Branch.²⁸⁸

²⁸⁷ See *About the Office*, DOJ Executive Office for Immigration Review, <https://www.justice.gov/eoir/about-office> (last updated Feb. 3, 2021).

²⁸⁸ Notably, the ABA, American Immigration Lawyers Association (AILA), Federal Bar Association, and the National Association of Immigration Judges (NAIJ) have all jointly advocated for change so that the immigration court is not under the Executive Branch. See *ABA urges Congress to create separate immigration courts*, ABA (July 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-urges-congress-to-create/>. See also *Achieving America's Immigration Promise: ABA Recommendations to Advance Justice, Fairness, and Efficiency*, ABA (2021), https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf.

Removal Proceedings

Removal proceedings²⁸⁹ are conducted to determine whether a person is subject to removal from the United States.²⁹⁰ Except for bond hearings, jurisdiction vests with the immigration court when the charging document is filed.²⁹¹ The most common charging document in an immigration case is the Notice to Appear (NTA). Read ILRC's Practice Advisory *The Notice To Appear (NTA)* issued in June 2020 to learn more. For jurisdiction to properly vest, the NTA must be filed with the immigration court by DHS ICE after service on the individual respondent.²⁹²

A case before the EOIR is styled as "In Matter of [Respondent's Name]" and references the Alien Number (A#). You will find your client's A# on the NTA. When you are in court, your client's case will typically be called by the last three digits of the A#.

Hearings are held in person, by video conference, or telephone conference.²⁹³ Hearings by video conference or telephone conference raise many concerns including due process issues, particularly when working with children.²⁹⁴ There is advocacy you can do to seek for the hearings to be in person

and strategies you can employ if this is an issue in your case. There are several resources available on this issue.²⁹⁵ Hearings are generally open to the public,²⁹⁶ except:

- If a judge has agreed after the respondent expressly requests that the hearing be closed;
- Hearings involving abused children or abused spouses unless the abused child or spouse agrees to open them to the public; and
- Hearings involving information that is considered subject to a protective order and was filed under seal.

Key Tools & Contacts

Use the ICE [Online Detainee Locator System](#) if you need to find an adult who is detained. You may search by A# or biographical information. This could come up if your child client's sponsor is detained or if your child client turns 18 and is detained.

Call the EOIR automated hotline at **1-800-898-7180** to determine case status, case date, etc. You will need to enter your client's A# to hear information regarding your specific case. You can also access the same information through the [EOIR online portal](#).

Find your [local immigration court](#) on EOIR's website.

Find your [local DHS Office of the Principle Legal Advisor](#) on ICE's website.

289 For more information regarding removal proceedings, see INA § 240(b)(4)-(5); 8 U.S.C. § 1229a(b)(4)-(5). See also C.F.R. §§ 1240.10, 1240.15.

290 INA § 240; 8 U.S.C. § 1229a.

291 8 C.F.R. §1003.14.

292 INA § 239; 8 U.S.C. § 1229(a)(1); 8 C.F.R. §§ 1003.13, 1003.14, 1003.15.

293 INA § 240(b)(2); 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c). In 2020 and 2021, with COVID-19, many immigration courts stopped holding non-detained hearings for an extended period, and many courts began holding more telephonic hearings and video teleconference hearings. The immigration court's website includes information regarding each court's operational status and whether the video teleconference platform Webex is available along with [Webex instructions](#). See also [PM 21-03, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing](#), Nov. 6, 2020.

294 See [Video Immigration Hearings Deny Children's Right to Fair Proceedings](#), The Young Center for Immigrant Children's Rights (Feb. 21, 2020), <https://www.theyoungcenter.org/stories/2020/2/21/video-immigration-hearings-are-a-threat-to-childrens-right-to-fair-proceedings>. See also Amanda Robert, *Video teleconference program for immigrant children 'is contrary to the American pursuit of justice,' ABA says*, ABA Journal (Mar. 5, 2020), <https://www.abajournal.com/news/article/aba-president-calls-for-end-to-new-video-teleconference-program-for-unaccompanied-children>.

295 For example, CILA has some relevant resources posted on our website under *Additional Resources*, <http://www.cilacademy.org/resources/additional-resources/>.

296 8 C.F.R. §§§§§ 1003.27, 1003.31(d), 1003.46, 1208.6, 1240.10(b), 1240.11(c)(3)(i).

The immigration judge electronically records hearings.²⁹⁷ The official file created by the immigration court containing the documents relating to respondent's case is called the record of proceedings (ROP).²⁹⁸ Case hearings are transcribed if and when appealed to the BIA. If you need a copy of prior court recordings, then request a copy of the recording from the immigration court,²⁹⁹ and you will typically be provided with a CD.³⁰⁰ You may also request to review the court's physical file, but will need to do so at the immigration court. A common reason to request a copy of the ROP is if your client represented themselves *pro se* in a hearing before you began representation, or if there was prior counsel.

TYPES OF HEARINGS: BOND HEARINGS, MASTER CALENDAR HEARINGS, INDIVIDUAL CALENDAR HEARINGS

In 2020 and 2021, EOIR made some significant changes regarding the flow of cases through immigration court, which are largely reflected in [PM 21-18, Revised Case Flow Processing Before the Immigration Courts](#) and revisions to the EOIR Policy Manual, [Part II - OCIJ Manual](#). Additionally, EOIR issued [PM 21-23](#) in May 2021, creating a new dedicated docket for family cases in immigration courts in ten cities; an eleventh city was later added. It is important to become familiar with these policy changes to determine if they impact your case. Generally, the changes in case flow impact master calendar hearings. The changes moved immigration court in the direction of judges issuing more scheduling orders and the parties conducting tasks in writing rather than during a hearing. However, there are some significant carve-outs detailed in PM 21-18 footnote one regarding situations where the changed case flow processing does not apply and that includes many children and youth in immigration court. Read CILA's [blog post EOIR Revises Case Flow Processing in April 2021 PM](#) to learn more about the changes.

Bond Hearings: Bond hearings are very common in adults' cases. In children's cases, these are less common and usually take place as *Flores*³⁰¹ bond hearings or *Saravia* hearings.

Master Calendar Hearings (MCH): Generally, MCHs run on a docket. You may be at court for a couple of hours waiting for your case to be called, but your hearing will likely be pretty short (approximately 5–15 minutes). Immigration Court hearings do not typically run in the order of the names listed on the docket. It depends on the judge, but frequently cases with attorneys will go first. This sometimes occurs in a first-come first-served order. These hearings cover more procedural matters such as taking pleadings and scheduling. MCHs are important because this is often your client's first appearance before an immigration judge, and the path of the case is set. Even though MCHs are typically short and procedural in nature, it is important to be prepared because an immigration judge can still issue a removal order at a MCH. This may occur, for example, if your client does not appear, abandons an application by not being prepared, or does not have any viable relief.

Typically, at a first MCH, the following will take place:

- Immigration judge will provide advisals³⁰² to the respondent

297 8 C.F.R. § 1240.9; EOIR Policy Manual, Part II - OCIJ Practice Manual Ch. 4.10.

298 EOIR is moving from paper records to an electronic ROP using the EOIR Courts & Appeals System (ECAS). Whether a ROP is paper or electronic will depend on the date the case started. More details on ECAS, which replaces the eINFO system, can be found here: <https://www.justice.gov/eoir/ecas/attorney-and-ar-FAQs>.

299 EOIR issued a new form, EOIR-59, *Certification and Release of Records* in March 2021 "for parties in cases or respondents who are in or have been in proceedings before the Executive Office for Immigration Review (EOIR) proceedings to authorize the disclosure of their information, including information retained in case files or a Record of Proceeding (documents, and if applicable, audio recordings), to an attorney, accredited representative, qualified organization, or other third party." Use this form when making requests.

300 EOIR Policy Manual, Part II - OCIJ Practice Manual Ch. 1.5(c)(3)(i).

301 Rachel Prandini and Alison Kamhi, *Practice Alert on Flores v. Sessions*, ILRC (July 2017), https://www.ilrc.org/sites/default/files/resources/flores_v_sessions_practice_alert_final.pdf.

302 EOIR has used video advisals in some immigration courts and posted the advisal videos online. See *Proactive Disclosures*, DOJ, <https://www.justice.gov/eoir/proactive-disclosures> (last updated Aug. 20, 2020). See also TRAC Immigration, *EOIR Training Materials for New Immigration Judges*, Syracuse University, <https://trac.syr.edu/immigration/reports/211/>.

- Immigration judge will likely ask your client some basic questions: name, birthdate, current address, best language, if they would like you to represent them, etc.
- Respondent will plead to the NTA
- Immigration judge will designate a country of removal (where your client will be removed to if ultimately denied relief). The immigration judge will typically ask you or the respondent to designate a country of removal. The common response by the representative is “respondent declines to designate.” This is for two reasons, first DHS has the burden to prove alienage and secondly, if your client is seeking asylum, you do not want to admit on the record that your client is willing to return to their home country.
- Respondent will indicate what relief will be sought and applications (or proof of filing applications with USCIS) should be submitted if not already done so in advance
- Immigration judge will schedule the next court date, either another MCH or an Individual Calendar Hearing (ICH)

The [EOIR Policy Manual](#), Part II - OCIJ Practice Manual has helpful information regarding how to do pleadings in immigration court.³⁰³ Review this section in advance of your MCH.

The immigration judge may expect any application(s) for requested relief to be filed at a MCH, or in advance of the next MCH. As noted above, the use of scheduling orders has increased in immigration courts, so it is important to see what deadlines, if any, the judge has set in a case either at a hearing or in a scheduling order. It is important to review the ROP if your client has attended one or more hearings *pro se* in order to understand what deadlines the immigration judge has set, and what you should be prepared to file when you first appear as counsel. If the immigration judge has set a deadline you cannot meet as new counsel on a case, this raises challenges. You can file a written motion for a continuance and/or an extension of a deadline explaining the need for more time, but it is also important to know the judge could deny the motion and find that your client abandoned the option for relief for not meeting their deadlines (even if you recently came onto the case) so generally, deadlines are very important to meet. The immigration judge could also either continue the matter to another MCH so an application (or proof of filing applications with USCIS) can be submitted or the immigration judge may schedule an ICH and provide a due date (aka call up date) for any applications to be filed with the court in advance of the ICH. Oftentimes, a client will have more than one MCH. If you need a continuance in your case, you may file a written motion in advance or orally seek a continuance at the time of your MCH. Generally, it is best practice to file a written motion so you receive a written order.

Individual Calendar Hearings (ICH): Generally, an ICH is your client’s merits hearing. This is a hearing set specifically for your client to appear at that specific date and time; it is not run on a docket. This is the time designated for the judge to hear your client’s testimony, consider evidence (submitted in advance), and for the judge to make a ruling on your client’s case.³⁰⁴ Usually, your client will only have one ICH. The length of an ICH varies per case, judge, and jurisdiction, but commonly an ICH will last 2–4 hours (sometimes longer). If the judge’s schedule does not allow for the case to keep going or if the judge is interested in seeing more evidence on a particular issue, it is possible for the case to get continued to another date. Sometimes you may also need to advocate for more time for additional testimony from your client or a witness if the judge is pressuring you to stop without fully providing an opportunity to present the case. An ICH can be described as a mini-trial on your case.

³⁰³ See [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 4.15, [Apps. K](#) (Ex. Pleading), [L](#). (Ex. Oral Pleading).

³⁰⁴ As stated previously, there are many challenges with video teleconference and telephonic hearings for children including the great potential for due process concerns and confusion. It is particularly important for individual calendar hearings to be held in person. See discussion *supra* note 294.

Typically, at the ICH, the following will take place:

- Some judges will ask the parties whether they stipulated to anything in the case before starting, to narrow the issues.
- The immigration judge will talk with you at the beginning to go over submissions. The immigration judge will make any decisions about any pending motions and enter evidence into the record.
 - Any applications, exhibits, motions, witness list, and criminal history chart (if applicable) should be filed in advance.
 - Be prepared to raise any objections to the government's evidentiary submissions or motions, if applicable.
- Be prepared to give an opening statement in case the immigration judge gives you this opportunity.
- Your client will likely testify. The immigration judge will have the opportunity to ask your client questions.
- The government attorney will cross examine your client.
- You will have the opportunity for re-direct.
- Any other witnesses you may have can testify, including experts. The judge may allow for telephonic testimony in some cases. This requires a motion for telephonic testimony to be filed in advance of the hearing. The government attorney can cross examine each of your witnesses, and you can ask questions on re-direct.
- The government attorney has the opportunity to present witnesses, but this often does not happen. If a witness is presented, you will have the opportunity to conduct cross examination.
- Be prepared to give a closing statement in case the immigration judge gives you this opportunity.
- The immigration judge will likely make an oral decision. Sometimes the judge will continue the case if the judge wants to see something specific or may set the case to another hearing to make a decision. Sometimes the judge will issue a written decision.
- The immigration judge will ask if you wish to reserve your client's right to appeal. This only preserves your client's option to appeal. This does not mean your client appealed the case. There is a separate process for that through the BIA.

LIFE OF A CASE

If denied before the immigration judge and your client chooses to appeal the case, this is the trajectory the case may take. Timing of the appeal is important, as you must file a Notice to Appeal with the BIA within 30 days of the immigration judge's decision.³⁰⁵



PLAYERS PRESENT IN IMMIGRATION COURT

Immigration judge: An immigration judge shall administer oaths, receive evidence, and interrogate, examine, cross examine the respondent, and any witnesses.³⁰⁶

³⁰⁵ Learn more in the CILA-NILA webinar *Winning at the BIA* posted on the *Appellate & Litigation Strategy* page of CILA's website.

³⁰⁶ INA § 240(b); 8 U.S.C. § 1229a(b).

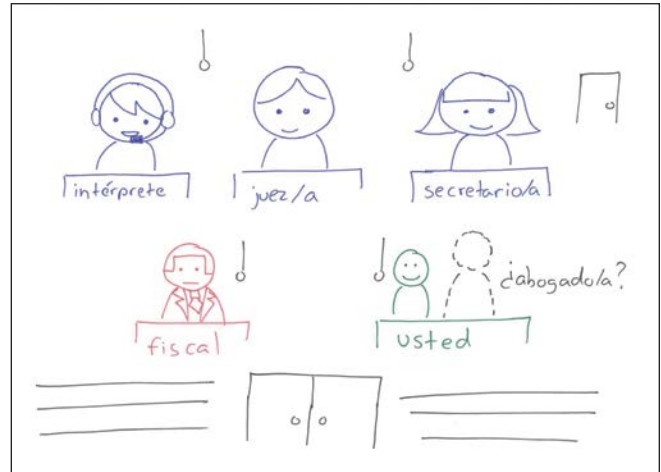
Government attorney: The government’s interests are represented by OPLA³⁰⁷ attorneys in cases before the EOIR. This will be your opposing counsel in immigration court. The OPLA is part of ICE,³⁰⁸ an agency of the DHS.

Respondent: The respondent is your client.

Interpreter: Currently, government-paid interpreters are available in immigration court.³⁰⁹

Court clerk: An EOIR employee will serve as a court clerk to assist the judge in clerical matters during court proceedings.

Example: The visual to the right provided by ProBAR is a great example of how to explain immigration court proceedings to a child through a drawing, so that the child can better understand what to expect. From left to right and top to bottom, the drawing shows the interpreter (intérprete), judge (juez/a), court secretary/clerk (secretario/a), government attorney (fiscal), the child respondent (usted) and outline to show possibly an attorney will be by their side (¿abogado/a?). You can use this drawing or a similar one to explain the process to your client, but reassure your client you will be by their side at any court proceedings.



A WORD ABOUT INTERPRETATION IN IMMIGRATION COURT

While interpreters are provided in immigration court, practically speaking, in many courts, only Spanish interpreters are available at MCHs unless the respondent seeks a continuance to have an interpreter or files a motion for an interpreter for a language other than Spanish in advance. At the first MCH, the immigration judge commonly asks the respondent for their best language. Then, the court is on notice regarding interpreter needs for the ICH.

SPECIAL COURT GUIDANCE FOR CASES INVOLVING CHILDREN

There are some special considerations for the immigration court when the respondent is a child. First, it is important to know “the Immigration Judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which respondent is an inmate or patient”³¹⁰ Therefore, if an immigration judge accepted an admission of removability from a child who previously appeared alone, this should not have happened and could be the basis of an appeal, objection, and/or motion to terminate proceedings. You may also want to consult these sources in detail to see how you can best advocate for your client.

- [EOIR Policy Manual, Part II - OCIJ Practice Manual Ch. 4.22 Juveniles](#)
 - “(c) Courtroom orientation. — Juveniles are encouraged, under the supervision of court person-

307 *Office of the Principal Legal Advisor Field Locations*, DHS U.S. Immigration and Customs Enforcement (ICE), <https://www.ice.gov/contact/legal>, (last reviewed/updated May 19, 2019).

308 Immigration and Customs Enforcement is also in charge of enforcement of immigration law including identification, arrest, detention, bond management, and removal through Enforcement and Removal Operations (ERO) as well as investigations through Homeland Security Investigations.

309 Providing interpreters in immigration court was previously in dispute. See *The U.S. Commission on Civil Rights Denounces Replacement of Interpreters with a Video at Immigrants’ First Immigration Hearing*, U.S. Commission on Civil Rights (July 19, 2019), <https://www.usccr.gov/press/2019/Immigration-Interpreter-Statement.pdf>.

310 8 C.F.R. § 1240.10(c).

nel, to explore an empty courtroom, sit in all locations, and practice answering simple questions before the hearing. The Department of Health and Human Services, Office of Refugee Resettlement, provides orientation for most juveniles in their native languages, explaining Immigration Court proceedings.”

- “(d) Courtroom modifications. — Immigration Judges make reasonable modifications for juveniles. These may include allowing juveniles to bring pillows, or toys, permitting juveniles to sit with an adult companion, and permitting juveniles to testify outside the witness stand next to a trusted adult or friend.”

- **EOIR Operating Policies and Procedures Memorandum (OPPM) 17-03**

- Applies to any case involving an unmarried individual under the age of 18, regardless of whether meets unaccompanied child definition (as respondent or third-party witness)
- Should employ “age-appropriate” procedures
- “Best interest of the child” cannot be used as a legal standard—concept alone cannot be used to provide legal basis for granting relief or protection
- Notes that children may require more frequent breaks than adults due to emotional and physical reasons
- Seems to indicate judges should use same standards when evaluating testimony of children and adults

TIPS TO CHECK THE RECORD

- When working with your client, you will interview your client to determine the facts of the case. It is also a good idea to do your due diligence and check those facts and gather more information by conducting a FOIA request(s)³¹¹ and/or reviewing the immigration court’s file.
- The Alien File (A file) is located in a centralized Alien/File Central Index system, shared within the agencies of the DHS (e.g., CBP, ICE, and USCIS). The immigration court’s file is separate and different from the A file.
- It is good practice, to do a FOIA to USCIS to obtain the A file. This will help you know what information DHS has regarding your client. If you are wanting particular information regarding your client’s entry into the country, it is advisable to do a FOIA request to CBP.
- If your client is in removal proceedings and has had activity before the immigration court prior to your representation (i.e., previously represented by other counsel or went to a hearing *pro se*), then it is a good idea to do a FOIA to EOIR so you can see what documents the court has in its file.³¹² Alternatively, you can make an appointment to review the court file, in the immigration court where the case is pending, which may be a faster process than a FOIA.
- To submit a FOIA request, generally you will need to file a **Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative (DHS)** and can use **Form G-639, Freedom of Information Act/Privacy Act Request**. Check out **USCIS’s website** regarding how to make a FOIA request with USCIS and other agencies.³¹³ The information on USCIS’s website may also help you identify where to send your request, to ensure you send it to the correct agency, depending on what you are trying to obtain.

311 See *Featured Issue: The Freedom of Information Act (FOIA)*, AILA, AILA Doc. No. 20022703 (May 11, 2021), <https://www.aila.org/advo-media/issues/all/foia>; *FOIA for Immigration Lawyers*, American Immigration Council (May 19, 2021), https://www.americanimmigrationcouncil.org/practice_advisory/foia-immigration-lawyers-0.

312 See *How to Submit a FOIA or Privacy Act Request*, EOIR, <https://www.justice.gov/eoir/foia-submit%20a%20request> (last updated Aug. 25, 2021).

313 See *Steps to File a FOIA Request*, DHS, <https://www.dhs.gov/steps-file-foia> (last updated Feb. 26, 2021); *FOIA Contact Information*, DHS, <https://www.dhs.gov/foia-contact-information> (last updated June 14, 2021).

PRESENTING EVIDENCE IN IMMIGRATION COURT

It is important to know that the Federal Rules of Evidence do not apply in immigration court. Instead, evidentiary rules are governed by the INA, and local rules through the EOIR Policy Manual. The strict rules of evidence are not applicable in removal proceedings.³¹⁴ The sole test for admission of evidence is relevance and fundamental fairness.³¹⁵ The question for the judge is what weight to give the evidence submitted. Also, although hearsay is admissible, its admission must be probative and not fundamentally unfair.³¹⁶ You may want to consult the Immigration Judge Bench Book (Tools → Evidence → Guide) to see how judges have been advised to consider evidentiary issues.³¹⁷

A WORD ABOUT DUE PROCESS IN IMMIGRATION COURT

Your client has Constitutional due process rights in immigration proceedings. Your client has the right to an opportunity for a full and fair hearing.³¹⁸ Evidence can be excluded or suppressed on due process grounds in removal proceedings if its use is not fundamentally fair.³¹⁹ You may make an objection based on Fourth and Fifth Amendment violations. To prevail in a due process challenge to the exclusion of evidence, the respondent must show both (1) that he was denied a reasonable opportunity to be heard on his evidence and (2) that there was resulting prejudice. Therefore, in practice, if you are unable to submit certain evidence, make a proffer³²⁰ of evidence. That way, the probative value of the evidence is on the record and you may have a better chance of success upon appeal because you have a basis for your argument of prejudice.

Before Your First Case in Immigration Court

As a representative, you must register with the EOIR before your first appearance in immigration court. Generally, you may start this process by filling out an online form and complete the process by appearing at a specified location to show identity documents so your identification can be verified. This is a requirement to represent a client before EOIR. Visit EOIR's [website](#) to register.

It is important to familiarize yourself with the [EOIR Policy Manual](#) (and particularly Part II - OCIJ Practice Manual and Part VI – Operating Policies and Procedures Memoranda and Part VII – Policy Memoranda), prior to representing your client so you are acquainted with the rules of the court. The EOIR Policy Manual, Part II - OCIJ Practice Manual has important information such as court deadlines, sample documents, and pleadings. Each immigration judge has their own style, rhythm, and particularities, so it is best practice to [observe court](#), and hopefully the immigration judge assigned to your case, in advance of your first appearance.

TIP: Since court calendars vary, you may call the immigration court and speak to the clerk to find out which days in a given period there will be MCHs so you know when you can observe. You do not need to ask permission to observe hearings since they are open to the public. You may also want to reach out to local attorneys to see if you can observe an ICH. While these are technically also open to the public, you should ask the attorneys of record in advance so they have time to consult with their client regarding the

314 *Matter of DeVera*, 16 I&N Dec. 266, 268 (BIA 1977).

315 *Matter of Ponce-Hernandez*, 22 I&N 784 (BIA 1999); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

316 *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990). 8 C.F.R. §§ 1240.7(a) and 1240.46(c) provide that an immigration judge “may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.”

317 See *Immigration Judge Bench Book (Archived)*, EOIR, <https://www.justice.gov/eoir/archived-resources> (last updated May 8, 2018).

318 *Matter of M-D-*, 23 I&N Dec. 540 (BIA 2002).

319 See *Matter of Garcia-Flores*, 17 I&N 325 (BIA 1980) (“Violation of a regulatory requirement by a Service officer can result in evidence being excluded or proceedings invalidated where the regulation in question serves a purpose of benefit to the [noncitizen] and the violation prejudiced interests of the [noncitizen] which were protected by the regulation.”)

320 See Jason S. Lambert, *The Perfect Proffer*, 89 The Florida Bar Journal, 38 (2015), <https://www.floridabar.org/the-florida-bar-journal/the-perfect-proffer/>.

request. Please know that with COVID-19 pandemic, there have been frequent changes to immigration court office openings and sometimes limitations to whom can enter. Check the EOIR website regarding your local immigration court's [operational status](#) and call ahead.

COMMON IMPORTANT FORMS IN IMMIGRATION COURT

Form EOIR-28, *Notice of Entry of Appearance as an Attorney or Representative before the Immigration Court*

Form EOIR-33/IC, *Alien's Change of Address Form/Immigration Court*

Form I-862, *Notice to Appear (NTA)*

Form I-213, *Report of Deportable/Inadmissible Alien*

To represent your client in immigration court, you will need a signed [Form EOIR-28, Notice of Entry of Appearance as an Attorney or Representative before the Immigration Court](#) for your client so you can enter your appearance. This may be submitted online or in court. If there has been a prior representative, you will need to file a motion to substitute counsel. As noted in the EOIR Policy Manual, Part II - OCIJ Practice Manual, while not required, it is highly encouraged that the E-28 be printed on light green paper.³²¹

PREPARING YOUR CLIENT FOR IMMIGRATION COURT

Your client has certain rights and responsibilities in removal proceedings, and it is important to go over this information with your client in advance of any court appearances. Frequently, at your first MCH, the immigration judge will ask you if you have reviewed with your client their rights and responsibilities and ask if they can waive a reading of the advisals. This reading by the immigration judge is frequently waived for a respondent with counsel.

It is advisable to go over this information at the beginning of your representation with your client to ensure the information is conveyed and your client is informed. This also allows you to have the time to explain the information in a more child friendly way that your particular client will understand, rather than having to do it in a court setting.

YOUR CLIENT'S RIGHTS IN REMOVAL PROCEEDINGS

- Representation at no expense to the government³²²
- List of pro bono legal services should be provided to respondent³²³
- Reasonable opportunity to examine the evidence against the respondent³²⁴
- Opportunity to present evidence³²⁵
- Opportunity to cross-examine witnesses presented by the government³²⁶

321 EOIR Policy Manual, Part II - OCIJ Practice Manual, Ch.11.2(f).

322 INA § 240(b)(4)(A); 8 U.S.C. § 1229a(b)(4)(A).

323 8 C.F.R. §§ 1003.61, 1240.10(a).

324 INA § 240(b)(4)(B); 8 U.S.C. § 1229a(b)(4)(B).

325 *Id.*

326 *Id.*

- To a complete record of the testimony and evidence³²⁷
- To accurate interpretation³²⁸
- To appeal if case is denied³²⁹
- Detained respondent should be notified that they may communicate with the consul or diplomatic officer of their country³³⁰
- Constitutional due process rights

While immigrants have the right to counsel in removal proceedings, counsel will not be provided by the government. This also applies to children, and as a result many children and adult respondents go forward in immigration removal proceedings without an attorney by their side. You can see some data regarding pending cases and representation rates before EOIR on EOIR's [website](#) and by using TRAC's [data tool](#).

YOUR CLIENT'S OBLIGATIONS IN REMOVAL PROCEEDINGS

- A respondent must tell the truth. These are formal proceedings and your client will be sworn under oath and will be subject to the penalty of perjury if they lie. Additionally, there are immigration consequences for not disclosing or misrepresenting information.³³¹
- A respondent must be present in court. If your client is not present, unless their presence has been previously waived, an *in absentia* removal order will likely be issued against your client.³³²
- A respondent must notify court of any changes in address or phone number within 5 days on [Form EOIR-33/IC, Alien's Change of Address Form/Immigration Court](#).³³³ The form must be printed on light blue paper.³³⁴

Child respondents are required to be present in court.³³⁵ Otherwise, an *in absentia* removal order could be issued, which presents grave consequences. An immigration judge may waive the presence of a child respondent at a hearing.³³⁶ If providing a waiver, this must be clearly stated on the record or in a written order.

REVIEWING AND EXPLAINING THE NTA AND I-213

A NTA is the most common charging document.³³⁷ It contains identifying information such as your client's name, A#, etc. It contains the government's factual allegations against your client and the government's charges against your client. Check the document to determine if service was properly conducted. Talk with your client regarding the NTA, assess for errors, and determine if you will concede service or not and how you will plead.

Form I-770, *Notice of Rights and Disposition*, must be provided to each child upon apprehension, and

³²⁷ INA § 240(b)(4)(C); 8 U.S.C. § 1229a(b)(4)(C).

³²⁸ [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 4.11. Also, note there is no right to translation of documents at the government's expense. *See* 8 C.F.R. § 1240.5.

³²⁹ 8 C.F.R. § 1240.10(a).

³³⁰ 8 C.F.R. § 1236.1, Article 36 of the [Vienna Convention on Consular Relations](#).

³³¹ For example, if it is determined your client made a frivolous application for asylum, then your client could be permanently ineligible for any immigration benefits. INA § 208(d)(6); 8 U.S.C. § 1158(d)(6).

³³² The Immigration and Nationality Act permits an immigration judge to order a person removed *in absentia* if the government establishes by clear, un-equivocal and convincing evidence that proper written notice was provided and that the person is removable. INA § 240(a)(5)(A); 8 U.S.C. § 1229a(a)(5)(A). *See also* 8 C.F.R. § 1003.26(c).

³³³ 8 C.F.R. § 1003.15(d)(2); [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 2.2(c).

³³⁴ *See* [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 11.2(f).

³³⁵ Children not in proceedings should not be brought to court. If a child disrupts a hearing, the hearing "may be postponed with the delay attributed to the party who brought the child." [EOIR Policy Manual](#), Part II - OCIJ Practice Manual Ch. 4.12(c)(3).

³³⁶ Immigration judges should adhere to requirements of [8 C.F.R. § 1003.25](#) to determine whether to waive a child's appearance at a hearing.

³³⁷ INA § 239(a); 8 U.S.C. § 1229(a) sets out what is required in the Notice to Appear (NTA).

informs the child of their rights during the initial processing interview typically conducted by CBP or ICE.³³⁸ Failure to comply with the regulation may be grounds for terminating proceedings.³³⁹

Form I-213, *Record of Deportable/Inadmissible Alien* is an important document in removal proceedings because it typically forms the basis for the government’s allegations against your client. This is a record of the apprehending officer, commonly a CBP officer. It contains biographical information about your client and any statements made by your client. Check your client’s documents for this form. If your client does not have a copy of it, you may be able to request a copy from the OPLA attorney in advance of your court date or at the hearing. If you did a USCIS FOIA request, to obtain the A file, the I-213 will likely be in your FOIA results. If you receive the I-213 the day of your court hearing, you may want to reserve any objections to the document for your next hearing to provide time for you to review it with your client. There are frequently errors and you will want to get them corrected, make appropriate objections, and/or possibly move to suppress the I-213 and terminate proceedings.³⁴⁰

COURTROOM KNOW YOUR RIGHTS – BEFORE MCH

Who’s going to be there:	What’s going on:	What’s going to happen:
<ul style="list-style-type: none"> The judge, government attorney, clerk, and interpreter will also be in court. There will also be a gallery of people behind your client. Explain the roles of each person who will be there. If your client needs an interpreter, advise them to pick up the headphones on the table to hear the interpreter. Emphasize the importance of letting you know right away if they cannot hear or understand the interpreter. 	<ul style="list-style-type: none"> Stand when the judge enters out of respect. No gum, no hats, etc. out of respect. Explain that more than one case will be heard since the case is scheduled on a docket. The judge may speak to the child individually or as part of a group. Go over the layout of the room and where they will sit for the hearing. 	<ul style="list-style-type: none"> The judge may ask your client some questions such as: Name? Birthdate? Address? Who are you here with? Do you want this person to represent you? Are you in school? Where do you go to school? The judge may take pleadings and accept any application(s). Go over the NTA with your client in advance and what they can expect for the hearing.

338 The regulation 8 C.F.R. § 236.3(h) says, “**Notice and request for disposition.** When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.” Also, know that DHS and HHS issued regulations intended to replace the *Flores* Settlement Agreement in 2019, but some of the regulations were enjoined from taking effect including the portion of the regulation related to this section of law. Therefore, the link for the regulation included above links to a prior version of the regulations (before the new DHS and HHS regulations were issued). Read more about the DHS and HHS regulations in CILA’s blog post, *The Flores Saga Continues: Update on DHS and HHS Flores Regulations after the 9th Circuit’s Ruling*.

339 See Helen Lawrence, Kristen Jackson, Rex Chen, Kathleen Glynn, *Practice Advisory Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, produced for the Vera Institute of Justice’s Unaccompanied Children Program (Mar. 2015), 4-5, [https://helenlawrencelaw.com/wp-content/uploads/2015/03/Suppression-Termination-PA-Appendices.pdf](https://helenlawrencelaw.com/wp-content/uploads/2015/03/Suppression-Termination-PA-without-Appendices.pdf).

340 See *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988) (“Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability.”) See also *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996) (“Although under 8 C.F.R. § 242.16(b) (1996), an Immigration Judge may not accept the admission to a charge of deportability by an unaccompanied and unrepresented minor under the age of 16, the regulation does not preclude an Immigration Judge from accepting such a minor’s admissions to factual allegations, which may properly form the sole basis of a finding that such a minor is deportable.”)

COMMON MOTIONS IN IMMIGRATION COURT

Consider OPLA's longstanding authority to exercise [prosecutorial discretion](#) in cases in removal proceedings. Advocates may want to also consider seeking prosecutorial discretion as part of case strategy and when preparing any of the following motions.

- **Continuance:**

- Seeking a continuance is common in children's cases because oftentimes a child needs more time to pursue a court order in state court or to wait for adjudication of their asylum or SIJS application before USCIS.
- Good cause must be shown to grant a motion for a continuance.
- *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) provides guidance regarding factors considered when deciding whether to grant a continuance when collateral relief is pursued.
- EOIR issued [PM 21-13](#) on *Continuances* in January 2021 to account for legal and policy developments including the issuance of *Matter of L-A-B-R-*.

- **Status Docket:**

- EOIR issued [PM 19-13](#) on the *Use of Status Dockets* on August 16, 2019 and lists three categories of cases that may be placed on a status docket: (1) one in which an immigration judge is required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition by USCIS, (2) one in which the immigration judge is required to reserve a decision rather than complete the case pursuant to law or policy, or (3) one which is subject to a deadline established by a federal court order. Notably, PM 19-13 says, "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. INA § 208(b)(3)(C)" and notes that this is an example type of case "that may be appropriately placed on a status docket. . . ."

* **TIP:** Best practice may be to file a motion to continue and concurrently ask for the case be placed on the status docket.

- **Administrative Closure:**

- Administrative closure removes a case from an immigration judge's active calendar, thereby temporarily pausing the proceedings. The case does not go away altogether, but no future hearings will be set until either party moves to re-activate the case by filing a motion to re-calendar or to dismiss or terminate proceedings. An immigration judge can administratively close a matter even if one of the parties objects.
- In children's cases, administrative closure has historically been sought for Special Immigrant Juveniles unable to adjust their status due to the visa backlog.
- In July 2021, Attorney General Garland certified to himself *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). The decision overruled the July 2018 decision *Matter of Castro-Tum*, which had limited judges' ability to manage their dockets finding that the use of administrative closure was not authorized, noting that *Castro-Tum* "departed from long-standing practice." Now, immigration judges should follow the precedents in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) and *Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017), at least pending the reconsideration of a 2020 [rule](#) (*Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*) that involved administrative closure but was preliminarily enjoined from taking effect.

• **Termination & Dismissal:**

- To terminate or dismiss removal proceedings ends the proceedings altogether. Many advocates and judges alike have used the terms dismissal and termination interchangeably, but a 2018 case *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) highlights the distinction between “a dismissal under 8 C.F.R. § 1239.2(c) and a termination under 8 C.F.R. §1239.2(f).” Read CLINIC’s *Attorney General restricts immigration judges’ and BIA’s power to dismiss or terminate removal proceedings* for more information regarding dismissal and termination. If granted, termination may be without prejudice and dismissal shall be without prejudice, so DHS may file the same charges at a later time. In children’s cases, termination has been sought for a variety of reasons including DHS’s failure to properly serve the NTA, meet its burden, or properly issue Form I-770.
- Advocates should consider seeking **prosecutorial discretion**³⁴¹ to dismiss cases when developing a case strategy.
- For additional guidance, see the Vera Institute of Justice’s Unaccompanied Children Program’s *Practice Advisory Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, March 2015.

COURTROOM KNOW YOUR RIGHTS - BEFORE ICH

Who’s going to be there:	What’s going on:	What’s going to happen:
<ul style="list-style-type: none"> • The judge, government attorney, clerk (sometimes present and sometimes not), and interpreter will also be in court. • Explain the roles of each person who will be there. • Hearings are open to the public, but often there will not be other people there for an ICH. • If your client needs an interpreter, advise them to pick up the headphones on the table to hear the interpreter. Emphasize the importance of letting you know right away if they cannot hear or understand the interpreter. 	<ul style="list-style-type: none"> • Stand when the judge enters out of respect. • No gum, no hats, etc. out of respect. • Explain how this hearing differs from the MCH. It is set for a specific date and time for your client’s case to be heard. • Go over the layout of the room and where they will sit for the hearing. 	<ul style="list-style-type: none"> • The judge will make a decision(s) on any pending motions and enter the evidence into the record. • Your client will testify. The judge will have the opportunity to ask your client questions and the government attorney will cross examine your client. You will have the opportunity for re-direct. • The government attorney has the opportunity to present witnesses, and you will have the opportunity for cross examination. • The judge will likely make a decision in the case. • The judge will ask if either party wishes to reserve the right to appeal.

341 See discussion *supra* note 184.

TALKING WITH YOUR CLIENT ABOUT THEIR RIGHT TO APPEAL

At the end of an ICH, the immigration judge will ask both parties if they wish to reserve the right to appeal the decision made in the case. It is important to know, if you respond affirmatively, this does not mean you have appealed your client's case. There is a separate process for that. The appeal must be filed in writing to the BIA within 30 days of the judge's order. Answering affirmatively while in court simply means you have reserved your client's right to appeal so that your client has the option to file an appeal. Because this is discussed at the ICH, it is important to talk with your client before the ICH about the option to appeal. This will help ensure your client does not get confused at the end of the hearing and understands the process and their options for any next steps in their case. Generally, it is best practice to answer "yes" to this question presented by the judge, to reserve your client's right to appeal and preserve their option to appeal. Even if you talked with your client about this in advance and they do not want to appeal, they may change their mind and you do not want to foreclose their option to appeal. However, that said, there may be times when you answer this question with a "no," as is often the case for a client who is detained and no longer wishes to be.³⁴² In that case, you may want to have your client provide a written signed statement regarding their decision to not appeal for your own records.

CILA-NILA Appellate and Litigation Strategy Resources

In partnership with the National Immigration Litigation Alliance (NILA), CILA and NILA released multiple recorded trainings and written resources to help advocates working with youth beyond the immigration court level. All of the materials are available to review on CILA's website on CILA's *Appellate & Litigation Strategy page*. The currently posted resources include:

- Challenging USCIS' Denial of a Petition for SIJS Under the APA (& AIC, CILA, NILA Practice Advisory Immigration Lawsuits and the APA: The Basics of a District Court Action)
- Nuts and Bolts of Habeas Corpus Petitions Challenging Immigration Detention (& Practice Advisory & Template Habeas Petition)
- *Niz-Chavez, Pereira*, and Notices to Appear
- Winning at the Board of Immigration Appeals (BIA)
- Seeking Attorneys' Fees Under the Equal to Access to Justice Act (& Template Motion for EAJA Fees)
- Intro to Federal Court Practice Part I and Part II
- Litigating SIJS Delay Cases: Mandamus and APA (& Practice Advisory: Mandamus & APA for SIJS Delay & Example Template Complaint for SIJS Delay Case)
- Advanced Immigration Legal Research
- Legal Writing
- Ready to Win – Moving Beyond Trying Cases at the Immigration Judge Level

³⁴² For example, there are instances when a detained client does not wish to appeal because they do not want to be detained any longer. If they are denied, they wish to be removed as soon as possible. In that case, if you answer "yes" you wished to reserve their right to appeal, your client will have to remain detained for at least the 30-day appeal window, whereas, if you indicate "no," it is possible they could be removed much sooner.

Links to Learn More About HOW TO PRACTICE IN IMMIGRATION COURT

- Check out CILA's 101 [webinar: Introduction to Removal Proceedings for Unaccompanied Children](#) (1 hour).
- Read CILA's resource *How to Prepare for an Individual Hearing: Different Practitioners' Perspectives* posted on CILA's website on the [Additional Resources page](#) to learn more about how to prepare for a merits hearing.
- Review CILA's resource *Trauma Informed Representation in Asylum Cases, Asylum Interview/Asylum Merits Hearing Checklists* on the [Additional Resources page](#) to prepare for an asylum merits hearing in immigration court.
- Take a look at the Safe Passage Project's *Representing Noncitizen Youth in Removal Proceedings*, 2018-2019, NY.
- Review the U.S. DOJ, EOIR, Fact Sheet: *Executive Office for Immigration Review: An Agency Guide*, December 2017.
- Review Appleseed Network Immigration Collaborative's *Getting Off the Assembly Line: Overcoming Immigration Court Obstacles in Individual Cases*, 2016.
- View the NITA on demand webcast *Be a Better Conductor: Common Ways Immigration Individual Hearings Go Off the Rails*, presented by Michelle Mendez.
- View the NITA on demand webcast *Do's and Don'ts for Demonstrative Evidence in Immigration Court*, presented by Judge Denise Slavin.
- Read CLINIC's Practice Advisory *Rules of Evidence in Immigration Court Proceedings*, Rebecca Scholtz and Michelle Mendez, March 13, 2020.
- Review CLINIC's Practice Advisory on *Opening Statements and Closing Arguments in Immigration Court*, Michelle Mendez, July 2, 2020 and Practice Advisory on *Direct Examination*, Victoria Neilson and Michelle Mendez, July 6, 2020.
- Read CLINIC's Practice Pointer *Refreshing Recollection in Immigration Court Proceedings*, Amanda McShane, Michelle Mendez, and Rebecca Scholtz, March 13, 2020.
- Learn more about Notices to Appear in American Immigration Council and Penn State The Dickinson School of Law's Practice Advisory *Notice to Appear: Legal Challenges and Strategies*, February 27, 2019.
- Also, read ILRC's Practice Advisory *The Notice to Appear (NTA)*, July 2020.
- For motions guidance check out the Vera Institute of Justice's Unaccompanied Children Program's Practice Advisory *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, March 2015.
- Check out ILRC's Practice Advisory *Representing Clients at the Master Calendar Hearing*, December 2018.
- Read ILRC's Practice Advisory *Obtaining Office of Refugee Resettlement Records for Clients who were Detained as Children*, Andrew Craycroft, November 2019.
- Learn more about how to do FOIAs with ILRC's *A Step-By-Step Guide to Completing FOIA Requests with DHS*, September 2020 and American Immigration Council's *Freedom of Information Act and Immigration Agencies*, updated May 2021.
- Consider the *ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, August 2018.
- Review DSCS Deportation Defense's webpage *Mental Health & Competency Resources* provided for attorneys.
- Read CLINIC's Practice Advisories and materials on *Representing Noncitizens with Mental Illness*, May 2020.

C. Introduction to USCIS and the Asylum Office

Representation before USCIS and the Asylum Office

TIPS FOR PRACTICING BEFORE USCIS

- Familiarize yourself with the USCIS Policy Manual including [Volume 1 - General Policies and Procedures](#).
- You will need a signed [Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative](#) to represent a client before USCIS and/or the Asylum Office.
- If your client is scheduled for an interview, you must bring your own interpreter.
 - See USCIS Policy Memorandum (PM-602-0125.1), *The Role and Use of Interpreters in Domestic Field Office Interviews*, January 17, 2017.
 - For asylum cases, see [8 C.F.R. § 208.9\(g\)](#) regarding details about providing your own interpreter.
- As the attorney, you will not be permitted to speak on behalf of your client while the officer asks your client questions during the interview. You may be given the opportunity to ask follow up questions at the end, which can be useful to bring out additional information or to clarify something. You may also have the opportunity to make a closing statement.
 - You may take notes of the proceedings, and if you believe your client is being asked to respond to an inappropriate question or sign something inadvisable, you are allowed to indicate that you are advising your client not to answer or sign.
- Make sure you have your bar card, if applicable, and a form of government identification if the USCIS officer wishes to inspect it prior to beginning the interview.

Key Tools & Contacts

- Search all USCIS forms using this [link](#) to find the application your client needs.
- Find the USCIS [Fee Schedule](#), instructions on how to pay [USCIS Fees](#) and how to file for a [Fee Waiver](#), when available and applicable.
- Your client must keep USCIS up to date with their [current address](#). Check out USCIS's website to find out how to do this.
- USCIS provides [case processing times](#) regarding some applications it processes. Check the time frames to get a better idea of wait times.
- Use this link to find a [USCIS office](#).
- Find information to prepare for a [Biometric Services Appointment](#).
- Use this link to access [USCIS's online Self Service Tools](#) including making a [case inquiry](#).
- Explore [USCIS's Contact Center](#) options.
- Consider reaching out to the [Ombudsman's office](#) for case assistance, if needed.

ASYLUM OFFICE - GENERALLY WHAT TO EXPECT FOR ASYLUM INTERVIEW

Asylum interviews are conducted by the U.S. Citizenship and Immigration Services (USCIS) asylum office in affirmative cases, and in the cases of unaccompanied children. At an asylum interview, there is no opposing counsel. The asylum officer is the adjudicator.

When appearing for an asylum interview, you will arrive at the asylum office and check in, as will your client and any interpreter you have brought with you. You will wait in a waiting area before being called into an office for the interview.

Interviews are conducted by a single asylum officer and often last a couple of hours. The officer may or may not be an attorney. Other than the officer, there will be no one from USCIS in the room.

Although you bring your own interpreter, the officer will contact a government interpreter to listen in by phone to monitor the interpretation. The interview is not recorded or transcribed, so you must be certain to take good notes.

The file will include the asylum application and any supporting documents you have submitted, such as your client's declaration, other declarations/reports (from witnesses, experts), case documents (medical records, death certificates, news articles) and country conditions reports.

The officer may ask you some preliminary questions about the file. Frequently officers will go through each of the biographical questions in the I-589 application to confirm that all of the information is correct and ensure there are no updates that need to be made. If there are updates/edits to the application, the officer will make those changes in red pen and ask the applicant to sign confirming that the changes are correct. This can be helpful since it gives the child an opportunity to make edits if an amended form was not submitted. The officer then will get started asking your client other questions.

Once the officer is done, you can request some time to ask some questions of your client as well. This is an opportunity to elicit critical information from your client that may not have come out during the interview or to clarify/contextualize any inconsistencies. Officers typically allow attorneys to provide a closing statement if they request it. Either after you are done with your questions or after a brief closing statement, the interview will conclude.

It is unlikely that you will receive a decision immediately. Instead, it will be available for you to pick up in the future, or it may be mailed to you.

If the asylum officer is unable to approve the asylum claim, they will generally refer the case to the immigration court for an immigration judge's review. The immigration judge will evaluate the asylum claim independently.

ASYLUM OFFICE - SAMPLE ASYLUM INTERVIEW CHECKLIST

Working with an Interpreter:

- If your client's best language is not English, obtain the services of an interpreter for the interview. The government does not provide an interpreter! (Please note, however, that a [temporary rule](#) in place at the time of drafting this checklist provides that asylum applicants who cannot proceed in English are not required to provide interpreters, but instead must proceed with government provided telephonic interpreters.)
 - If you are working with a nonprofit organization who referred you the case, check with them regarding finding an interpreter. It is likely best to try and secure pro bono interpretation whenever possible. It is also best to use the same interpreter throughout the life of the case, if possible.
 - If you are having trouble finding an interpreter, you might also consider reaching out to law school immigration clinics to see if a student would be able to volunteer interpret for you.
- Be a bridge for your client to the interpreter. Explain confidentiality to both your client and the interpreter to help develop a trusting relationship.
- Explain to the interpreter their role in the proceedings, so that they understand they are to be impartial, not add new information to the case, and that they are not there to provide testimony.
- Make eye contact with your client even though speaking through an interpreter and learn to rely more heavily on non-verbal communication.
- Remind a less-experienced interpreter to interpret verbatim and not in the third person. *See Section II.D.* for more guidance and tips on how to work with an interpreter.
- Practice with the interpreter prior to the interview, and make sure the applicant can communicate effectively with them.
- Let the interpreter know that the government will have someone on the phone listening for correct interpretation at the interview.
- Also, keep in mind that any notes the interpreter takes on their notepad during the interview will be collected by the asylum officer and added to the file. For this reason, they should be careful of what they memorialize.

Supplementing Documents/Correction to Asylum Application:

- Take an original and two copies of any supplemental documents to the interview and provide them to the asylum officer. If you mailed any supplemental documents in advance of the interview, take an extra copy to the interview in case the mailed copy did not make it into the file. Also bring any proof of mailing.
- If there are numerous documents, make an index, tab the documents, and highlight relevant portions of documents for the asylum officer.
- Remember that all non-English documents must be translated into English, and you must include a certificate of translation.
- Review all case documents for consistency. If you need to make corrections to the application, take a letter documenting the changes and two copies for the asylum officer, and provide this before the interview begins. Be sure that your client has signed and dated any supplement to the application.

ASYLUM OFFICE – SAMPLE ASYLUM INTERVIEW CHECKLIST

Preparing Your Client for the Interview:

- Remind your client of the legal requirements for the case and what you are trying to prove, as well as your case theory and strategy. This may help your client have a full understanding of the proceeding as well as help your client have a big picture understanding of the goals for the proceeding.
- Provide your client with a copy of the application and their declaration. Provide the declaration in your client's best language so that she can review it easily. Ask your client to review dates/events if they are able to do so.
- Review the application and declaration with your client and note any changes.
- If you are including any expert evidence, be sure your client is aware of what information is included in that evidence. It also helps to briefly review the other supplemental evidence submitted.
- Talk to your client about telling her story through her interview. Ask her whether there are any aspects of her story that she really does not want to have to discuss. Discuss options for how you can go about making sure that the necessary information is still available for the asylum officer, such as referencing her declaration. Clearly set expectations for your client so they understand you and the asylum officer will have the opportunity to ask questions.
- Conduct mock interviews with your client, with someone playing the role of the interpreter if the interpreter is not available.
- Explain the setup of the desk, etc. in the office of an asylum officer so that your client knows what to expect.
- Learn more about [USCIS's response to COVID-19](#) and how that impacts what to expect. The setup for interviews during the pandemic have often been different, including that the attorney and client may be in one room and the adjudicator in another room connected via iPads, or with everyone in separate rooms connected via iPads. The setups could vary per jurisdiction, so it helps to ask others locally what to expect, if possible.
- Explain your role and the role of others who will be in the room at the time of the interview.
- Explain that both you and the asylum officer will take notes during the interview.
- Remind your client to tell the truth, to listen carefully to the asylum officer's questions, and only answer the questions asked.
- Empower your client. Let her know it is okay to ask for a break to go to the bathroom or rest a moment. It is okay to show emotion. It is also okay to ask the officer to repeat a question, let the officer know when she does not understand a question, and respond with "I do not know" or "I do not remember."
- Instruct your client to wait for the interpreter to finish talking before responding.
- If your client has children included in the application, they will also need to attend. If your client does not have someone who can babysit, try to find a volunteer to come and agree to stay with the kids in the waiting room. Consider being prepared with activities and snacks for kids.

ASYLUM OFFICE - SAMPLE ASYLUM INTERVIEW CHECKLIST

- Let your client know what they can and cannot bring into the USCIS office and discuss appropriate attire.
- Explain to your client what will happen after the interview. The asylum officer may approve the case or refer the case to the immigration court, and they may very well wait to issue a decision until a later date. Explain that even if the asylum officer decides to issue a denial, the case will be referred to an immigration judge to consider fresh.
- Ask your client if they have any questions or if there is anything you can do to better support them that day.

Attorney Preparation/Conduct for Interview:

- Have a couple of copies of your representation document (Form G-28) with you and at least the asylum application (Form I-589) and client's declaration with you.
- Bring any original documents to the interview for inspection by the officer.
- Bring your identification and, if applicable, your bar card.
- Ask the interpreter to bring their identification as well.
- Make a list of key points. If the asylum officer does not cover this information in their questioning, ask your client these questions related to these points when you are given time to do so at the end of the interview.
- After the officer has completed questioning, ask to proceed with a few follow-up questions of your client if necessary. Try to address any real or perceived inconsistencies in your client's story. Ask the officer whether they see any outstanding issues or problem areas. Offer to address these with additional evidence if possible.
- Take detailed notes of the interview as it will not be videotaped or recorded by the government.
- Prepare an oral and, if possible, written closing statement. Summarize for the officer why the applicant is eligible for asylum and deserves to be granted asylum. Note that some but not all asylum officers are lawyers. Your summary is particularly helpful in cases where the officer would like to grant relief but needs your help in finding a legal basis for doing so.

Post Interview:

- Let your client know the interview has concluded and thank them for their strength.
- Ask your client if they have any questions or if anything was confusing to them. It sometimes helps to provide an overview summary of what occurred before going over next steps.
- Explain to your client what happens next, specifically, that the asylum officer will make a decision to either grant asylum or refer the case to an immigration judge.
- Ask your client how they are feeling. Encourage them to inform a family member, friend and/or therapist if the interview experience has been especially traumatic.

ADDITIONAL INFORMATION RELATING TO DIFFERENT TYPES OF RELIEF

- **Special Immigrant Juvenile Status:**

- Review USCIS's webpage on [Special Immigrant Juveniles](#).
- If necessary, review [USCIS's Questions and Answers: Appeals and Motions](#).

- **Adjustment of Status before USCIS:**

- Read USCIS's website about getting a [Green Card based on Special Immigrant Juvenile Classification](#). Read more information about getting a [green card](#).
- Check out USCIS's Adjustment of Status [Filing Charts from the Visa Bulletin](#).
- Consult the Department of State [Visa Bulletin](#).
- If necessary, review [USCIS's Questions and Answers: Appeals and Motions](#).

- **Representation before the Asylum Office:**

- Read USCIS's information regarding the [Affirmative Asylum Process](#).
- If your client has applied for asylum before USCIS, you can find use the [USCIS Service and Office Locator](#) to find the closest asylum office and related information.
- Check out USCIS's guidance on [Preparing for your Asylum Interview](#).
- Review the potential [Types of Asylum Decisions](#) including a grant or referral to immigration court.

- **U Visa:**

- Review USCIS's webpage regarding [Victims of Criminal Activity: U Nonimmigrant Status](#).
- Review USCIS's [Resources for Victims of Human Trafficking and Other Crimes](#).

- **T Visa:**

- Refer to USCIS's webpage regarding [Victims of Human Trafficking: T Nonimmigrant Status](#).
- Review USCIS's [Resources for Victims of Human Trafficking and Other Crimes](#).

- **VAWA Self-Petition:**

- Review USCIS's [Questions and Answers: Battered Spouses, Children and Parents Under the Violence Against Women Act \(VAWA\)](#).
- Explore USCIS's information [Green Card for VAWA Self-Petitioner](#).

- **Family-Based Claims:**

- Review USCIS's webpage regarding options for [Family of U.S. Citizens](#).
- Take a look at USCIS's webpage regarding options for [Family of Green Card Holders \(Permanent Residents\)](#).