

PART I: INTRODUCTION AND OVERVIEW

CHAPTER 1

INTRODUCTION AND OVERVIEW

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§ 1.1 Introduction and Overview to This Manual

The United States has been the primary destination for immigrants from around the world since at least 1950.¹ The states with the highest number of foreign-born residents are California, Texas, New York, Florida, and New Jersey.² However, the growth of the immigrant population is not limited to states with a traditionally large immigrant presence. Between 2010 and 2019, the states with the largest percent growth in immigrant populations were North Dakota, South Dakota, Kentucky, Delaware, and South Carolina.³ Immigrant youth form a large part of the foreign-born population in the United States. Approximately twenty-six percent of children in the United States are either immigrants or the children of immigrants.⁴ Many children of immigrants are U.S. citizens, having been born in the United States, regardless of their parents' immigration status. Others are immigrants themselves. In 2019, there were approximately 2.2 million immigrant children living in the United States.⁵ Some immigrant children and youth are without legal status despite having grown up almost entirely in the United States and considering this country their only home. Some of them do not speak the language spoken in their country of origin and left at such an early age that they have no memory of it. Other young people are more recent immigrants who may be unfamiliar with the U.S. legal system and customs.

¹ Jeanne Batalova, Brittany Blizzard & Jessica Bolter, Migration Policy Institute, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (Feb. 2020), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Numbers> [hereinafter *Frequently Requested Statistics*]; Migration Policy Institute, *Net Number of Migrants by Country, 1950-2015 (by Five Year Intervals)*, <https://www.migrationpolicy.org/programs/data-hub/charts/net-number-migrants-country-1950-2015-five-year-intervals>.

² Migration Policy Institute, *Immigrant Population by State, 1990-Present*, <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present?width=1000&height=850&iframe=true>.

³ *Id.*

⁴ See *Frequently Requested Statistics*.

⁵ *Id.*

A. How Immigrant Children and Youth Come to the United States

Immigrant children and youth may travel to the United States with parents, an adult relative, or a non-relative, such as a family friend. Some come to the United States with their parents as infants or young children. Increasingly, children and youth come to the United States unaccompanied, without their parents or a legal guardian.⁶ In many cases, these youth are fleeing violence, persecution, and extreme poverty, and may have suffered traumatic experiences in their home countries. A 2013 United Nations High Commissioner for Refugees (UNHCR) study found that many unaccompanied children left their countries to escape violence, either by gangs, in the home, or both.⁷ While many of these young people come to the United States, UNHCR also reports an increase in asylum claims in other countries as well. Some of these youth receive the assistance of smugglers, often called “*coyotes*” or “*snakeheads*.” Many assume extraordinary debt to come to the United States and in some cases, solely to help their families. Often, these youth endure dangerous and exploitative work conditions to pay off these debts.

Particularly for unaccompanied immigrant youth, the journey to the United States is often extraordinarily arduous and dangerous. Many youth have been robbed, beaten, or sexually assaulted during the journey. Still others are survivors of human trafficking, and are forced to engage in sex work or to work in slave-like conditions in factories, as domestic servants, or in restaurants during the journey or after they arrive in the United States.⁸ Hundreds of young people have lost a limb or sustained other disabling injuries trying to jump on or off trains across Mexico.⁹ Many young people embark on the journey to come to the United States, never to be heard of again; they may have been killed, kidnapped and trafficked, or died from an accident along the way or during the trek across the desert.

Although these dangers are often viewed as unavoidable or inherent in unauthorized migration, U.S. border enforcement strategies and policies have created or exacerbated many of them. In 1994, the U.S. Border Patrol introduced a strategic plan of “prevention through deterrence,” increasing enforcement efforts around border cities and populated areas resulting in unauthorized immigrants being “forced over more hostile terrain.”¹⁰ The plan envisioned the desert and mountain terrain of the southern U.S. border as “natural barriers” given the harsh environment

⁶ See Office of Refugee Resettlement, *Fact Sheet: Unaccompanied Children (UC) Program* (last accessed Jul. 30, 2021), <https://www.hhs.gov/sites/default/files/uac-program-fact-sheet.pdf> [hereinafter UC Fact Sheet].

⁷ UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection 6–7* (Mar. 13, 2014), <https://www.unhcr.org/en-us/children-on-the-run.html> [hereinafter *Children on the Run*].

⁸ According to a U.S. Department of State estimate, more than 109,000 survivors of trafficking were identified in 2020, but millions more have not been identified. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report*, 60 (June 2021), https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf.

⁹ See Sonia Nazario, *Enrique’s Journey: The Story of a Boy’s Dangerous Odyssey to Reunite with his Mother* (2006); Oscar Martinez, *The Beast: Riding the Rails and Dodging Narcos on the Migrant Trail* (2010).

¹⁰ U.S. Border Patrol, *Border Patrol Strategic Plan 1994 and Beyond*, 7, (Aug. 8, 1994), available at <https://www.hsdl.org/?abstract&did=721845>.

where entrants “can find themselves in mortal danger.”¹¹ Instead of deterrence, this strategy has resulted in the deaths of thousands of migrants who attempted to enter the United States through remote and dangerous areas including many young people.¹²

More recently, U.S. Customs and Border Protection has enacted a series of policies blocking asylum seekers from presenting themselves at ports of entry and exercising their right to request asylum, including metering, the Migration Protection Protocols (MPP),¹³ and Title 42 expulsions.¹⁴ These partial closures of the border have left many young people stranded in dangerous conditions along the southern U.S. border.¹⁵ Asylum seekers who were denied access to ports of entry under these policies have been robbed, trafficked, sexually assaulted, and killed.¹⁶ Hundreds of children have been kidnapped or almost kidnapped.¹⁷ Others have died attempting to cross the border in more dangerous areas.¹⁸

B. Unaccompanied Child and Youth Migration in Recent Years

From 2002, when the detention of unaccompanied children was transferred to the U.S. Department of Health and Human Services’ Office of Refugee Resettlement (ORR),¹⁹ to 2011,

¹¹ *Id.* at 2.

¹² According to the Border Patrol’s statistics, over 7,500 people died crossing the southern U.S. border from fiscal years 1998 to 2018, with many of these deaths occurring in the Rio Grande Valley and Tucson sectors. See U.S. Border Patrol, *Southwest Border Deaths by Fiscal Year*, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-deaths-fy1998-fy2018.pdf>. The real number of deaths is probably much higher than these official counts. See James Verini, *How U.S. Policy Turned the Sonoran Desert into a Graveyard for Migrants*, *The New York Times*, Aug. 18, 2020 (updated Nov. 22, 2020), <https://www.nytimes.com/2020/08/18/magazine/border-crossing.html>.

¹³ See U.S. Department of Homeland Security, *Migrant Protection Protocols*, <https://www.dhs.gov/migrant-protection-protocols> (last accessed Sept. 14, 2021). On August 25, 2021, the Supreme Court declined to stay a lower court ruling requiring the Biden administration to reinstate MPP. *Biden v. Texas*, No. 21A21 (Aug. 25, 2021).

¹⁴ See American Immigration Council (AIC), *Policies Affecting Asylum Seekers at the Border*, (Jan. 29, 2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>; AIC, *A Guide to Title 42 Expulsions at the Border*, (Mar. 29, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [hereinafter *Guide to Title 42*].

¹⁵ *Guide to Title 42*.

¹⁶ See Human Rights First, *Delivered to Danger*, current as of Feb. 19, 2021, <https://www.humanrightsfirst.org/campaign/remain-mexico>.

¹⁷ *Id.*

¹⁸ See Nina Lakhani, *Eight Year Old Boy Dies as Migrants Risk Arctic Conditions to Cross River into U.S.*, *The Guardian*, Feb. 19, 2021, <https://www.theguardian.com/world/2021/feb/19/eight-year-old-honduran-boy-dies-river-us-mexico-border>; Adolfo Flores, *More Immigrant Children are Dying at the Border as the Trump Administration Sends People Back to Mexico*, *BuzzFeed News*, Sept. 19, 2019, <https://www.buzzfeednews.com/article/adolfoflores/immigrant-children-dying-united-states-mexico-trump>; Bill Chappell, *A Father and Daughter Who Drowned at the Border Put Attention on Immigration*, *NPR*, Jun. 26, 2019, <https://www.npr.org/2019/06/26/736177694/a-father-and-daughter-drowned-at-the-border-put-attention-on-immigration>; *Border Patrol Finds Bodies of Woman and Three Children in South Texas*, *The Guardian*, Jun. 26, 2019, <https://www.theguardian.com/us-news/2019/jun/24/mexico-us-border-texas-bodies-discovered>.

¹⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

fewer than 8,000 unaccompanied children were apprehended by the Department of Homeland Security (DHS) and placed in ORR custody annually.²⁰ In Fiscal Year 2012, the number rose to 13,625 children referred to ORR. This number rose again in Fiscal Year 2013 to 24,668 referrals. Since then, with the exception of 2020, the annual number has remained between 33,000 and nearly 70,000.²¹ To address the increase in unaccompanied children being placed in its custody, ORR has opened additional shelters to detain them. Many of these facilities, especially ORR’s emergency influx sites, have been reported to have conditions that are unsuitable for children, and there are many allegations of abuse and neglect by staff.²² As of July 2021, ORR operates approximately two hundred shelters in twenty two states.²³ DHS has also opened additional family detention centers in response to the sharp increase in the number of families with children crossing the southern border, discussed in greater detail in **Chapter 18**. In recent years, pursuant to a “zero tolerance” policy, DHS separated thousands of children from their parents placing them in ORR detention.²⁴ As of this year, although the separations under this particular policy have halted, hundreds of the children have still not been reunified with their families.²⁵

The increase in arrivals over the last nine years is largely due to the migration of children from Guatemala, Honduras, and El Salvador, a region of Central America known as the “Northern Triangle.”²⁶ Children from these countries have made up between eighty four and ninety five percent of referrals to ORR during this time period.²⁷ Studies have found that, while there may be multiple reasons that a child leaves their home country, “children from the region consistently cite gang or cartel violence as a prime motivation for migrating.”²⁸ A 2013 report by the UNHCR found that forty-eight percent of unaccompanied children interviewed as part of the study shared experiences of how they had been personally affected by violence in the region by organized armed criminal actors, including gangs and drug cartels, as well as state actors.²⁹ Gang violence in the region rose following mass deportations in the wake of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a punitive law rooted in the era’s “tough on crime”

²⁰ *UC Fact Sheet*.

²¹ *Id.* at 2.

²² See Kids in Need of Defense, *Emergency Intake Sites for Unaccompanied Children: Recommended Standards and Broader Solutions*, (Apr. 22, 2021), <https://supportkind.org/wp-content/uploads/2021/04/EIS-Policy-Brief-Final-4.28.pdf>.

²³ *UC Fact Sheet*, at 2.

²⁴ American Civil Liberties Union (ACLU), *Family Separation by the Numbers*, (Oct. 2, 2018), <https://www.aclu.org/issues/family-separation>.

²⁵ Lee Gelernt, ACLU, *The Moral Imperative to Eliminate the Historic Stain of Family Separation*, (Apr. 29, 2021), <https://www.aclu.org/news/immigrants-rights/the-moral-imperative-to-eliminate-the-historic-stain-of-family-separation/>.

²⁶ See AIC, *A Guide to Children Arriving at the Border: Laws, Policies, and Responses*, (July 2014), <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> [hereinafter *Children Arriving at the Border*].

²⁷ Office of Refugee Resettlement, *Facts and Data*, <https://www.acf.hhs.gov/orr/facts-and-data-0>.

²⁸ *Children Arriving at the Border*, at 2.

²⁹ *Id.* at 2-3; United Nations High Commissioner for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, 6 (March 2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf [hereinafter *Children on the Run*].

policy approach.³⁰ At the time, the region was undergoing a nascent transition to democracy following the end of the U.S.-backed civil wars in El Salvador³¹ and Guatemala³² and a series of dictatorships in Honduras.³³ As gang violence rose, the region's governments enacted a series of policies known as *mano dura*, or iron fist. These policies resulted in mass incarceration, but failed to curb rising violence.³⁴ Children in gang-controlled neighborhoods are subject to extortion, forced recruitment, sex trafficking, and other forms of violence. In recent years, gangs in the region have increasingly become political actors engaging directly with government officials and attempting to win concessions from the region's governments.³⁵

Although gang violence is one of the primary reasons children from the region come to the United States, there are many additional reasons. Many children are coming to reunite with a parent or relative who is already in the United States, and they may no longer have a viable caretaker in their home country.³⁶ Domestic violence and femicide, including against children, is widespread in the region and authorities often fail to intervene.³⁷ LGBTQ youth and youth from indigenous

³⁰ See Judy Rabinovitz, ACLU, *Ending the Laws that Fuel Mass Detention and Deportation*, (Oct. 20, 2011), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ending-laws-fuel-mass-detention-and>.

³¹ The civil war in El Salvador between the U.S.-backed government and guerilla forces claimed 75,000 lives by the time it ended in 1992. U.S. trained government forces deliberately targeted and killed civilians, notably in the 1981 El Mozote massacre. Heather Gies, *El Salvador Massacre: Forensics Teams Dig for Remains as U.S. Envoy Faces Grilling*, The Guardian, Feb. 15, 2019, <https://www.theguardian.com/world/2019/feb/14/el-salvador-massacre-el-mozote>.

³² After democratically elected president Jacobo Arbenz was ousted in a CIA-backed coup in 1954, Guatemala experienced several decades of dictatorships and civil war in which over 200,000 people were killed and U.S.-backed forces committed multiple atrocities, including a genocide against indigenous Guatemalans. Mario Castillo, *Apology Reignites Conversation about Ousted Guatemalan Leader*, CNN, Oct. 24, 2011, <https://www.cnn.com/2011/10/22/world/americas/guatemala-arbenz/index.html>; Carrie Khan, *Former Guatemalan Dictator Found Guilty of Genocide*, NPR, May 10, 2013, <https://www.npr.org/2013/05/10/182967537/former-guatemalan-dictator-found-guilty-of-genocide>.

³³ Honduras housed U.S. military installations that were used during the civil wars and was ruled by a dictatorship until 1982. Annie Murphy, *'Who Rules in Honduras?' Coup's Legacy of Violence*, NPR, <https://www.npr.org/2012/02/12/146758628/who-rules-in-honduras-a-coups-lasting-impact>; Robert J. McCartney, *U.S. Is Dotting Honduran Countryside with Military Facilities*, The Washington Post, Feb. 17, 1984, <https://www.washingtonpost.com/archive/politics/1984/02/17/us-is-dotting-honduran-countryside-with-military-facilities/99ed337d-c612-4287-804e-5f639acd1fd4/>.

³⁴ See International Crisis Group, *El Salvador's Politics of Perpetual Violence* (Dec. 19, 2017), <http://www.refworld.org/publisher/ICG,,,5a3cf2394,0.html>; see also Latin America Working Group Education Fund, *El Salvador: Gang Violence and Growing Abuses by State Security Forces* (Nov. 13, 2017), <http://lawg.org/action-center/lawg-blog/69-general/1945-el-salvador-gang-violence-and-growing-abuses-by-state-security-forces>; see also Washington Office on Latin America (WOLA), *Central American Gang-Related Asylum: A Resource Guide* (May 29, 2008), <https://www.wola.org/analysis/central-american-gang-related-asylum-guide/>.

³⁵ See Robbi Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over*, Wall Street Journal, Nov. 2, 2018, <https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619>.

³⁶ See *Children on the Run* at 9-10.

³⁷ See *id.* at 9-10, 33.

communities face widespread societal discrimination and persecution.³⁸ In recent years, climate change has also become a factor behind migration from the region both because of its direct effects on the region's climate and exacerbation existing societal problems.³⁹ Once children arrive in the United States, however, their struggles are not over. Children and youth without legal immigration status are exceptionally vulnerable in the United States. Many undocumented youth face discrimination and burdensome fears of deportation that drive them, and any family they may be with, into the shadows. The need to remain invisible marginalizes them and their families, and undermines their ability to access basic necessities. As a whole, undocumented youth are more likely to live in poverty,⁴⁰ less likely to have health insurance, and more likely to encounter barriers to accessing public benefits and social services than U.S. citizen youth.⁴¹

Importantly, there are many avenues available for undocumented youth to obtain lawful immigration status in the United States to eliminate their fear of deportation and ensure that they have access to the benefits and services they need. In 2008, Congress, recognizing the unique needs of unaccompanied children and youth, provided broader legal protections and access to services through the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁴² It was signed into law on December 23, 2008. Unfortunately, there have been many attempts to eliminate or undermine these protections and numerous bills and policies have been introduced to limit its effect.⁴³

C. Overview of this Manual

This manual seeks to provide background and guidance on the immigration options available to young people. It will cover various forms of immigration relief, with a special emphasis on Special Immigrant Juvenile Status (SIJS). While this manual is primarily intended to guide advocates and attorneys representing or working with undocumented young people, this manual is also useful in working with those who have legal status and face various immigration related issues, whether defending against removal charges, seeking to change status, or applying for citizenship.

³⁸ See *id.*; see also Human Rights Watch, “Every Day I Live in Fear:” *Violence and Discrimination Against LGBT People in El Salvador, Guatemala, and Honduras, and Obstacles to Asylum in the United States* (Oct. 7, 2020), <https://www.hrw.org/report/2020/10/07/every-day-i-live-fear/violence-and-discrimination-against-lgbt-people-el-salvador#>.

³⁹ Lauren Markham, *How Climate Change is Pushing Central American Migrants to the U.S.*, *The Guardian*, Apr. 6, 2019, <https://www.theguardian.com/commentisfree/2019/apr/06/us-mexico-immigration-climate-change-migration>.

⁴⁰ Jeffrey S. Passel, *Demography of Immigrant Youth: Past, Present and Future*, 21 *The Future of Children* 1, 33 (2011); see also *Frequently Requested Statistics*.

⁴¹ See, e.g., Univ. of Cal, Davis Center for Poverty Research, *Poverty Research and Policy in the U.S.: Building a Path to Mobility* 14 (Apr. 2016), https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-poverty_research_and_policy_in_the_us.pdf.

⁴² Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁴³ See, e.g., Kids in Need of Defense, *Death by a Thousand Cuts: The Trump Administration's Systematic Assault on the Protection of Unaccompanied Children* (May 2018), https://supportkind.org/wp-content/uploads/2018/05/Death-by-a-Thousand-Cuts_May-2018.pdf.

NOTE: Terminology. Various terms used to describe young people, including “child,” “youth,” and “young person” will appear throughout this manual. These terms may have different meanings depending on their context. For example, in ordinary usage “child” means a young person usually between infancy and puberty,⁴⁴ while under federal law a “child” is an unmarried person under the age of twenty-one.⁴⁵ “Youth” generally refers to older children and adolescents. “Young person” refers to both children and youth, and may also include young adults who have recently reached the age of majority.

This manual is divided into four parts:

Part I: Introduction and Overview, Chapters 1–2. These chapters provide introductory information on basic terms and principles of immigration law as they apply to young people, a summary of immigration relief options for them, and an overview of the immigration process (both affirmative and defensive). **Chapter 2** provides background on particular developmental issues that are unique to children and youth, practice tips for advocates working with them to address these issues, and tips for avoiding re-traumatization.

Part II: Special Immigrant Juvenile Status (SIJS), a Form of Immigration Relief for Abused, Neglected, or Abandoned Children, Chapters 3–9. **Chapter 3** provides a basic overview of SIJS. For many child welfare workers and non-legal advocates curious about SIJS, or supporting a young person who is applying for SIJS, it will provide all of the information needed. **Chapters 4–6** are designed to answer more specific questions about SIJS eligibility, the adjustment of status process for people with SIJS, and risks and benefits of applying. **Chapter 7, Part One** is a basic primer on the various state court systems that may play a role in SIJS findings, including dependency, delinquency, guardianship, custody, and adoption. **Part Two** provides procedural guidance in obtaining SIJS findings in juvenile courts. **Chapter 8** provides information on the affirmative SIJS application process and how to complete the forms. **Chapter 9** provides information on the defensive SIJS application process for young people who are in removal (or deportation) proceedings.

Part III: Other Forms of Immigration Relief, Chapters 10–16. This part of the manual provides information on other potential ways in which young people can obtain lawful status including U nonimmigrant status (**Chapter 10**), relief under the Violence Against Women Act (**Chapter 11**), asylum and related relief (**Chapter 12**), family-based visas (**Chapter 13**), citizenship and naturalization for young people (**Chapter 14**), T nonimmigrant status (**Chapter 15**) and other immigration-related laws that may help young people, including temporary protected status and cancellation of removal, among others (**Chapter 16**).

Part IV: Special Issues in Representing Children and Youth, Chapters 17–18. **Chapter 17** covers the immigration consequences of juvenile delinquency, discusses immigration enforcement in the juvenile justice system, and provides a basic overview of the immigration consequences of criminal conduct. **Chapter 18** covers detention-related issues of immigrant children and youth, including how they are apprehended and the bases for their detention and release.

⁴⁴ *Child*, Merriam Webster’s Dictionary (11th Ed. 2003).

⁴⁵ INA § 101(b)(1).

The **Appendices** to this manual contain many useful documents, including quick reference guides, a sample screening intake form, sample motions, court orders and other papers that you can present to a juvenile court judge in SIJS cases or to the immigration court or immigration authorities, practice advisories, a copy of the relevant law, regulations, U.S. Citizenship and Immigration Services (USCIS) memoranda, and sample completed copies of application forms.

§ 1.2 Lawful Immigration Status and Forms of Immigration Relief Available to Young People

A. Lawful immigration status: What is it and why is it important?

“Immigration status” refers to a person’s classification under U.S. immigration laws. Immigration status determines the rights, privileges, and benefits for which individual young people are eligible, and the possible consequences they will face if charged with a violation of law.

Under immigration laws, any person in the United States *who is not a U.S. citizen* (which can be a complex determination) or U.S. national is referred to as an **alien** in federal immigration statutes. This manual will not use that term, except when quoting the statute directly. Instead, it will use the term **noncitizen**.⁴⁶ A noncitizen who has a **green card** has permanent lawful immigration status and is called a **lawful permanent resident**. A noncitizen can have many other different types of lawful status in the United States as well, such as asylum, a U visa, a T visa, a visitor’s visa, or temporary protected status. A noncitizen may also have been granted prosecutorial discretion or deferred action--such as pursuant to Deferred Action for Childhood Arrivals (DACA)—which is not lawful status but can provide protection from deportation (and work authorization, for deferred action). These categories are described in more detail below. A noncitizen with no lawful immigration status is said to be **undocumented**.

Life in the United States can be terribly difficult for an undocumented person. They might be **deported or removed** (forced to leave the United States) if caught by immigration authorities. Further, they generally cannot obtain **employment authorization**, and so cannot work legally. They are often excluded from many public benefits. In most states, undocumented young people are not eligible for in-state tuition at state colleges and universities, and therefore may have to overcome more barriers to attend college.⁴⁷

NOTE: U.S. citizenship. It is important to determine whether the child or youth may be a U.S. citizen. U.S. citizens are not subject to federal immigration laws and therefore, cannot be removed or refused admission to the United States.

Individuals can obtain citizenship in a number of different ways. They may be born in the United States. They may apply to become a citizen through the process of naturalization. This is the process by which someone immigrates to the United States, obtains lawful permanent residence,

⁴⁶ See *Noncitizen*, USCIS Glossary, <https://www.uscis.gov/tools/glossary>.

⁴⁷ Note, however, that some states provide exceptions by allowing undocumented immigrants to attend state colleges at the much lower in-state tuition rate. See National Immigration Law Center, *Basic Facts About In-State Tuition for Undocumented Immigrant Students*, <https://www.nilc.org/issues/education/basic-facts-instate/> for further information.

and then becomes a citizen after a certain period of time; note that children under eighteen cannot naturalize. A person can also acquire or derive citizenship automatically from a U.S. citizen parent, such as if the person's parent was a U.S. citizen at birth and met certain criteria, or if the person was a lawful permanent resident and their parent naturalized.⁴⁸ Under certain circumstances, a person may be able to acquire citizenship if U.S. citizenship can be traced through the lineage of their U.S. citizen parent(s) or even in some instances, grandparent(s) or great grandparent(s), even if the child was born abroad and lived abroad for most of their life. The vast majority of U.S. citizens, however, acquire their citizenship because they are born in the United States.

With the rise in immigration enforcement, more U.S. citizens are mistakenly placed in removal (or deportation) proceedings. In the decade between 2007 and 2017, 693 U.S. citizens were held in county jails under immigration detention orders, and 818 U.S. citizens were in immigration detentions centers during the same time period; that amounts to roughly 150 mistaken detentions of U.S. citizens per year.⁴⁹ The Trump administration also challenged the U.S. citizenship of thousands of recorded U.S. citizens who were born along the Texas border.⁵⁰

Noncitizen categories. A person who is not a U.S. citizen or national⁵¹ is a noncitizen. A noncitizen is *always* subject to the possibility of deportation/removal regardless of their circumstances. Many noncitizen children and youth are removable by virtue of lacking lawful immigration status.

⁴⁸ INA §§ 301, 309, 320.

⁴⁹ Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, The New Yorker, Mar. 21, 2018, <https://www.newyorker.com/news/daily-comment/when-ice-tries-to-deport-americans-who-defends-them>; see also Victoria Bekiempis, *Why Did Immigration and Customs Enforcement Detain a U.S. Citizen for Three and a Half Years?*, Newsweek, Nov. 6, 2014, <http://www.newsweek.com/why-did-immigration-and-customs-enforcement-detain-us-citizen-3-and-half-years-282509>; Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, (Mar. 2009), <https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>.

⁵⁰ Kevin Sief, *U.S. Is Denying Passports to Americans Along the Border, Throwing their Citizenship into Question*, The Washington Post, Aug. 29, 2018, https://www.washingtonpost.com/world/the-americas/us-is-denying-passports-to-americans-along-the-border-throwing-their-citizenship-into-question/2018/08/29/1d630e84-a0da-11e8-a3dd-2a1991f075d5_story.html?noredirect=on&utm_term=.a4aeda7205b2.

⁵¹ Persons who were born in American Samoa and the Swains Islands are considered U.S. nationals and not U.S. citizens. See INA §§ 101(a)(3), 308(1); *Noncitizen*, USCIS Glossary, <https://www.uscis.gov/tools/glossary>. Because they are not considered “noncitizens” under immigration law, U.S. nationals cannot be deported, but they must apply for naturalization to obtain the full benefits of U.S. citizenship, including the right to vote. The practice of conferring nationality rather than citizenship to persons born outlying U.S. possessions is rooted in explicitly racist policies enacted after the United States acquired new overseas territories in the Spanish American war. See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 305-06 (1901) (White J. concurring). Advocates have recently challenged its constitutionality. See *Fitisemanu v. United States*, Nos. 20-4017 & 20-4019 (10th Cir. Jun. 15, 2021); *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

The various noncitizen categories that a person can fall into include:

- **Lawful permanent resident** (“green card holder”). They are permitted to live and work permanently in the United States and are entitled to the most secure noncitizen immigration status, as well as many benefits that U.S. citizens hold.
- **Refugee or asylee.** They are granted refuge and status in the United States based on persecution they faced or will face in their home country or country of origin. They can become lawful permanent residents within a certain period of time.
- **Nonimmigrant visa holders.** A nonimmigrant visa holder is a person who obtained a temporary visa allowing them to enter and remain in the United States legally for a specific period of time under specific conditions. Certain visa holders can obtain lawful permanent residence, while others can only be here for a certain period of time. Some common examples of visa holders include tourists, students, temporary workers, diplomats, religious workers, victims of crimes who assist with an investigation or prosecution of the crime (U visas), informants, and trafficking victims (T visas).

Nonimmigrant visa holders who violate the terms of their visa (e.g., students who drop out of school or tourists who stay longer than permitted) become “undocumented,” meaning they no longer have lawful status in the United States and are subject to apprehension by immigration authorities and removal from the country.

- **Undocumented person.** This is someone who does not have legal status under the immigration laws. Contrary to public perception, undocumented persons are not just those who crossed the border without inspection, but also include persons whose visas have expired.

Just because a person is undocumented, however, does not mean that person will be removed from the United States. Many undocumented people are eligible to apply for lawful immigration status through one of the avenues available under the immigration laws. However, undocumented people are always at risk of apprehension, detention, and initiation of removal proceedings by immigration authorities. Crossing the border unlawfully or having contact with the juvenile justice system are common avenues by which undocumented young people are apprehended by immigration authorities.

- **DACA recipient.** Deferred Action for Childhood Arrivals (DACA) provides a work permit and relief from removal for two years to certain eligible undocumented people who came to the United States when they were under the age of sixteen and meet certain other eligibility requirements. DACA is not an immigration status, nor does it lead to U.S. citizenship, but it does provide temporary protection from deportation. Further, DACA was not created the way that many other forms of immigration relief were. Rather, it is a use of prosecutorial discretion by the executive branch to provide protection from removal from the United States for a certain period of time. The Trump Administration attempted to end the DACA program.⁵² At the time of this manual’s writing, DACA is the subject of much federal litigation. Due to a recent court ruling, DACA holders are

⁵² Elaine Duke, DHS Acting Secretary, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

currently permitted to continue to renew their DACA, but new applicants are unable to receive it.⁵³ The future of the program is uncertain.

- **Those in the process of obtaining legal status.** Many persons present in the United States do not have lawful status, but are in the process of obtaining lawful status, which often takes many years. Immigration authorities are aware of their presence in the United States and may defer their removal pending the outcome of their application. Depending on the lawful status applied for, a person may receive a work permit or employment authorization document (EAD) to work lawfully for a specified period of time while the application is pending.

B. Forms of immigration relief available to young people

There are many avenues within the categories discussed above available for undocumented young people to obtain lawful immigration status in the United States. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)⁵⁴ (discussed in § 1.4) made important procedural and substantive changes to broaden eligibility for immigration legal relief for young people and provide more child-sensitive procedures for those children and youth in immigration custody and at imminent risk of removal. Some of the avenues of relief available to young people, discussed in greater detail throughout this manual, are:

- **Special immigrant juvenile status (SIJS).** Young people can obtain lawful permanent residence if they are under twenty-one years old, not married, under the jurisdiction of a juvenile court (which may differ based on the state, but typically includes dependency, delinquency, guardianship, or family court) or committed to the custody of state agencies or departments or to court-appointed individuals or entities, and the court has made a finding that the young person cannot be reunified with one or both parents due to abuse, neglect or abandonment or a similar basis under law, and that it is not in their best interest to be returned to their home country. To obtain this form of relief, an order from the juvenile court making the above findings is required. See **Chapters 3–9**.
- **Violence Against Women Act (VAWA).** Young people are eligible for lawful permanent residence if they have been “battered or subject to extreme cruelty” (including purely emotional abuse) by a *U.S. citizen or permanent resident spouse, parent, or step-parent*. A young person may also qualify if their parent suffered domestic violence. See **Chapter 11**.
- **U and T nonimmigrant status for victims of serious crimes and trafficking.** If the noncitizen young person or their parent is a victim of a serious crime or of trafficking, they may be able to obtain a nonimmigrant visa that will put them on a path to permanent residence.

U nonimmigrant status is available to noncitizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity, possess information concerning the activity, and are helpful to the investigation of the criminal activity.⁵⁵ In

⁵³ See, e.g., National Immigration Law Center, *Deferred Action for Childhood Arrivals (DACA) Class Action Lawsuit*, (Jul. 21, 2021), <https://www.nilc.org/issues/daca/daca-class-action-lawsuit/>.

⁵⁴ Pub. L. No. 110-457, 122 Stat. 5044 (2008).

⁵⁵ INA § 101(a)(15)(U).

order to qualify for U nonimmigrant status, the victim must get a signed certification saying that they suffered a crime and were helpful. The certification must come from a police agency, a judge, prosecutor, or similar official. See **Chapter 10**.

T nonimmigrant status is available to victims of severe forms of trafficking in persons,⁵⁶ including sex or labor trafficking, who comply with reasonable requests for assistance in the investigation or prosecution of the offense (unless they are under the age of eighteen), and show they will suffer extreme hardship if removed from the United States. See **Chapter 15**.

- **Asylum.** People who fear return to their home country because of an individualized fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group may be able to apply for asylum.⁵⁷ If a child or youth expresses fear of return, they are generally subject to specialized guidelines and procedures for children in determining whether they have a valid asylum claim. See **Chapter 12**.
- **Cancellation of removal for non-permanent residents.** Noncitizens in removal proceedings who have lived in the United States for ten years or more and can show that they have a parent, spouse, or child who is a U.S. citizen or permanent resident who would suffer exceptional and extremely unusual hardship if the person were deported can qualify for this relief and obtain lawful permanent residence.⁵⁸ See **Chapter 16**.
- **U.S. citizenship and family immigration.** Some young people may be U.S. citizens without knowing their status, based on U.S. citizenship of parents and in some cases, grandparents. See **Chapter 14**. Additionally, some young people may have U.S. citizen or lawful permanent resident family members in the United States who can help them become a lawful permanent resident. See **Chapter 13**.

WARNING! Immigrant young people can be eligible for more than one type of immigration relief. To ensure that they have the best chance of obtaining lawful immigration status, advocates should carefully screen their client for all forms of relief. A sample screening questionnaire to assist in flagging eligibility is provided at **Appendix A**.

§ 1.3 Immigration System Actors

Immigration laws are passed by Congress and enforced by administrative agencies in the executive branch of the federal government. As part of the executive branch's function as enforcer of immigration laws, it may exercise prosecutorial discretion favorably, and not remove (deport) certain people, as it has done with the DACA program for example. Practically every immigrant child or youth will come into contact with at least one (and usually several) federal agencies if they decide to apply affirmatively for immigration relief or are placed in removal proceedings

⁵⁶ INA § 101(a)(15)(T).

⁵⁷ INA § 208.

⁵⁸ INA § 240A(b).

(both discussed in § 1.6). These agencies and actors fall under three different federal agencies: the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), and the Department of Justice (DOJ). Each of these departments serves a different purpose within the immigration system, which can be analogized as the enforcer, the custodian, and the adjudicator or decision maker, respectively. It is important to know that they often must follow conflicting directives as to how immigrant children and youth should be treated, and thus the actions of the federal agencies cannot always be easily reconciled.

A. Department of Homeland Security (DHS)

As a result of the Homeland Security Act of 2002, introduced in the aftermath of the September 11th attacks, the former Immigration and Naturalization Service (INS) ceased to exist as an independent agency within the Department of Justice and its functions were transferred to various agencies within the newly formed Department of Homeland Security (DHS).⁵⁹ DHS now has primary responsibility for administering and enforcing immigration laws. Three agencies within DHS handle these responsibilities: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).⁶⁰

1. USCIS

U.S. Citizenship and Immigration Services (USCIS). USCIS is responsible for processing and making decisions on many applications for immigration benefits, most of which are filed affirmatively. These include applications for SIJS, asylum, lawful permanent residence, and citizenship. USCIS can also initiate deportation proceedings by either issuing a Notice to Appear (NTA), or charging document, or by referring cases to ICE to do so.

2. ICE

Immigration and Customs Enforcement (ICE). ICE is the “interior” enforcement arm of DHS (i.e., not at the border or ports of entry) and has a goal of identifying and removing all removable persons located within the United States. One of its primary targets is people with criminal convictions. ICE therefore has a strong presence in the criminal legal system and juvenile justice system, especially in jails, prisons, and youth detention centers. ICE has the authority to arrest, transport, and/or detain (except for certain juveniles) individuals in violation of immigration laws. Not only do ICE attorneys represent the government in removal proceedings, but ICE also coordinates the actual removal of noncitizens who are ordered deported.

It is important to emphasize that ICE’s goal is to enforce immigration laws and not to look out for the best interests of children or youth or ensure that they receive due process. Once ICE detains a young person, it will not tell them about their immigration relief options; advocates have also reported that ICE may even dissuade young people from pursuing options available to them and encourage them to accept voluntary return (deportation without a hearing).⁶¹ This is particularly critical as many children and youth have trouble distinguishing the roles of various persons in the

⁵⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in pertinent part in scattered sections of 6 and 8 USC); see H.R. Rep. No. 107-609, Part 1, at 64 (2002).

⁶⁰ See DHS, *Operational and Support Components*, <https://www.dhs.gov/operational-and-support-components>.

⁶¹ 8 CFR § 240.25.

immigration system, e.g., whether a person is their attorney or works for the government, and as such may confide and trust in ICE before realizing its intentions.

ICE's role with children under the age of eighteen may be limited where the child is considered "unaccompanied," meaning where there is no parent or legal guardian able or willing to provide for the child's care and custody. In these cases, ICE will identify and arrest children, but then will transfer them to the custody of the Office of Refugee Resettlement (ORR, described below). ICE will still initiate and prosecute removal proceedings against unaccompanied children and coordinate their physical removal from the United States if they are ordered deported or accept voluntary departure or return. The vast majority of children apprehended by ICE are deemed "unaccompanied" and are thus detained by ORR. Where the child is deemed "accompanied," ICE will take a greater role in the deportation process and may detain them pending the outcome of removal proceedings. This could be in a family detention center if the child was apprehended with a parent or legal guardian with whom they will be detained, or otherwise in a juvenile jail that ICE contracts with to hold "accompanied" children separate from adults. Outside of the family detention context, little is known about how many accompanied juveniles are detained by ICE and who they are. See **Chapter 18** for more information.

3. *CBP*

U.S. Customs and Border Protection (CBP). CBP is responsible for inspecting visitors and cargo at ports of entry and administers the U.S. land, sea, and air ports of entry. CBP is also given the authority to arrest, transport, and detain noncitizens, but unlike ICE, it focuses on those who are caught in violation of immigration laws at the border and ports of entry. Note that CBP interprets its authority to allow it to operate within one hundred miles of any land or sea border, so many parts of the United States (such as Los Angeles, New York City, Houston, and all of Florida) are within CBP's jurisdiction.

Statistics show that in Fiscal Year 2019, over 80,634 unaccompanied children were apprehended by CBP crossing the Mexico-U.S. border, but only 69,488 children were referred to ORR, including children who were not apprehended by CBP.⁶² Children from a bordering country, e.g., Mexico, will generally be sent back in a process called "voluntary return" if they do not present persecution or trafficking flags and will never see a judge or an attorney.⁶³ Advocates have reported that even when Mexican children present indicators of persecution or trafficking CBP routinely subjects them to voluntary return anyway and there is little oversight of CBP's actions at the border.⁶⁴ CBP plays a role that is similar to ICE by initially detaining and effectuating the removal of children.

⁶² U.S. Customs and Border Protection, *Southwest Border Migrations FY 2019*, <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last accessed Aug. 2, 2021); *UC Fact Sheet*.

⁶³ TVPRA § 235(a)(2)(B).

⁶⁴ See Young Center for Immigrant Children's Rights, *Border Screening for Children Has Failed* (Aug. 5, 2019), <https://www.theyoungcenter.org/stories/2019/8/5/current-border-screening-of-unaccompanied-children-from-mexico-has-failed-and-should-not-be-a-model-for-reform>.

B. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR)

In March 2003, DHS established that custody of “unaccompanied” immigrant children would be placed with the Office of Refugee Resettlement (ORR). ORR, which is a division of the U.S. Department of Health and Human Services, created “DCS”—the Division of Children’s Services—to detain unaccompanied children pending the conclusion of the immigration case or release to a caretaker or “sponsor.”⁶⁵ DHS, through ICE, continued to retain control and oversight of “accompanied” immigrant children. Immigration law defines “unaccompanied,” but not “accompanied” children. See **Chapter 18** for discussion on this classification.

ORR is tasked with taking into account the unique nature of each child’s situation in making placement and release decisions, though in recent years this has been called into question.⁶⁶ The agency is mandated to develop a plan to ensure timely appointment of legal representation for children in its custody (although in practice many children do not receive legal representation in their removal proceedings).⁶⁷ It also works towards reunifying all children in their custody with family members or other close friends where possible.

ORR, like ICE, also has a role working with referring agencies such as the juvenile justice system. Although minors from the juvenile justice system are often detained upon arrest by ICE or CBP, ORR’s stated priority is to reunify all children with family members where possible, regardless of their record. Unfortunately, advocates currently report long delays in release for youth in secure ORR custody who may have a juvenile record or otherwise be accused of bad acts such as gang affiliation. In order to get reunification approved, social workers working with the youth must ensure that they will comply with their probation terms, participate in rehabilitative and other support programs when released into the community, and not reoffend. This requires working with probation officers to ensure that they know and are cooperating in the youth’s re-entry into the community.

Tension between DHS (ICE) and HHS (ORR): Conflicting federal directives. As noted above, the missions of DHS and ORR are fundamentally at odds with one another and dictate the level of attention paid to the safety and well-being of immigrant children and youth in each agency’s respective custody. DHS’s mission (through its divisions of ICE and CBP) is to enforce immigration laws to ensure the departure from the United States of all removable noncitizens, including unaccompanied youth. For that reason, DHS, at the front end, often encourages the reporting of noncitizen minors for deportation. On the other hand, ORR’s mission through its Administration for Children and Families is to “foster health and well-being by providing federal

⁶⁵ Women’s Refugee Commission and Orrick Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody* 1 (Feb. 2009), <https://www.womensrefugeecommission.org/research-resources/halfway-home-unaccompanied-children-in-immigration-custody/> [hereinafter *Halfway Home*].

⁶⁶ See, e.g., *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017) (finding that all children in ORR custody have the right to request a *Flores* “bond” hearing before an immigration judge, which allows the child to advocate for placement in a less restrictive setting and to inspect the evidence that ORR may be using against the child to determine that they are dangerous).

⁶⁷ *Halfway Home*, at 14.

leadership, partnership and resources for the compassionate and effective delivery of human services.”⁶⁸ Unfortunately, ORR has increased its cooperation with DHS in recent years, taking on more of an enforcement role. In April of 2018, ORR entered into a Memorandum of Agreement with ICE under which ORR shared sensitive information, including names, fingerprints, addresses, and phone numbers, on the children’s parents or sponsors.⁶⁹ This Memorandum of Agreement was superseded on March 11, 2021, by a new agreement. Although the new agreement, reprinted in, does not require the same degree of information sharing, it does not expressly protect sensitive information from being shared with ICE either.

This ongoing tension between the dual goals of taking care of children and enforcing federal laws against them is due to the divided structure of the immigration system for children and youth as well as conflicting laws and policies. DHS exerts significant influence over the treatment of undocumented children who arrive or are initially arrested in the United States. Because DHS is the “gatekeeper,” it has the power to exercise its authority in ways that are not in the child’s best interest. For example, even though the Homeland Security Act clearly intended that ORR become the legal custodian for “unaccompanied” children, in some instances, DHS has continued to retain custody of this category of children. See **Chapter 18** on detention.

To compound this problem, there are conflicting directives from Congress and the Executive Branch. The immigration laws for young people passed by Congress, such as the TVPRA, have been more encompassing and protective of children’s rights as compared to adults. At the same time, subsequent presidential administrations have taken a hardline enforcement approach to immigrant youth, including expediting court hearings, discouraging youth from applying for relief, building more detention facilities and processing centers, increasing border militarization, urging Central American governments to block people from journeying north, and narrowing eligibility for immigration status for young people;⁷⁰ all in an effort to stem the flow of migration, despite ample evidence that a majority of young people arriving unaccompanied to the United States qualify for and are in need of international protection.⁷¹

C. Department of Justice, Federal Circuit Court of Appeals, and the U.S. Supreme Court⁷²

Although the Homeland Security Act transferred many of the Attorney General’s (AG) immigration functions to the Department of Homeland Security (DHS), the AG still retains the power to make definitive determinations on questions of law and to review many DHS decisions.

⁶⁸ U.S. Department of Health and Human Services, Office of Refugee Resettlement, Administration for Children and Families, *ACF Vision, Mission, and Values*, <https://www.acf.hhs.gov/about/acf-vision-mission-values>.

⁶⁹ Eli Hager, *Trump’s Quiet War on Migrant Kids*, The Marshall Project (May 1, 2018), <https://www.themarshallproject.org/2018/05/01/trump-s-quiet-war-on-migrant-kids>.

⁷⁰ See, e.g., *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018) (seeking to limit the instances of private persecution that can qualify an applicant for asylum); Liz Robbins, *A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade*, New York Times (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>.

⁷¹ *Children on the Run*, at 6.

⁷² Thanks to Ann Benson for providing much of the original material in this section.

More importantly, the Executive Office for Immigration Review (EOIR), which consists of the immigration courts and the appellate body that reviews their decisions, the Board of Immigration Appeals (BIA), remains under the jurisdiction of the U.S. Department of Justice, headed by the AG. EOIR has the authority to review many DHS decisions, but the AG has the power to overrule decisions made by EOIR. Unfortunately, this can allow the immigration courts to be yet another political branch of the government. Attorneys General under the Trump administration repeatedly used this power to overrule key agency decisions to narrow eligibility for immigration relief,⁷³ and undermine the authority of judges to continue, administratively close, or otherwise exercise discretion in individual immigration cases.⁷⁴ These decisions have spurred renewed calls from immigration judges and advocates to Congress to create an independent judicial court system for immigration cases.⁷⁵

EOIR is composed of the immigration courts and the BIA. While USCIS oversees most applications, the immigration courts oversee judicial decisions regarding the immigration process as well as applications filed in court. ICE, USCIS, or the CBP arrest an individual and initiate formal “removal” (deportation) proceedings. These proceedings occur in immigration court and are presided over by an immigration judge (IJ). The IJ determines whether the noncitizen should be ordered removed from the United States or, if they qualify, be granted “relief from removal” and permitted to remain.

All noncitizens, as well as the government, have the right to appeal decisions of the IJ to the BIA. The BIA is located in Falls Church, Virginia, and is currently comprised of twenty three Board Members, including a Chairman and Vice Chairman,⁷⁶ who have the power to issue decisions that are binding on all immigration judges, as well as ICE, USCIS, and CBP throughout the country. Information on EOIR and the BIA can be found online at <https://www.justice.gov/eoir>.

The federal circuit courts of appeal (federal appellate courts) have the power to review decisions made by the BIA. The federal circuit wherein the case arose (i.e., where removal proceedings were concluded) will have the power to review the BIA decision (regardless of the physical location of the noncitizen at the time the appeal is filed).⁷⁷ Federal legislation passed in 1996 placed significant limitations on the powers of the appellate courts in relation to immigration appeals. However, despite these limitations, immigration appeals remain the largest category of cases in many federal appellate courts. Decisions of the federal circuit courts of appeal are binding on the BIA, the immigration judges, ICE, USCIS, and CBP within that circuit.

⁷³ See, e.g., *Matter of A-B-*, 27 I. & N. Dec. 316 (AG 2018) (seeking to limit the instances of private persecution that can qualify an applicant for asylum), vacated by *Matter of A-B-*, 28 I. & N. Dec. 307 (A.G. 2021).

⁷⁴ See, e.g., *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (AG 2018) (limiting the reasons immigration judges can issue continuances in immigration cases).

⁷⁵ See, e.g., American Immigration Lawyers Association, *Stop the Corruption of USCIS and EOIR Missions: Ensure Fairness and Consistency in All Immigration Decisions*, Aug. 1, 2018, <https://www.aila.org/advo-media/tools/advocacy-made-easy/stop-the-corruption-of-uscis-and-eoir-missions>.

⁷⁶ BIA, *Board of Immigration Appeals Practice Manual* (Mar. 23, 2018), <https://www.justice.gov/eoir/page/file/1079696/download>.

⁷⁷ INA § 242(b)(2).

Either party (the government or the noncitizen) can file a petition requesting the U.S. Supreme Court to review a decision by the federal appellate court. However, unlike the BIA or the federal appellate court, this is not an “appeal of right” (i.e., one that the court is required to hear), but rather is discretionary. The Supreme Court only agrees to review a fraction of the cases it is requested to hear. However, decisions issued by the Supreme Court are binding on every U.S. court and agency.

Special note on USCIS Administrative Appeals Office (AAO) decisions. When an application is denied by USCIS, there is an administrative appeals process. The body that handles these appeals is the Administrative Appeals Office (AAO). Often, decisions regarding SIJS will appear as AAO decisions. See example at **Appendix E**. CLINIC’s “Index of Unpublished Administrative Appeals Office Decisions on Special Immigrant Juvenile Status” is a valuable resource to help assess a potential appeal of an SIJS denial.⁷⁸

D. U.S. consulates

U.S. consulates are part of the Department of State, and at least one U.S. consular office exists in most foreign countries. U.S. consulates play a primary role in the processing and issuance of U.S. visas to foreign nationals who wish to come to the United States and qualify under some type of legal avenue to do so, such as student visas, tourist visas, employment visas, or refugee visas. Family members who are immigrating to the United States and foreign workers coming to work for companies in the United States all must have their visas issued by a U.S. consulate.

§ 1.4 Immigration Legal Provisions

A. Immigration and Nationality Act and accompanying regulations and memoranda

Immigration law is controlled by a federal law—the Immigration and Nationality Act (INA). The INA appears at Title 8 of the United States Code (USC), 8 USC § 1101 *et seq.* Corresponding regulations to the INA are contained in Title 8 of the Code of Federal Regulations (CFR) § 1.1 *et seq.* These regulations interpret the meaning of the INA and set procedures for implementation. They are written by the governmental agency that implements them. Whereas the INA says what the law is, the regulations fill in a lot of details about how the DHS immigration agencies apply the laws. The INA and immigration regulations are on USCIS’s website at <https://www.uscis.gov/> under “Laws.”

Finally, there are memoranda or internal operation instructions written and issued by the various federal agencies who work with immigrants. These are internal instructions to the employees of the agency. Their purpose is to instruct the agency employees on agency protocol and practice. Some are numbered and issued in a collection in books, for example, the Foreign Affairs Manual of the Department of State (which can be accessed online at <https://www.state.gov/>) and the USCIS Policy Manual (which can be accessed on the USCIS website at <https://www.uscis.gov/>, and has special sections on SIJS and SIJS-based adjustment of status at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6.html> and <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartF-Chapter7.html>). Other times they are issued through policy memoranda authored by a government agency, many of which also can be accessed on the USCIS website at <https://www.uscis.gov/> under “Laws.”

⁷⁸ You can request the index online at <https://cliniclegal.org/issues/defending-vulnerable-populations/sijs-aao-index>.

B. Cases

The case law governing immigration includes decisions written by various courts, from the BIA to the federal appellate courts to the U.S. Supreme Court. For better or worse, there are not many published cases regarding immigration issues for children and youth from the BIA or federal courts, although there is an emerging body of federal case law on SIJS.⁷⁹ The cases that do exist carry equal legal weight to statutes and regulations. In fact, cases can sometimes be more powerful than statutes and regulations because the cases can define and even overturn statutes and regulations. One such case relevant to children is *Perez-Olano v. Gonzalez*, a case that brought claims against USCIS for overstepping its authority by imposing additional SIJS requirements in regulations that were not stated in the statute. This case was resolved via settlement agreement in late 2010⁸⁰ and supersedes all “practices, policies, procedures and federal regulations to the extent they are inconsistent with the [Settlement] Agreement,” although it has now sunset.⁸¹ See discussion in **Chapter 4**.

NOTE: The Flores settlement agreement. One important case concerning the detention of unaccompanied children is the *Flores* settlement.⁸² The settlement arose from a lawsuit filed by advocates in 1985 in response to the INS detaining children in unsafe and unsuitable conditions.⁸³ The resulting settlement reached in 1997 applies to all children in detention and requires the government to release children as soon as possible and to place them in safe, clean, and appropriately licensed detention facilities.⁸⁴ A 2001 stipulation allows the government to publish final regulations that implement and terminate the agreement as long as they are consistent with the substantive terms and spirit of the settlement.⁸⁵ In 2019, the Trump administration attempted to end *Flores* by issuing new regulations.⁸⁶ Advocates challenged these regulations pointing out that they were inconsistent with the terms of the settlement, and the District Court overseeing the settlement permanently enjoined them and blocked the government from terminating the agreement.⁸⁷ The government appealed to the Ninth Circuit Court of Appeals, which in December 2020 affirmed in part and reversed in part the District Court’s ruling.⁸⁸ For additional information on the Flores regulations, see **Chapter 18**. As of this writing, the Flores settlement agreement remains in effect.

⁷⁹ See, e.g., *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018); *Budhathoki v. Nielsen*, 898 F.3d 504 (5th Cir. 2018); *Osorio-Martinez v. Att’y Gen.*, 893 F.3d 153 (3d Cir. 2018).

⁸⁰ Settlement Agreement in *Perez-Olano, et al. v. Holder, et al.*, No. CV 05-3604, (C.D. Cal. Dec. 14, 2010), http://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf [hereinafter *Perez-Olano Settlement Agreement*].

⁸¹ *Id.* at 5-6.

⁸² *Flores v. Reno*, CV 85-4544 (C.D. Cal. Jan. 17, 1997).

⁸³ See Kids in Need of Defense, *Flores Settlement Agreement: Why is the Administration Proposing New Regulations*, (Sept. 19, 2018), https://supportkind.org/wp-content/uploads/2019/11/FloresProcedureFactSheet_9.19.18.pdf.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 84 Fed. Reg. 44,392 (Aug. 23, 2019).

⁸⁷ *Flores v. Barr*, CV 85-4544 (C.D. Cal. Sept. 27, 2019).

⁸⁸ *Flores v. Rosen*, 984 F.3d 720 (9th Cir. 2020).

C. **Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008**

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) was signed into law on December 23, 2008. This legislation was designed to bolster federal efforts to combat trafficking and, in the process, to provide critical protections for the tens of thousands of unaccompanied children who come to the United States each year. The law seeks to create better screening of unaccompanied children who may be survivors of trafficking or who may fear return to their home country, safer repatriation of any child removed from the United States, more compassionate environments for children in immigration custody, and broader legal protections and access to services for them. The TVPRA has been repeatedly challenged and criticized, including by the former Trump administration, but unless or until it is overturned by an act of Congress, the TVPRA remains good law.

In the past, unaccompanied children were detained in overly secure facilities in immigration custody, afforded little legal representation in immigration proceedings, and often returned to their home countries with virtually no safeguards. The TVPRA created a multi-agency response to address these problems by recognizing the enormous vulnerability of these youth and providing special services tailored to their needs. A core tenet of the TVPRA's changes to the treatment of unaccompanied minors is its emphasis on the child welfare principle of the "best interests of the child."

Screening and repatriation. The TVPRA creates mandatory screening of children brought into federal custody at the border to determine whether they are survivors of trafficking or fear persecution. If the child is to be repatriated, the law provides a pilot repatriation program that works with Health and Human Services (HHS), the Department of State (DOS), and the Department of Homeland Security (DHS) to develop and implement best practices for safe-repatriation and reintegration of youth to their home countries.⁸⁹ The agencies are required to report to Congress with data on minors removed from the United States—including age, gender, country of origin, and types of immigration relief requested.

Detention. The TVPRA also provides that children be placed in the least restrictive setting that is in "the best interest of the child" and prohibits children from being placed in secure facilities unless a determination has been made that the child poses a danger to themselves or others or has been charged with having committed a criminal offense. For children ultimately placed in secure detention facilities, HHS must review such placement on a monthly basis.

Legal access. The TVPRA expands legal access for unaccompanied children by requiring "to the greatest extent practicable" that they have legal representation and authorizing HHS to appoint independent child advocates for trafficking survivors and other vulnerable unaccompanied children.⁹⁰ For years following the implementation of the TVPRA, this was limited to the provision of pro bono legal representation for a small number of children, but did not result in representation in the vast majority of cases. More recently, ORR began pilot programs in Houston, Texas and Los Angeles, California to provide legal representation for a limited number of unaccompanied children after their release from detention. This program was then expanded to provide legal representation in nine cities for unaccompanied children who meet certain other criteria.⁹¹

⁸⁹ TVPRA § 235(a)(5).

⁹⁰ TVPRA § 235(c)(5)–(6).

⁹¹ See ORR, *Services Provided*, <https://www.acf.hhs.gov/orr/about/ucs/services-provided>.

The TVPRA also expanded the category of young people eligible to apply for SIJS. The legislation also exempted unaccompanied children from the one-year filing deadline for asylum applications and allowed them to apply for asylum with USCIS in a non-adversarial system, rather than in front of an immigration judge in a courtroom. However, recent BIA precedent and USCIS policies have eroded these protections. Further, the TVPRA provides no-cost voluntary departure for unaccompanied children who wish to return to their home country.

While many advocates point out that the TVPRA still falls short of offering the types of legal protections that immigrant children need, and the implementing regulations have never been issued, its importance cannot be understated. However, in order to have access to its protections, children need to be identified as children. If you have a client who is a child or youth who has been mistakenly identified as an adult, correct this classification with the appropriate agency (DHS if the child is in custody, EOIR if the child is in court) as soon as possible.

Determining if and when a child is “unaccompanied,” for purposes of obtaining TVPRA protections. The TVPRA’s critical protections described above apply to “unaccompanied” minors in the United States. The term “unaccompanied alien child” (abbreviated as “UAC” in legal sources and as “UC” here) is defined as a child who has no lawful status in the United States, is under the age of eighteen, and has no parent or guardian in the United States or no parent or legal guardian in the United States who is available to provide care and physical custody.⁹²

Currently, while both the TVPRA and Homeland Security Act of 2002 are ambiguous as to who has jurisdiction to make the “unaccompanied” child determination, in practice, it has been made principally by CBP and ICE, and to a lesser extent ORR, EOIR, and USCIS. Unfortunately, interpretation of the term “unaccompanied,” has varied amongst these agencies and consequently, has led to inconsistent determinations. This confusion has sometimes resulted from the various shifts of a child’s physical custodial status (for example, release from ORR custody into the custody of a parent or non-parent sponsor). Additional issues around the unaccompanied child determination can also arise from the interpretation of a parent or legal guardian “available to provide care and custody.” For example, a child may have parents in the United States who may not want to live with the child because the parent and the child are estranged. Further, many children living with their parents are apprehended in the United States without their parents and their parents do not come forward out of fear for their own deportation. However, many of these parents are able and willing to provide care and custody. Nonetheless, many of these children are classified as “unaccompanied.”

Jurisdiction and interpretation of the term “unaccompanied.” The TVPRA created important procedural protections for child asylum applicants classified as “unaccompanied” (UC) including that USCIS has initial jurisdiction over *any* asylum application filed by a UC applicant, even if they are in removal proceedings.⁹³ The issue of who has authority to determine UC status, when that determination should be made, and whether it can be re-assessed has been the subject of much disagreement. In 2013, USCIS issued a policy memorandum changing its approach to UC

⁹² 6 USC § 279(g)(2).

⁹³ See INA § 208(b)(3)(C). Most, but not all UCs are in removal proceedings.

asylum cases, known as the “Kim Memo.”⁹⁴ Under the Kim Memo, asylum offices must rely on a previous determination by CBP or ICE that an applicant is a UC, without making a separate factual inquiry into the applicant’s age or unaccompanied status, and take jurisdiction over the asylum application. The one exception to this policy is where there has been an affirmative act to terminate UC status by a federal agency before the filing of the asylum application. USCIS attempted to rescind the Kim memo, which advocates challenged in *JOP v. DHS*, which is currently pending.⁹⁵ The district court has issued an injunction that requires USCIS to continue to use the Kim Memo to determine jurisdiction over a UC claim. This means that if an applicant has previously been designated a UC and has not been affirmatively de-designated, the asylum office must take jurisdiction over their application. For additional information on UC asylum jurisdiction, see § 12.5.

Timing. The unaccompanied determination can be made at any time in the process of a child’s case, but in the vast majority of cases, it is made during the initial apprehension by DHS because the TVPRA requires that DHS refer an unaccompanied minor to HHS custody within seventy-two hours of apprehension. If a previous determination of unaccompanied status has not been made, asylum offices will make determinations at the time the child files their asylum application.⁹⁶

Rescission of TVPRA protections based on change of unaccompanied minor classification. Advocates should argue that the protections of the TVPRA, once triggered, cannot be taken away from a child. The TVPRA’s retroactivity and effective date provide that the statute shall apply “to all [noncitizens] in the United States in pending proceedings” before DHS or EOIR or administrative or federal appeals, “on the date of the enactment of this Act.” With this language, advocates should argue that Congress provided TVPRA protections to all persons who have cases still pending regardless of whether they still meet the definition of an unaccompanied child.

§ 1.5 Grounds of Inadmissibility and Deportability and Waivers

A. Grounds of inadmissibility (formerly grounds of exclusion)

Grounds of inadmissibility, found in INA § 212(a), were developed to identify the kinds of persons whom Congress did not want to admit to the United States. Whenever any noncitizen attempts to enter the United States, that person is subject to being barred from admission based on these categories. Before April 1, 1997, the grounds of inadmissibility were referred to as the grounds of exclusion.

Example: Jaime, an unaccompanied minor, is attempting to enter the United States from Mexico. DHS determines that Jaime does not possess a valid unexpired immigrant visa, reentry permit, border crossing identification, or other valid entry document. Jaime may be found inadmissible and refused admission, unless DHS determines that he is a victim of trafficking or has a credible fear of persecution.

⁹⁴ U.S. Citizenship & Immigration Services, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> (hereinafter “Kim Memo”).

⁹⁵ *JOP v. DHS*, 8:19-cv-01944 (D. Md.) (filed Jul. 1, 2019).

⁹⁶ *See id.*

The grounds of inadmissibility do not only apply at the border. Noncitizens already in the United States must prove that they are not inadmissible in order to qualify for many immigration benefits, including SIJS, immigration through a family visa petition, U or T nonimmigrant status, and temporary protected status. Fortunately, some immigration options for children and youth provide exemptions from certain grounds of inadmissibility. The exemptions depend on the form of relief for which the child is applying. Even if the child is inadmissible, there may be broad waivers for inadmissibility available to them.

Example: Tariq, who is sixteen years old, has lived in the United States for five years with no lawful status. He was abused by his mother and abandoned by his father and consequently, he entered the child welfare system as a dependent. Despite the fact that Tariq falls within several grounds of inadmissibility including being likely to become a public charge and being present in the United States without being admitted, he is still eligible to apply for SIJS because these grounds are automatically exempted for SIJS applicants.

Chapters 5 and 17 provide a more thorough discussion of some of the grounds of inadmissibility.

PRACTICE TIP: Many children and youth are eligible for forms of relief that exempt them from certain grounds of inadmissibility or allow them to apply for special waivers of inadmissibility. You should check the requirements for each form of immigration relief carefully.

B. Grounds of deportation

The grounds of deportation provide bases for expelling persons from the United States once they have been admitted. Some grounds of deportation are similar, although not identical, to corresponding grounds of inadmissibility. The grounds of deportation are found in INA § 237(a).

Example: Monique is a lawful permanent resident (“green card” holder). At the age of nineteen she becomes deportable after she is convicted in adult criminal court of domestic violence. If Monique is placed in removal proceedings, an immigration judge can find her deportable and order her removal. She would lose her permanent resident status and be forced to leave the United States. (Note: If Monique’s criminal case was handled in juvenile court proceedings instead, she would not be deportable under this ground because it requires a conviction, and juvenile delinquency adjudications are not considered convictions for immigration purposes. See **Chapter 17**.)

A discussion of some of the grounds of deportability is in **Chapter 17**.

C. Waivers of inadmissibility and deportability

Some grounds of inadmissibility and deportability can be waived under certain circumstances, at the discretion of an immigration judge, USCIS, or consular officials. Children and youth may have special waivers available to them depending upon the form of immigration relief for which they are applying and the act that they committed. Waivers are granted as a matter of discretion.

The law governing which grounds may be waived and what standards apply may be located in the same sections of the Immigration and Nationality Act as the grounds of inadmissibility or deportability. Other waivers may be set forth in the law governing the specific form of immigration relief for which the person is applying. Waivers for each form of relief are discussed in their respective chapters.

D. When do the inadmissibility and deportability grounds apply?

While this area is complex, and each case must be individually researched and analyzed, there is a fairly simple way to visualize which grounds might apply in which circumstances. A noncitizen who wants to get something from the immigration authorities generally must be admissible. For example, if children want to be admitted at the border or obtain legal status, i.e., a green card, they generally will need to overcome the grounds of inadmissibility. *Issues about the grounds of inadmissibility are usually what will affect undocumented children and youth the most.*

By contrast, a noncitizen child or youth who has some lawful immigration status and is trying not to lose it will face the grounds of deportation. A lawful permanent resident (LPR) who is deportable can be placed in removal proceedings and removed, at which time the LPR will lose permanent resident status. On the other hand, an LPR who is inadmissible but not deportable can afford to sit tight. As long as the LPR does not leave the country (and therefore might have to apply to re-enter) and does not want to apply for any new benefit, such as U.S. citizenship, the fact that they have committed some act causing them to be inadmissible (but not deportable), will not cause them to lose the immigration status that they have: it may just block them from getting anything new.

Analogy: The family dinner. Think of the United States as a family having dinner, when a stranger comes to the door claiming to be a long-lost cousin. The many questions that would be asked and strict standards that would be applied to the stranger before they are admitted to the house are like the grounds of inadmissibility. Once the stranger has been admitted to dinner, they probably would not be told to leave unless they behaved very badly (or it was discovered that they committed fraud to get in). This somewhat more generous standard represents the grounds of deportability.

WARNING! It is important that advocates individually analyze each case. Some immigration applications have requirements beyond not being deportable or inadmissible. For example, an application for Violence Against Women Act (VAWA) or naturalization requires that the person possess good moral character. Some other immigration applications, such as DACA, do not necessarily require that the client not be deportable or inadmissible, but have entirely separate criteria.

§ 1.6 Overview of the Immigration Process for Young People

A. The affirmative immigration process

The affirmative immigration process generally involves an application for an immigration benefit, such as SIJS, asylum, and/or lawful permanent residence, for which a person may be eligible. Many immigration applications are submitted to U.S. Citizenship and Immigration Services (USCIS). The process generally involves submitting an application packet to USCIS, attending a

biometrics appointment for youth over a certain age (a background check), attending an interview if scheduled, possibly submitting any additional documentation needed by USCIS, and then issuance of a decision by USCIS. The processes for applying for the different forms of relief covered in this manual are provided in their respective chapters.

Applying affirmatively for a form of immigration relief confers several benefits, including providing enough time to develop a strong case, allowing the youth to have their application adjudicated in a less adversarial setting, and having greater control over the case overall, i.e., the information submitted and considered. The risk of submitting an affirmative application (that is, for a child or youth who is not in removal proceedings), however, is that if it is denied and the child has no other way to immigrate, ICE could place the child in removal proceedings and try to deport them. The risk of being placed in removal proceedings must be considered and factored into the decision whether or not to submit an immigration application.⁹⁷ By applying for any form of immigration relief affirmatively, youth are making themselves known to DHS.

One downside for immigrant young people who are not in removal proceedings is that they may not realize that they need to, and are eligible to, apply for immigration relief until they are already too old for some of the relief options specifically for youth. Remember to tell your clients that any undocumented younger siblings or family members will also need immigration relief, and could benefit by applying sooner rather than later.

B. Removal (or deportation) proceedings

1. Overview

Immigrant children and youth in the deportation process face overwhelming obstacles. They are held to the same standard of proof as adults in fighting their deportation. They are provided with very little information about their legal rights, such as viable defenses against deportation, for which many of them are eligible. They often do not understand the nature of the proceedings due to age, language and cultural barriers, and lack access to counsel.

Some improvements have been made, however, to these processes for children and youth. Unaccompanied children and youth in ORR custody are significantly more likely to receive representation due in part to federal, state, and local efforts to increase representation of unaccompanied children. There is also a program in a limited number of jurisdictions, run by the Young Center for Immigrant Children's Rights, to provide child advocates, similar to guardians *ad litem*, to particularly vulnerable youth in custody.⁹⁸ The TVPRA also promotes greater access to legal counsel for unaccompanied immigrant children, encourages the appointment of child advocates for trafficking survivors and other vulnerable children, and requires specialized training of federal officials who work with unaccompanied immigrant children.⁹⁹

⁹⁷ See USCIS, PM-602-0050, *Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens* (Nov. 7, 2011), <https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf>.

⁹⁸ For more information, see Young Center for Immigrant Children's Rights, *Child Advocate Program*, <https://www.theyoungcenter.org/child-advocate-program-young-center/>.

⁹⁹ TVPRA § 235(c)(5)–(6); TVPRA § 235(e).

Ultimately, what happens to a young person in removal proceedings will depend on various factors including: whether they are considered accompanied or unaccompanied as defined by immigration laws, where they are apprehended by immigration authorities, and the individual circumstances of their situation, including prior immigration and delinquency history, if any. This section will provide the authority for and standards governing removal proceedings and describe generally what happens to minors in the removal (or deportation) process once they have been apprehended. A map of the deportation process for children and youth is provided at **Appendix B**. An in-depth discussion of the apprehension/arrest phase and detention process is covered in **Chapter 18**.

2. Removal proceedings: Admission and the burden of proof

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 created removal proceedings. A removal proceeding is the court process that determines whether someone will be removed (also called deported) from the United States. Removal proceedings are initiated when DHS files a Notice to Appear (in other words, a charging document).¹⁰⁰ In removal proceedings, DHS may charge noncitizens with being inadmissible¹⁰¹ or deportable.¹⁰² Generally only those noncitizens who have been “admitted” to the United States will face the grounds of deportability in removal proceedings. Those who entered without inspection will face the grounds of inadmissibility.

Thus, a key question in removal proceedings is whether the person has been **admitted** into the United States. To be considered admitted, a person must have made a “**lawful entry ... after inspection**” by a DHS officer.¹⁰³

Noncitizens who entered the United States with inspection, pursuant to a visa of some kind, have been **admitted**. If the DHS brings them into removal proceedings, *the DHS has the burden of proving that the individual comes within a **ground of deportability***.

Noncitizens who have not been lawfully admitted into the United States are **seeking admission**. If challenged and placed in removal proceedings, *these people have the burden of proving that they do not come within one of the **grounds of inadmissibility***. In some cases, the persons simply have no immigration documents and are removed for being inadmissible on that basis. In other cases, they may be inadmissible for other reasons.

Who has not been admitted, and therefore is still seeking admission and is subject to the grounds of inadmissibility? Noncitizens who:

- Entered the United States without inspection—for example, avoided a DHS checkpoint by wading across the Rio Grande River from Mexico with a smuggler or *coyote*;
- Arrived at the border or a port of entry hoping to be admitted but who are stopped and challenged by DHS;

¹⁰⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 304(a)(3), 110 Stat. 3009–546, 3009–587 (1996). IIRIRA applies to proceedings on or after April 1, 1997; before then, deportation proceedings were initiated by an Order to Show Cause. *See id.* at § 309(c)(1).

¹⁰¹ INA § 212(a). IIRIRA renamed the former grounds of “exclusion” the grounds of “inadmissibility.”

¹⁰² INA § 237(a). Under IIRIRA, INA § 237 replaced former INA § 241 grounds of deportation.

¹⁰³ INA § 101(a)(13).

- Are parolees;¹⁰⁴ or
- Are crewmen.¹⁰⁵

A different rule applies to lawful permanent residents who travel abroad and return to the United States. Returning permanent residents are presumed *not* to be seeking admission, *unless* they come within certain exceptions set out in the statute.¹⁰⁶

There are a few types of removal proceedings. For purposes of children and youth, there are two primary removal procedures with which advocates should be familiar. A noncitizen can be ordered removed by an immigration judge as described in **Subsection 3** below. A person can also be removed through voluntary return by agreeing to withdraw their application for admission. This often occurs at the border, although unaccompanied youth, under the TVPRA, should not be voluntarily returned unless they are from a contiguous country and there are no trafficking concerns or fear of return. Voluntary return should not be confused with voluntary departure, which is a formal order granted by ICE or EOIR to qualifying immigrants in lieu of a removal order. See **Chapter 16**.

3. *The removal process*

Removal proceedings against an individual start when an immigration official issues a document called a Notice to Appear (NTA), files it with the immigration court, and gives a copy to the individual.¹⁰⁷ Often the person is arrested first and then receives the NTA. The person against whom the NTA is issued is called the **respondent** (the person who responds to the charges). The regulations implementing the removal procedures are found at 8 CFR §§ 239, 240, 1239, and 1240.

Generally, the process for removal proceedings is as follows:

1. **Arrest and detention.** A person can be **arrested and detained** by an immigration official (usually a CBP or ICE official) on suspicion of not having lawful immigration status, or of having received a conviction that makes the person deportable. After the arrest, the official will interview the person. DHS is required by law to provide a notice of rights to children and youth. Nevertheless, few children understand what this interview is about, and information they disclose is often used against them. See **Chapter 18** on apprehension/arrest.
2. **The Notice to Appear.** The Notice to Appear (NTA) is the formal legal document that charges the person with being removable. In the NTA, the government must state specific facts that show (1) the person is not a U.S. citizen and what their alleged country of citizenship is, (2) the acts or conduct that are allegedly in violation of the law, (3) the legal authority under which the government is conducting the proceedings, and (4) the provisions of the law that the person allegedly violated. The NTA must also contain the time and date of the hearing in a single document.¹⁰⁸

¹⁰⁴ See INA § 101(a)(13)(B).

¹⁰⁵ *Id.*

¹⁰⁶ See INA § 101(a)(13)(C).

¹⁰⁷ Certain designated officials of USCIS, CBP, and ICE have the authority to issue a Notice to Appear. See 8 CFR § 239.1(a).

¹⁰⁸ *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Niz Chavez v. Garland*, 141 S. Ct. 1474 (2021). This has been the subject of much recent litigation and is an evolving area of law.

Example: In Gabriela’s case, the NTA will state that Gabriela is a citizen of Mexico and not a U.S. citizen. It will state that Gabriela entered the United States without inspection in June 2017 near Calexico, California. (Gabriela herself gave the immigration officer all of this information when she was arrested.) Based on these factual allegations, the NTA will charge Gabriela with being present in the United States in violation of the Immigration and Nationality Act and thus removable.

The government must **serve** the person with a copy of the NTA (give the person a copy). If the person is detained, the government may simply hand the person the NTA. If the person is not in detention, the government may serve the NTA by mail.¹⁰⁹

3. **The bond hearing.** Bond hearings are uncommon for children and youth. Children and youth who are deemed “unaccompanied” (under the age of eighteen and who do not have a parent or legal guardian who is willing or able to provide for their care and custody), will be in the custody of ORR. For these youth, there is often no bond hearing, but instead a reunification process facilitated by ORR with family members, or a transfer to long-term foster care. Nevertheless, the ORR reunification process is opaque, and in some instances, the youth may want a bond hearing in front of an immigration judge. Previously, ORR’s position was that it had exclusive authority over the release of immigrant youth in its custody. In 2017, the Ninth Circuit disagreed and found that all detained immigrant youth have a right to a bond hearing before an immigration judge.¹¹⁰ See **Chapter 18**. If the child or youth has been arrested and is considered “accompanied,” ICE Enforcement and Removal Operations may set an **immigration appearance bond** that the person (or a family member or friend) must post to secure the youth’s release from custody. ICE may also release the youth on their own recognizance, or subject to an ankle-bracelet monitoring program called Intensive Supervision Appearance Program (ISAP). If a bond is issued, it is supposed to guarantee that the person will come to future hearings and interviews. If the person does not show up, the person will lose the bond money. More information on the bond and release process for unaccompanied and accompanied youth is in **Chapter 18**.
4. **The master calendar hearing.** The next stage in removal proceedings is called the **master calendar** hearing. At this hearing, the person must respond to the charges on the NTA. The judge will most often rule on two questions:
 - a. Is the person really removable, as charged on the NTA? In other words, can ICE prove that the NTA charges are correct?
 - b. If so, should the person be removed, or can the person apply for some kind of **relief from removal or means of immigrating?**

If the child can apply for some relief (for example, adjustment of status), the judge may schedule another longer hearing to decide if the youth is eligible for the relief. In some cases, however, the judge may terminate (or end) proceedings for the youth to proceed with an immigration

¹⁰⁹ INA § 239(a)(1).

¹¹⁰ *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

application before USCIS; this happens in some jurisdictions, for example, when a youth has been approved for SIJS. If removal proceedings are not terminated, the judge may administratively close the case taking it off the court's active docket, grant a continuance, or schedule a longer hearing called the **merits hearing** or "individual hearing." The judge may also schedule a merits hearing if the person challenges removability and attacks the government's evidence as being insufficient.

If the person cannot apply for any relief, and does not request or qualify for **voluntary departure** instead of removal, the judge will issue a **final order of removal**. If the person does not challenge the removal order, ICE can remove the person to their country of origin. While the TVPRA provided for a pilot program for the safe repatriation of children, it remains unclear to what extent any of these practices have been implemented.

Voluntary departure. Voluntary departure is a form of discretionary relief that allows a person to depart the United States, instead of undergoing deportation or removal. The INA provides for a grant of voluntary departure at two distinct times. First, immigration authorities may grant pre-hearing voluntary departure prior to the conclusion of removal proceedings.¹¹¹ Second, the immigration judge may grant voluntary departure instead of removal at the conclusion of removal proceedings.¹¹² It is easier for the applicant to qualify for the type of voluntary departure that comes prior to the conclusion of proceedings. This fact unfortunately penalizes applicants who pursue relief.

Legally, departing voluntarily is different from and better than having an order of removal on one's record. A person who accepts voluntary departure is not subject to certain bars to re-entry triggered by orders of removal and therefore may be able to return to the United States if the person qualifies for immigration relief in the future. If the child or youth qualifies and is classified as a UC, then voluntary departure is available at no cost.¹¹³ If a child is considering voluntary departure in lieu of removal, it should only be requested if the child is actually going to leave the United States and/or the immigration judge denies relief and all appeals fail. Otherwise, the voluntary departure order will automatically convert into a removal order if the child fails to depart and the child will be subject to *additional* penalties that can bar immigration relief in the future.¹¹⁴ Voluntary departure is discussed in greater detail in **Chapter 16**.

5. **"Merits hearings" for relief.** If the person has a defense to removal, the judge may set the case over for another hearing on that defense, called a "merits hearing," or "individual hearing." The defense could be an attack on the facts or law set out in the NTA, and/or it could be an application for relief. At the conclusion of the merits hearing, the judge may either issue a decision in court or "reserve" the decision to give the judge time to prepare a written decision. If the person is ordered removed, the person may appeal the decision to the Board of Immigration Appeals (BIA). If the person is granted relief, ICE may appeal the decision to the BIA.

¹¹¹ INA § 240B(a)(1).

¹¹² INA § 240B(b)(1).

¹¹³ TVPRA § 235(a)(5)(D)(ii).

¹¹⁴ INA § 240B(d).

6. **Expedited removal process.** Under the TVPRA, unaccompanied children must be placed in removal proceedings under INA § 240 and therefore, should not be subject to expedited removal proceedings.¹¹⁵ Only in certain cases, such as when the youth is from a neighboring country and has been properly screened in accordance with the TVPRA, may the child be subject to voluntary return (withdrawal of their application for admission)—but even here, the child is not subject to expedited removal proceedings.¹¹⁶ A youth over eighteen years old, however, could be subject to expedited removal, as could an accompanied youth.

After deportation. Once a young person is deported, the government provides little to no resources to facilitate reunification with family members. Advocates have found that children are often dropped off at the border, in their home country’s capital, or with the country’s child welfare agency. The TVPRA attempted to change these practices and provided a pilot repatriation program that worked with several federal agencies to develop and implement best practices for safe repatriation and reintegration of youth to their home countries. However, on the ground, not much appears to have changed. Many children are dropped off far from home, and their relatives in the home country are often not alerted to when, how, where, or even that the children are returning home. The best time to address what will happen to your clients after they are deported is before they actually leave the United States. Try to identify and contact family members before your clients are deported, and prepare a plan with your clients for what to do upon their arrival.

PRACTICE TIP: Before you practice in any immigration court, read the governing regulations and the Immigration Court Practice Manual (ICPM). The ICPM may be found on the EOIR website at <https://www.justice.gov/eoir>. The ICPM contains the rules that the EOIR has made for practice in the local courts. They supplement the general regulations concerning practice in immigration courts, and include important filing deadlines. You must follow the general regulations and the ICPM rules or you may have procedural problems—including missed filing deadlines—that injure your case.

Immigration judges do still retain some discretion regarding setting, extending filing deadlines, motions practice, and other issues that may arise. If you have questions about local practice, you should speak with an experienced local practitioner. You can also call the immigration court clerk and/or the clerk of the immigration judge before whom your case is pending to clarify how the ICPM is being implemented locally or inquire about your case. If you have filed a motion that is time-sensitive, you can follow-up on the motion with a call to the judge’s clerk to ask about the timing on the decision.

¹¹⁵ TVPRA § 235(a)(5)(D)(i).

¹¹⁶ TVPRA § 235(a)(2)(B)(i).