

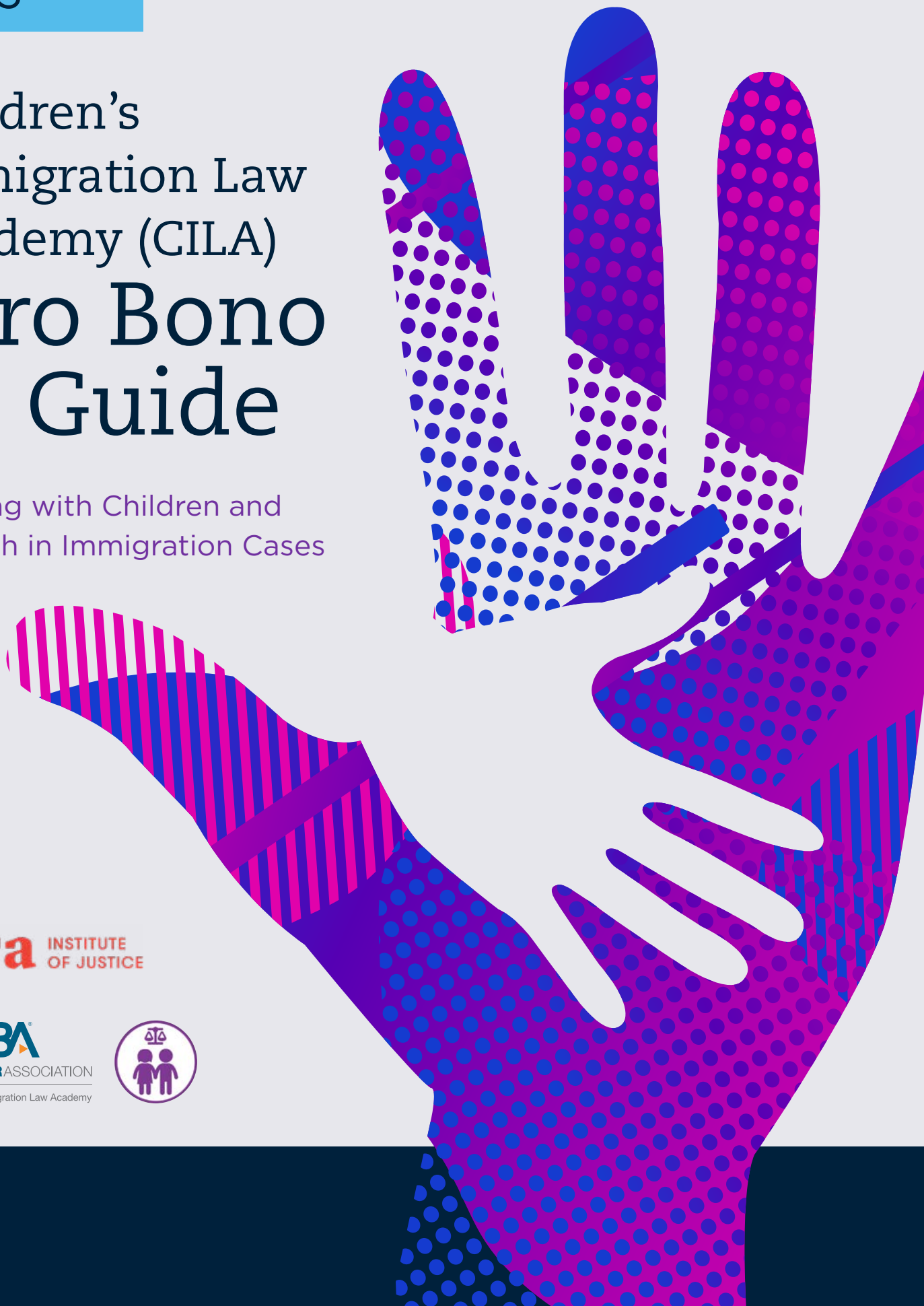
2023

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

Working with Children and  
Youth in Immigration Cases

**Vera** INSTITUTE  
OF JUSTICE

**ABA**  
AMERICAN BAR ASSOCIATION  
CILA Children's Immigration Law Academy



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

—MEREDITH LINSKY, DIRECTOR OF THE  
ABA COMMISSION ON IMMIGRATION

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Updated 2021 and 2023

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

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# GLOSSARY

## Common Acronyms and Forms

- A#: Alien number
- [AR-11](#): Alien's Change of Address Card (USCIS)
- CAT: Convention Against Torture
- CBP: Customs and Border Protection
- DHS: Department of Homeland Security
- DOJ: Department of Justice
- EAD: Employment Authorization Document
- ECAS: EOIR Courts & Appeals System
- EOIR: Executive Office for Immigration Review
- FOIA: Freedom of Information Act
- [Form EOIR-26](#): Notice of Appeal from a Decision of an Immigration Judge
- [Form EOIR-28](#): Notice of Entry of Appearance as Attorney or Representative before the Immigration Court
- [Form EOIR-33](#): Alien's Change of Address Form (EOIR)
- [Form EOIR-42B](#): Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents
- [Form EOIR-61](#): Notice of Entry of Limited Appearance for Document Assistance Before the Immigration Court
- [Form G-28](#): Notice of Entry of Appearance as Attorney or Accredited Representative (DHS)
- [Form G-639](#): Freedom of Information/Privacy Act Request
- [Form G-1055](#): Fee Schedule (USCIS)
- [Form I-130](#): Petition for Alien Relative
- [Form I-192](#): Application for Advance Permission to Enter as a Nonimmigrant
- [Form I-213](#): Report of Deportable/Inadmissible Alien
- [Form I-290B](#): Notice of Appeal or Motion
- [Form I-360](#): Petition for Amerasian, Widow(er), or Special Immigrant
- [Form I-485](#): Application to Register Permanent Residence or Adjust Status
- [Form I-589](#): Application for Asylum and for Withholding of Removal
- [Form I-765](#): Application for Employment Authorization
- [Form I-770](#): Notice of Rights and Disposition
- [Form I-862](#): Notice to Appear
- [Form I-912](#): Request for Fee Waiver
- [Form I-914](#): Application for T Nonimmigrant Status
- [Form I-914, Supplement A](#): Application for Family Member of T-1 Recipient
- [Form I-914, Supplement B](#): Declaration of Law Enforcement Officer for Victim of Trafficking in Persons
- [Form I-918](#): Petition for U Nonimmigrant Status
- [Form I-918, Supplement A](#): Petition for Qualifying Family Member of U-1 Recipient
- [Form I-918, Supplement B](#): U Nonimmigrant Status Certification
- HHS: Department of Health and Human Services
- ICE: Immigration and Customs Enforcement
- ICH: Individual Calendar Hearing (aka merits hearing)
- ICPM: Immigration Court Practice Manual
- IJ: Immigration judge
- INA: Immigration and Nationality Act
- LTFC: Long term foster care
- MCH: Master Calendar Hearing
- NBC: National Benefits Center
- NOID: Notice of Intent to Deny
- NOIR: Notice of Intent to Revoke or Rescind
- NTA: Notice to Appear
- OPLA: Office of the Principal Legal Advisor
- ORR: Office of Refugee Resettlement
- OTIP: Office on Trafficking in Persons
- PSG: Particular social group
- RFE: Request for evidence
- ROP: Record of Proceeding
- SIJS: Special Immigrant Juvenile Status
- TPS: Temporary Protected Status
- URM: Unaccompanied refugee minor
- USCIS: U.S. Citizenship and Immigration Services



# SECTION I.

# I. INTRODUCTION

## A. About CILA

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

CILA serves nonprofit, pro bono, and private sector legal advocates who work with children in immigration-related proceedings. CILA began operations in Houston, Texas in late 2015 in response to the thousands of children from Central America who surged across our Southern border fleeing prolific violence and abuse in their home countries and seeking humanitarian protections offered under U.S. law. Through our work, we hope to ensure more immigrant youth are represented and to provide the resources and expertise needed to support those who endeavor to represent them. In furtherance of this goal, in 2022, CILA expanded its technical assistance program nationwide and opened up more trainings and working groups to a national audience.

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

Should you or someone you know wish to make a donation to further our work, please visit: [https://www.americanbar.org/groups/departments\\_offices/fund\\_justice\\_education/donate/com-imm-cila/](https://www.americanbar.org/groups/departments_offices/fund_justice_education/donate/com-imm-cila/).

## Services and Resources

### TRAININGS

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

### PRO BONO

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

## RESOURCES

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

- **CILA's Website:** Resources can be found on CILA's website on the Online Library page and CILA's blog. Additional CILA resources can be accessed after [setting up an account](#). Contact CILA at [cila@abacila.org](mailto:cila@abacila.org) if you have questions about any CILA resources mentioned in this Guide.
- **Champions for Immigrant Youth:** CILA shares monthly updates via a newsletter with legal updates, resources, opportunities to connect and learn, as well as celebrations of the work of advocates. Advocates can sign up to receive the newsletter by completing this [survey](#).

## EMERGENCY SHELTERS

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

## CILA WORKING GROUPS & LISTSERVS

CILA hosts six working groups which meet virtually and create spaces for advocates from around Texas and the nation to connect with each other, share on-the-ground trends, and receive updates on major changes in the law. We host a quarterly meeting for six different issue areas: (1) Special Immigrant Juvenile Status (SIJS), (2) Houston SIJS, (3) children's asylum law, (4) detained unaccompanied children, (5) social services, and (6) pro bono coordination. Attorneys and staff at legal service providers, pro bono attorneys, and private attorneys are all encouraged to participate in one or more of the working groups. CILA also hosts four listservs on different topics: (1) Houston SIJS, (2) Texas children's immigration, (3) social services, and (4) pro bono coordination. To learn more about our working groups or to join one of CILA's listservs, please visit: <https://cilacademy.org/resources/community/>.

## TECHNICAL ASSISTANCE

CILA provides individualized technical assistance (TA) to legal advocates across the nation relating to specific case questions and issues. Legal TA requests can be made on CILA's website: <https://cilacademy.org/request-assistance/>. CILA also provides individualized TA related to the psychosocial service needs of children and youth. Requests for assistance may relate to best practices for working with children and survivors of trauma, assistance in identifying psychosocial needs, and available resources to assist in meeting those needs. Social services technical assistance can be made on CILA's website: <https://cilacademy.org/social-work-program/request-assistance-social-service/>.

## B. How to Use this Guide

This Guide is intended to help provide a background to pro bono attorneys representing children and youth in immigration cases. The legal definition for children facing removal from the United States alone in immigration cases is "unaccompanied alien child."<sup>1</sup> We follow the ABA's lead in using the terminology "unaccompanied child," to avoid the unintentional dehumanization of our clients. It is important to note,

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<sup>1</sup> In 2021, the Biden Administration ordered agencies to use more welcoming language and to no longer use the words "alien" or "illegal alien." Hamed Aleaziz, "Alien" Will Be Removed From An Immigration Policy Manual Under A Biden Administration Plan, BuzzFeed News (Mar. 30, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/alien-policy-manual-uscis-biden>. Joel Rose, Immigration Agencies Ordered Not To Use Term 'Illegal Alien' Under New Biden Policy, NPR (Apr. 19, 2021), <https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-policy>. As a result, changes were made in the U.S. Citizenship and Immigration Services (USCIS) Policy Manual, and Executive Office for Immigration Review (EOIR) issued Policy Memorandum (PM) 21-27 on terminology for EOIR employees including staff and judges. The PM includes alternatives to "unaccompanied alien child" such as "unaccompanied noncitizen child" and "unaccompanied non-U.S. citizen child." EOIR PM 21-27, Terminology, July 26, 2021.



we use the term unaccompanied child to refer to a range of ages and developmental levels. Unaccompanied children can be toddlers, tender-age, preteen, teenagers, adolescents, and even young adults depending on their age of arrival in the United States and the length of their immigration case. The Guide is designed to provide introductory information and links to webinars and additional resources to explore for more detailed training.

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

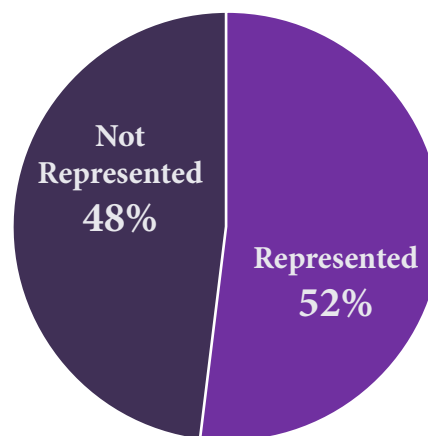
Immigration law is complex. This is not intended to be a comprehensive overview of everything potentially applicable to your case, nor is this Guide a replacement for your own research and study of the relevant issues and law involved in your case and jurisdiction. Our hope is that the Guide provides a solid starting point as you begin your pro bono representation.

## What Is the Need for Pro Bono Representation of Children?

Unfortunately, children in immigration court are not entitled to free appointed legal counsel or best interest advocates like children in the juvenile or child welfare systems in the United States. Many children and youth are facing removal alone. The Executive Office for Immigration Review (EOIR) (immigration court) provides some data regarding pending unaccompanied children's cases. EOIR data through January 2023 shows that 76,012 unaccompanied children's cases are pending in immigration court.<sup>2</sup> According to EOIR, 52% of unaccompanied children have representation and 48% do not, which means that over 36,000 unaccompanied children do not have representation in immigration court in currently pending cases.<sup>3</sup>

[Transactional Records Access Clearinghouse \(TRAC\) Immigration](#), Syracuse University's data tool, previously tracked information regarding unaccompanied juveniles' cases in removal proceedings.<sup>4</sup> There is a need for more current and specific data related to unaccompanied children's cases in immigration courts across the country related to different factors such as jurisdictions, representation, and outcomes. Review of historic

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



<sup>2</sup> Executive Office for Immigration Review Adjudication Statistics, UAC Statistics, EOIR, <https://www.justice.gov/eoir/page/file/1083086/download> (last visited June 6, 2023).

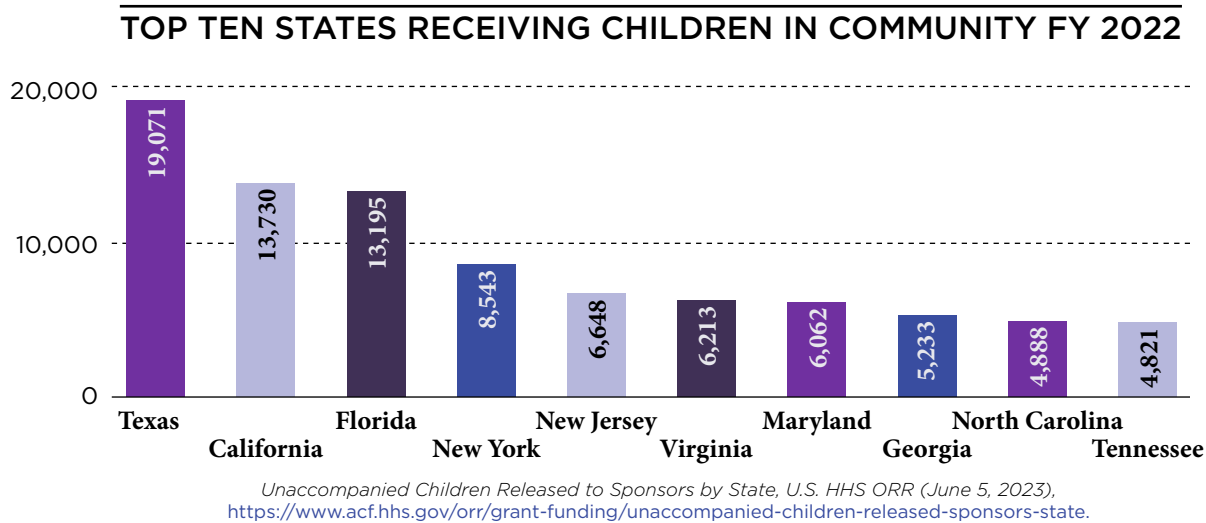
<sup>3</sup> Executive Office for Immigration Review Adjudication Statistics, Current Representation Rates, EOIR, <https://www.justice.gov/eoir/page/file/1062991/download> (last visited June 6, 2023).

<sup>4</sup> Transactional Records Access Clearinghouse (TRAC) data regarding unaccompanied juveniles in immigration court proceedings from 2005 to 2017 covers 293,179 cases. Of those, 62,128 matters were currently pending before the immigration court. TRAC Immigration, *Juveniles – Immigration Court Deportation Proceedings*, Syracuse University, <https://trac.syr.edu/phptools/immigration/juvenile/> (last visited June 6, 2023). TRAC stopped posting updated data regarding juveniles and removed data after 2017 as a result of alleged flaws in EOIR's data. TRAC Immigration, *Immigration Court's Data on Minors Facing Deportation is Too Faulty to Be Trusted*, Syracuse University (Dec. 2, 2021), <https://trac.syr.edu/immigration/reports/669/>.





Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),<sup>10</sup> provides legal orientations and screenings for children who are in the custody of the Office of Refugee Resettlement (ORR), under the Department of Health and Human Services (HHS), along with representation while they are detained.<sup>11</sup> Many youth, however, are released from ORR care to a sponsor somewhere in the United States, and are set for hearings at immigration courts in their communities.



Although children may have spoken to a lawyer while they were in detention, there is no guarantee of representation in the community where they are released, especially if they are released to a different area than where their shelter was located.<sup>12</sup> Additionally, many parts of the country do not have legal service providers that represent youth for free or low cost, or who are able to provide support to pro bono attorneys to help kids released in their areas.<sup>13</sup> This means oftentimes youth are not represented upon release from detention, unless a pro bono attorney is willing to take the case.

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

<sup>10</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044, 5080 (Dec. 23, 2008); 8 U.S.C. § 1232.

<sup>11</sup> There have also been reports of limitations to children's access to representation while detained. The judge in *Lucas R. v. Azar* lawsuit authorized a class of children in the Office of Refugee Resettlement (ORR) based on the fact that "ORR blocks lawyers from representing detained children with respect to placement, non-consensual administration of psychotropic medications, or release to available custodians notwithstanding that Congress has allocated funds specifically to provide such lawyers to represent children who are or have been in ORR custody in 'legal matters,' including issues related to ... [placement in the least-restrictive setting]."

<sup>12</sup> Learn more about access to counsel in immigration court. *U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs*, Congressional Research Service (CRS) (July 6, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12158>.

<sup>13</sup> For a list of free or low-cost legal services, search this directory by state or zip code. See ImmigrationLawHelp.org, <https://www.immigrationlawhelp.org/> (last visited June 12, 2023). List of Pro Bono Legal Services Providers, EOIR, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers> (last visited June 12, 2023).

CILA has many resources available to support you in your pro bono representation, including this Guide and other materials on CILA's website. Learn more about CILA in Section I.A. of this Guide.



# GET INVOLVED

CILA hosts a platform called Pro Bono Matters for Children Facing Deportation on CILA's website. The platform works similarly to a bulletin board. The platform is a place for nonprofit legal service providers who work with children and youth in immigration matters to post pro bono opportunities in need of assistance. Interested lawyers and advocates can search and share available pro bono cases and opportunities. We welcome you to get involved and express interest in a case on the platform.



Sign up to receive CILA's quarterly e-newsletter for pro bono attorneys and others who want to follow our work: Pro Bono Matters



Visit CILA's website to learn more about how you can get involved.



# SECTION II.

## II. EFFECTIVE REPRESENTATION

### A. Working with Unaccompanied Children

The migration of children and adolescents is not a new phenomenon and is not unique to the United States. According to the United Nations, there were 281 million international migrants worldwide in 2022, and of those, 41 million were below the age of 19.<sup>14</sup>

While the number of unaccompanied children entering the United States has changed in waves over time, there have been higher numbers of unaccompanied children entering the United States at the southwest border in FY 2021, 2022, and 2023.<sup>15</sup> There are likely many reasons for this, including terrible conditions in their home countries, natural disasters, the COVID-19 pandemic, and U.S. policies limiting many from seeking humanitarian relief, among others.<sup>16</sup> In FY 2022 in total, there were 2,766,582 encounters at the U.S. borders according to data from the U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP).<sup>17</sup> This figure includes 152,880 unaccompanied children; therefore, unaccompanied children accounted for approximately 6% of the encounters at the borders of the United States in 2022.<sup>18</sup>

#### Learn About Unaccompanied Children in Your Area

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

### Unaccompanied Child Definition

An “unaccompanied alien child” is a child who enters the United States without a valid entry document and who was not accompanied by a parent or legal guardian. An unaccompanied child is defined by the Homeland Security Act of 2002 and the TVPRA as an individual (a) under eighteen years of age; (b) without lawful immigration status; and (c) with no parent or legal guardian in the United States available to provide care and physical custody.<sup>19</sup>

### DEMOGRAPHICS OF UNACCOMPANIED CHILDREN

Currently, the majority of unaccompanied children are migrating to the United States from Central America, particularly Guatemala, Honduras, and El Salvador.<sup>20</sup> Primarily, teenage boys are the ones mi-

<sup>14</sup> International Organization for Migration, *World Migration Report 2022*, United Nations, [https://publications.iom.int/system/files/pdf/WMR-2022\\_0.pdf](https://publications.iom.int/system/files/pdf/WMR-2022_0.pdf) (last visited June 12, 2023).

<sup>15</sup> View the April 9, 2021 webinar hosted by the American Bar Association (ABA) *Unaccompanied Children at the Border: Get the Facts from the Experts* to learn more. *Unaccompanied Children at the Border: Get the Facts from the Experts*, ABA, <https://www.youtube.com/watch?v=MSf9WVJ69tQ> (last visited June 13, 2023). See also *Rising Border Encounters in 2021: An Overview and Analysis*, American Immigration Council (Mar. 4, 2022), <https://www.americanimmigrationcouncil.org/rising-border-encounters-in-2021>. See *infra* notes 16-17.

<sup>16</sup> See Leila Miller, *Which countries send migrants to the U.S. border, and what are they fleeing?*, Los Angeles Times (Apr. 3, 2023), <https://www.latimes.com/world-nation/story/2023-04-03/what-countries-send-most-migrants-to-us-border-what-are-they-fleeing>.

<sup>17</sup> *Nationwide Encounters*, U.S. Customs and Border Protection, <https://www.cbp.gov/newsroom/stats/nationwide-encounters> (last modified Sept. 22, 2023). The government fiscal year for 2022 began October 1, 2022 and ended on September 30, 2022.

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* notes 9-10.

<sup>20</sup> Data from FY 2022 shows that 47% of unaccompanied children migrated from Guatemala, 29% from Honduras, 13% from El Salvador, 3% from Mexico and 8% from other countries. See *Facts and Data*, ORR, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> (last reviewed June 13, 2023).



grating.<sup>21</sup> Children migrate for a variety of reasons and often for multiple reasons, but certainly common reasons for migration relate to uncontrolled violence in home countries, corruption, impunity, family-based violence, gender-based violence, and gang-related violence.<sup>22</sup> Although not the majority, an increased number of children arrived unaccompanied from Afghanistan in 2021 with the fall of the country to the Taliban and from Ukraine in 2022 due to the war with Russia—to seek protection in the United States.<sup>23</sup>

## What Happens When Unaccompanied Children Arrive in the United States?

Most often, children are apprehended by CBP. Unaccompanied children from contiguous countries (i.e., unaccompanied children from Mexico and Canada) must be screened within 48 hours for claims of persecution, trafficking, and fear of trafficking, as well as willingness to withdraw their application and voluntarily return home.<sup>24</sup> Voluntary returns must be processed within 48 hours. DHS must transfer unaccompanied children from non-contiguous countries and those from Mexico who qualify to ORR generally within 72 hours.<sup>25</sup>

In 2019, there was much news coverage of the abhorrent conditions in border patrol facilities, such as the one in Clint, Texas where reports of conditions for both children and adults shocked the conscience of many Americans.<sup>26</sup> These reports echoed similar reports made in other facilities in the Rio Grande Valley in 2013.<sup>27</sup>

In 2021, there were problems in border patrol facilities with overcrowding.<sup>28</sup> With increased numbers of youth at the border, emergency shelters were opened that were inadequate and not well-equipped for youth.<sup>29</sup>

CBP officers record their interview notes on Form I-213, *Record of Deportable/Inadmissible Alien* and issue a Notice to Appear (NTA), an official charging document, asserting any violations of immigration law against the children. Officers should also serve Form I-770, *Notice of Rights and Disposition* when the

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21 Data from 2022 shows that 72% of unaccompanied children were over 15 years of age and 64% were boys. *Id.* ORR also releases monthly data regarding unaccompanied children who are detained and released from ORR.

22 See Paulina Villegas, *Detentions of Child Migrants at the U.S. Border Surges to Record Levels*, N.Y. Times (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/world/americas/unaccompanied-minors-border-crossing.html>. Central American Migration: Root Causes and U.S. Policy, CRS (Dec. 12, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11151>. View CILAs webinar *A Deep Dive Into Current Conditions in El Salvador, Guatemala, & Honduras with the Experts* to learn more.

23 See Kristina Cooke, Mica Rosenberg, and Lindsey Wasson, *Insight: ‘When are my parents coming?’ - 1,300 Afghan children evacuated to U.S. in limbo*, Reuters (Nov. 10, 2021), <https://www.reuters.com/world/when-are-my-parents-coming-1300-afghan-children-evacuated-us-limbo-2021-11-10/>. Field Guidance #19 – *Unaccompanied Afghan Minor Processing*, ORR (Sept. 4, 2021, revised Jan. 6, 2023), <https://www.acf.hhs.gov/sites/default/files/documents/orr/fg-19-uam-processing-rev-11-9-21.pdf>. Camilo Montoyo-Galvez, *Ukrainian children in U.S. custody find unlikely sponsors as war rages back home*, CBS News (May 4, 2023), <https://www.cbsnews.com/news/ukrainian-children-us-custody-sponsors/>. Learn about other legal relief potentially available to clients from Afghanistan and Ukraine in Section III.A. of the Guide.

24 Unaccompanied children from contiguous countries are processed differently than other unaccompanied children. See TVPRA 2008, *supra* note 10.

25 *Id.* There is an exception to the 72-hour requirement during “exceptional circumstances.”

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

27 See Guillermo Cantor, PhD, *Hieleras (Iceboxes) in the Rio Grande Valley Sector*, American Immigration Council (Dec. 2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras\\_iceboxes\\_in\\_the\\_rio\\_grande\\_valley\\_sector.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/hieleras_iceboxes_in_the_rio_grande_valley_sector.pdf).

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

29 See Adolfo Flores, *Detained Immigrant Teens Feel Desperate And Hopeless At Emergency Shelters, Attorneys Say*, BuzzFeed News (Aug. 9, 2021), <https://www.buzzfeednews.com/article/adolfoflores/immigrant-youth-er-shelters>. See also Keegan Hamilton, *Kids Allege Medical Neglect, Frigid Cells, and Rotten Burritos in Border Detention*, VICE News (May 2, 2022), <https://www.vice.com/en/article/93b4vv/border-patrol-abuse-migrant-children>. Nina Lakhani, *Eight-year-old girl dies after being detained by border patrol in Texas*, The Guardian (May 18, 2023), <https://www.theguardian.com/us-news/2023/may/18/eight-year-old-girl-dies-detained-border-patrol-texas>.

child is apprehended. Since unaccompanied children are entitled to speak to an immigration judge in removal proceedings, Immigration and Customs Enforcement (ICE) will then file the NTA with the immigration court, initiating removal proceedings for the unaccompanied children. Next, the immigration court will mail out hearing notices with required court dates for the child to attend court. There are many instances in which you might find that one of these steps was missed (i.e., failure to file the NTA with court, failure to serve Form I-770) or lacking in due process (i.e., copying and pasting incorrect information on a child's I-213). See [Section IV.C.](#) to learn more about what to expect in immigration court.

Once in ORR's care, the agency will work to place the youth with a sponsor to facilitate reunification, commonly with a parent or other close family member. If there is no option to reunify with a sponsor, the child will remain in ORR care via transfer to a long-term foster care (LTFC) and/or unaccompanied refugee minor (URM) program if the child qualifies for immigration relief.<sup>30</sup> Children who do not qualify for immigration relief and have no reunification option are repatriated to their home country. ORR shelters are spread across the United States with a large concentration found in the Rio Grande Valley along the border of Texas with Mexico. At ORR, a child goes through an assessment involving a biographic intake, medical exam, and mental health evaluation. Previously, many youth were transferred to ICE detention to be detained with adult immigrants on the youth's 18th birthday. As a result of litigation in *Garcia Ramirez v. ICE*, "unaccompanied children who turn 18 and 'age out' of ORR custody should generally not be transferred to ICE detention unless there is evidence that they are a flight risk, danger to themselves, or danger to the community, and that release, including release on an Alternative to Detention (ATD) program, would not mitigate these concerns."<sup>31</sup> As a result of the litigation, many children who turn 18 in HHS custody are now released on their own recognizance.<sup>32</sup>

## Learn More About Unaccompanied Children at the Border

Read the [ABA CILA Fact Sheet: Unaccompanied Children at the Border](#) and the ABA's Commission on Immigration's [Primer: Immigration Enforcement Mechanisms at the U.S. Border](#).

## Learn More About Unaccompanied Children in Immigration Detention

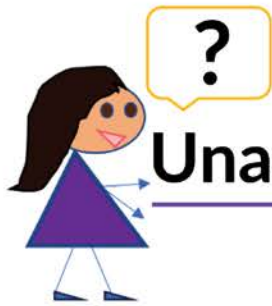
Check out CILA's [blog post](#) on the topic: *Frequently Asked Questions: Who Regulates the Detention of Children Facing Deportation?*

<sup>30</sup> In June 2021, [ORR Field Guidance #18](#), eligibility for long-term foster care placement for unaccompanied children expanded to those without legal immigration relief.

<sup>31</sup> Read more in a Frequently Asked Questions (FAQ) document about the litigation to further understand the impact of the case. *Garcia Ramirez et al. v. Immigration and Customs Enforcement et al. Frequently Asked Questions*, AIC, National Immigrant Justice Center (NIJC) (Jan. 13, 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/stopping\\_ice\\_from\\_unlawfully\\_detaining\\_immigrant\\_youth\\_trial\\_faq.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/stopping_ice_from_unlawfully_detaining_immigrant_youth_trial_faq.pdf). Learn more about the issue and case on NIJC's [website](#) and AIC's [website](#).

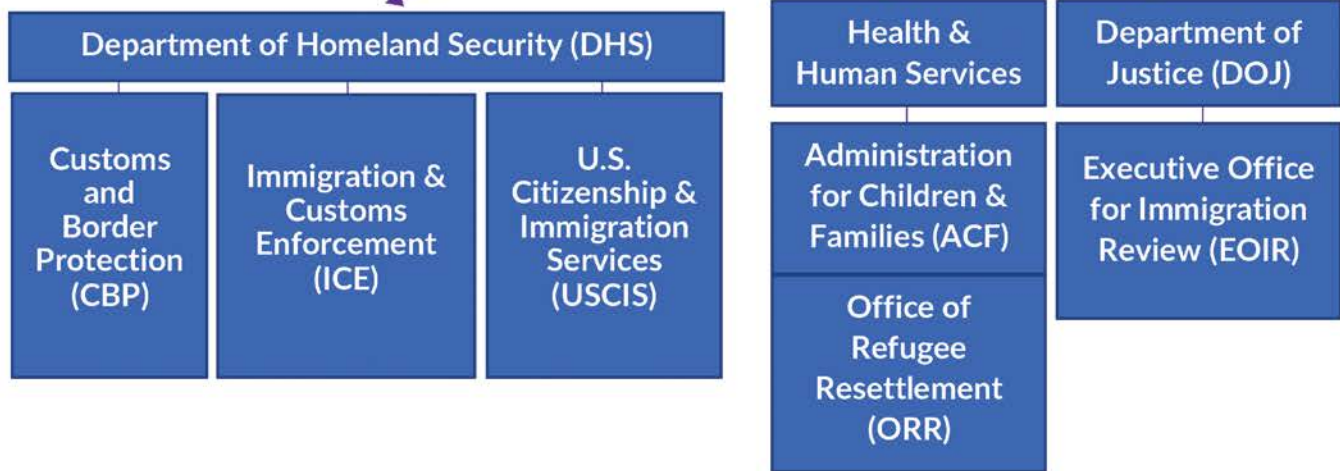
<sup>32</sup> *Id.*





# Who's Who in the Unaccompanied Children's World

## Federal Agencies



### State Courts

- State courts of general jurisdiction or specialized courts (family, juvenile) may make judicial determinations related to one form of children's relief—SIJS.
- State courts may also be asked to grant conservatorship over unaccompanied children to URM programs.
- Many courts have their own local rules you must follow beyond state rules of procedure, evidence, etc.
- Staff include presiding judges, associate judges, judge's clerks and filing clerks, and sometimes interpreters.

*Note: State courts are not involved in every child's case. They are typically involved when a child is seeking SIJS or has been accepted into ORR's URM program. A child may also be subject to state court proceedings in which you may not be providing assistance—for example, for violations (traffic, criminal, etc.).*

### Young Center for Immigrant Children's Rights

- Appointed child advocates in specific cases referred by legal service providers, advocates, or ORR
- Independent nonprofit organization with various offices nationwide
- Provides best interest recommendations regarding detained unaccompanied children for various stakeholders

### Government Accountability

- DHS: Office of Inspector General (OIG), Office of the Immigration Detention Ombudsman (OIDO), Office for Civil Rights & Civil Liberties (CRCL), CBP Joint Intake Center (JIC) and Office of Professional Responsibility (OPR), & Citizenship & Immigration Services (CIS) Ombudsman Office
- HHS: OIG
- DOJ: EOIR Judicial Conduct and Professionalism Unit

\*For more information about these entities, check out a more detailed version of this explainer on CILA's website.

## Foundational Sources of Law Impacting Unaccompanied Children's Rights

SOURCE OF LAW	NOTES
<a href="#">Flores Settlement Agreement</a>	<ul style="list-style-type: none"> <li>• 1984: Advocates sued Immigration and Naturalization Service (INS) over their policy to release unaccompanied children only to a parent and legal guardians and over the detention conditions of children, who were strip-searched, placed with unrelated adults, and deprived recreation and education</li> <li>• 1997: Settlement approved improving standards for detention, release, and treatment of minors in immigration custody <ul style="list-style-type: none"> <li>- Must be detained in “least restrictive setting”</li> <li>- Apprehension—Safe and sanitary facilities and transfer out within 3 days</li> <li>- Custody—Must be placed in state licensed facility although it does contemplate secure facilities in some cases with the option to request bond</li> <li>- Policy favoring release—including release to non-parent relatives and other placements with a sponsor agreement</li> </ul> </li> <li>• 2019: DHS and HHS issued a Joint Final Rule (84 Fed. Reg. 44,392 (2019)). The new regulations were challenged in litigation in <i>Flores v. Rosen</i> (<i>Flores III</i>), and the U.S. Court of Appeals for the Ninth Circuit found that the regulations pertaining to HHS except for two provisions could go into effect, and the DHS regulations were enjoined except for two provisions. Learn more in CILA's blog post <a href="#">The Flores Saga Continues: Update on the DHS and HHS Flores Regulations after the 9th Circuit's Ruling</a> and the Congressional Research Service's <a href="#">Child Migrants at the Border: The Flores Settlement Agreement and Other Legal Developments</a>.</li> </ul>
<a href="#">Homeland Security Act of 2002</a> Codified as to ORR at <a href="#">6 U.S.C. § 279</a>	<ul style="list-style-type: none"> <li>• Transferred the responsibility of custody of unaccompanied children from “legacy” INS to ORR</li> <li>• Led to the creation of the child advocate program: “ensuring that the interests of the child are considered in decisions and actions relating to the care and custody”</li> <li>• Defined “unaccompanied alien child”</li> </ul>

SOURCE OF LAW	NOTES
<p>William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008</p> <p>Codified at 8 U.S.C. § 1232</p>	<ul style="list-style-type: none"> <li>• Asylum protections for unaccompanied children <ul style="list-style-type: none"> <li>- Safe third country bar does not apply to unaccompanied children</li> <li>- One-year filing deadline does not apply to unaccompanied children</li> <li>- Initial jurisdiction of an unaccompanied child's application is with an asylum officer</li> </ul> </li> <li>• Expedited removal protections <ul style="list-style-type: none"> <li>- Treatment of children from contiguous countries</li> <li>- Safe repatriation of children</li> <li>- Placement in removal proceedings</li> <li>- Care and custody of unaccompanied children</li> <li>- Safety and suitability assessments for custodians</li> <li>- Access to counsel</li> <li>- Child advocates</li> </ul> </li> <li>• Expanded protections and eligibility for Special Immigrant Juvenile Status (SIJS)</li> </ul>

## Sample Checklist of What to Do Before Your First Client Meeting

- Review the information you have in the client file.
- If you are working with a nonprofit organization as a pro bono attorney, review all materials provided by the nonprofit organization.
- Do some research regarding the country your client is from so you have some background and context. Consider how you plan to represent the child with cultural competency and with a trauma-informed approach.
- Learn more about cultural competency with CILA's Guide: *Cultural Competency and Humility When Representing Unaccompanied Children*.
- Learn more about working with survivors of domestic violence and child abuse, trauma-informed lawyering, and interviewing techniques in Sections II.B.-C. of this Guide.
- Consider case strategy and summarize your client's options.
  - This may require some legal research and familiarization with your client's immigration options. The resources in this Guide should provide some background and a starting point to get to know the relevant law.
  - Think about how you will explain this information and the immigration process to your client in language appropriate to your client's age and developmental stage.
  - Use a case strategy matrix or other tool to help keep track of legal and factual elements. CILA has case theory and evidence matrix charts for SIJS and asylum posted on CILA's [website](#).

- Prepare any documents you will need signed at your first meeting including any documents you will need to request additional records. See [Section IV.C.](#) for more information and resources on seeking records and conducting FOIAs.
- Draft a list of questions to ask your client based on your case file review and initial case strategy.
- Create a meeting agenda taking into consideration your trauma-informed stance. Review the sample first meeting checklist below for ideas.
- Offer the client a choice in meeting times among those you have available and make sure the client has directions and a plan for transportation, parking, child care, etc. during the meeting. When working with a child client, you may often be communicating with a parent or caregiver about some of these details. However, many adolescent and teenage clients are able to communicate and arrange meetings as well, and it is empowering to give them a voice in the process.
- Be sure to arrange an interpreter, if needed, for your meeting whether in person or through a telephonic interpretation system, as appropriate. See [Section II.D.](#) for tips regarding working with an interpreter.
- Check in with the client the day before the meeting to make sure they have all of the information they need to be present at the meeting.
- Make sure any office staff knows to expect them in person or possibly receive a phone call if they are having trouble finding the office, and that other staff has a trauma-informed stance as well.

## Sample Checklist for Your First Client Meeting

- Remember your trauma-informed stance: start by building rapport and giving your client signals of warmth and safety. Review CILA's resource [\*Tips for Working with Migrant Children and Trauma-Informed Lawyering\*](#) to learn more how to practice with a trauma-informed stance. Consider bringing items to break the ice, like music, games, coloring books, or toys. You may also want to bring fidget toys, such as play-dough or bubble wrap, that can be used during the meeting.
- Be curious: try to get to know your client and connect on a more personal level. Ask about your client's interests, daily life, etc.
- Remember that the client may have never met a lawyer before or been provided a voice in this process, and that their cultural context for law enforcement, lawyers, and adults may be different than yours.
- Be patient, kind, and practice empathetic listening skills. See [Section II.C.](#)
- Introduce anyone in the room, including interpreters, associates, legal staff, or interns.
- Review what you are going to be talking about in the meeting and how long it will last, and let the client know that they can ask for a break at any time to use the restroom or get some water.
- Review your role.
  - This is a good time to ensure your client knows you are there to help.
  - Discuss your duties of confidentiality to help put your client at ease. Do not forget to go over any exceptions to confidentiality that may exist in your jurisdiction. For example, in Texas all professionals including attorneys are mandatory reporters of child abuse.
  - If you have a computer or are going to take notes, explain why and let the child know the rules about confidentiality apply to the notes as well.



- Remind the client that you do not work for the government, the court, the ORR shelter, or anyone other than them.
- Set clear expectations—what your client can expect and what you expect from your client, including any client obligations (being honest, appearing for court, etc.). For example, *see* [Section IV.C.](#) for your client’s obligations while in removal proceedings.
- Sign documents.
- Review the file and information you have already received with your client.
- Discuss strategy options, including any pertinent deadlines.
- Emphasize the need to stay in communication, and make sure you have the best contact information for your client and alternative methods of contact. Be sure to provide your client with the best way to contact you and your contact information.
- Make a plan for next steps in the case. Sometimes it helps to write down any key next steps such as the next meeting date, hearing information, or a list of information you are asking your client to gather for you.
- Try to end the interview on a lighter note, away from the substance of the meeting. If the client was emotional or had to discuss anything hard to talk about, remind them of their strength and bravery. This will help your client transition into the rest of their day.

## Know Your Rights

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

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

## Filing a Complaint with the Department of Homeland Security

If a DHS employee (i.e., a CBP or ICE officer or U.S. Citizenship and Immigration Services (USCIS) adjudicator) violated your client’s civil rights or civil liberties, your client may want to consider making a civil rights complaint with the DHS Office for Civil Rights and Civil Liberties (CRCL). Check out CILA’s blog post: [Keeping the Government Accountable: Upholding Civil Rights and Due Process for Unaccompanied Children](#), October 2019. The blog post will help provide more information about the process and gives tips on how to screen for these issues in your case. It is always important to ask the right questions!

Additionally, if your client’s rights were violated while detained by CBP or ICE, then you or your client may want to file a complaint with the Office of the Immigration Detention Ombudsman (OIDO). Read about OIDO and the complaint process in CILA’s blog post, [Have you Heard of DHS’s OIDO?](#), April 2023.

Unfortunately, violations have occurred. A DHS Office of Inspector General (OIG) July 2019 [report](#) on the Rio Grande Valley highlighted problems occurring when children were held at CBP holding facilities, such as overcrowding, prolonged detention, and lacking access to showers and limited access to change clothes. Another OIG [report](#) from August 2022 on CBP facilities in the El Paso area found prolonged detention and non-compliance with the [National Standards on Transport, Escort, Detention, and Search \(TEDS\)](#).

## Links to Learn More About WORKING WITH UNACCOMPANIED CHILDREN

- Check out CILA's 101 [webinar](#): *Introduction to Working with Unaccompanied Children* (1 hour, 35 minutes).
- Check out this [flowchart](#) to learn more about the process unaccompanied children go through upon entry into the United States and which agencies are involved in the process.
- Check out CILA's Guide on Stakeholder's Relations: *Who's Who in the Unaccompanied Children World? A Guide to Identifying and Working with Stakeholders*.
- Read the Council on Foreign Relations' article *U.S. Detention of Child Migrants*, March 27, 2023.
- Review resources from the Coalition to Abolish Slavery and Trafficking (Cast) on [cultural humility](#), including a practice advisory and videos.
- Refer to CILA's resource on *Bite-Sized Tips for New Practitioners & Pro Bono Attorneys*, which includes 7 tips provided in short [videos](#) and compiled in a [written resource](#). The tips will help you get started in working with unaccompanied children.
- Learn about some sources to start your research when working with an Indigenous child with CILA's *Resources for Working with Indigenous Individuals*.
- Read the resource developed by CILA & Loyola's Center for the Human Rights of Children (CHRC), *Considerations for Tender-Aged Children in Immigration Court Proceedings*, September 28, 2023.

## B. Trauma-Informed Lawyering

### Working with Survivors of Domestic Violence and/or Child Abuse

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

"Domestic violence (also called intimate partner violence (IPV), dating abuse or relationship abuse) is a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."<sup>33</sup> Abuse can take many forms including controlling behavior, fear tactics, physical and sexual violence, coercion, threats, emotional or financial abuse, etc.<sup>34</sup> According to the [Children's Hospital of Philadelphia Research Institute's Center for Violence Prevention](#), "[c]hild maltreatment (both abuse and neglect) is often linked with [intimate partner violence], and encompasses any act or failure to act on the part of a parent or caregiver which results in harm to the child, including serious physical or emotional harm, sexual abuse or exploitation, or death."<sup>35</sup> In addition to child abuse often co-occurring with other domestic violence at home, "[a] child can be an indirect victim of [intimate partner violence] as a witness and still face the serious consequences of the abuse."<sup>36</sup>

A common question by outsiders to this work is why a person would stay in a situation where there is domestic violence. It is important to know that the individual facing the abuse is in the best position

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<sup>33</sup> *Understand Relationship Abuse*, National Domestic Violence Hotline, <https://www.thehotline.org/is-this-abuse/abuse-defined/> (last visited June 13, 2023).

<sup>34</sup> *Id.*

<sup>35</sup> *Domestic Violence and Child Abuse*, Children's Hospital of Philadelphia Research Institute, <https://injury.research.chop.edu/violence-prevention-initiative/types-violence-involving-youth/domestic-violence-and-child-abuse#.Xj-WqzFKiM9> (last visited June 13, 2023).

<sup>36</sup> *Id.*

to know when and whether they should leave the situation. It is a complicated decision to make. The [National Coalition Against Domestic Violence](#) (NCADV) says, “[a]busers repeatedly go to extremes to prevent the victim from leaving. In fact, leaving an abuser is the most dangerous time for a victim of domestic violence.”<sup>37</sup> NCADV goes on to explain,

[a] victim’s reason for staying with their abusers are extremely complex and, in most cases, are based on the reality that their abuser will follow through with the threats they have used to keep them trapped; the abuser will hurt or kill them, they will hurt or kill the kids, they will win custody of the children, they will harm or kill pets or others, they will ruin their victim financially - - the list goes on.<sup>38</sup>

When working with a child, sometimes due to age or cultural differences, a child may have a different perception of the abuse, and this may be something that has to be defined and explained to the child. Depending on the age of your client, it may be helpful to use [power and control wheels](#) to discuss the issues with your client.<sup>39</sup>

Many children have suffered abuse and/or neglect in their home country, but if a child is currently in an abusive situation, check in with the child regarding their safety. For example, ask your client questions such as if their phone number is a number where you can leave a voicemail and if your client has a safe place to receive mail. You can also help your client by encouraging them to make a safety plan and working with them to create the plan.<sup>40</sup>

Additionally, remember your ethical responsibilities, including in some states, the mandatory duty to report child abuse. See [Section II.E](#). Also keep in mind legal relief such as VAWA and U nonimmigrant status, and ensure you screen for these types of legal relief. See [Sections III.E](#) and [III.F](#). You can also share the hotline numbers included in this resource and research other local sources to assist your client.

Childhood abuse and neglect can have short-term and long-term consequences impacting a child physically and mentally.<sup>41</sup>

Toxic stress can be caused by experiencing ACEs [adverse childhood experiences], including child maltreatment. It can change an individual’s brain architecture, which can cause the person’s stress response system to be triggered more frequently and for longer periods of time and place him or her at an increased risk for a variety of physical and mental health problems, including cardiovascular disease, depression, and anxiety (National Scientific Council on the Developing Child, 2014). Trauma-informed approaches, however can help improve outcomes for individuals affected by toxic stress, and there is evidence that social and emotional support (e.g., consistent parenting practices, community supports) can alleviate its effects (U.S. Department of Health and Human Services [HHS], Administration for Children and Families [ACF], 2017).<sup>42</sup>

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37 *Why do Victims Stay?*, The National Coalition Against Domestic Violence (NCADV), <https://ncadv.org/why-do-victims-stay> (last visited June 13, 2023).

38 *Id.*

39 The [Domestic Abuse Intervention Programs](#) provides several wheel adaptations that could be useful to discuss these issues with your client. Take a look at the various wheels to see what is most relevant to your client’s particular situation.

40 View National Domestic Violence Hotline’s website with an interactive tool to create a safety plan. *Create a Safety Plan*, National Domestic Violence Hotline, <https://www.thehotline.org/plan-for-safety/create-a-safety-plan/> (last visited June 13, 2023). See also *Personalized Safety Plan*, NCADV, <https://ncadv.org/personalized-safety-plan> (last visited June 13, 2023); *What is a Safety Plan?*, National Child Abuse Hotline (June 18, 2016), <https://www.childhelp.org/wp-content/uploads/2014/07/CH-Safety-Plan.pdf>.

41 *Impact of Child Abuse & Neglect*, Child Welfare Information Gateway, <https://www.childwelfare.gov/topics/can/impact/> (last visited Aug. 30, 2023).

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



The effects of the abuse or neglect may impact your representation because it may affect your working relationship with your client and/or how your client can communicate their story with you and/or a decision maker in an interview or hearing. Frequently, it is necessary to have a forensic evaluation conducted by an expert to fully explain how your client's past is impacting their physical and/or mental health. More information and resources regarding forensic evaluations are provided later in this section, as well as in [Section II.C.](#) and [Section III.A.](#)

It is always important to practice self-care when working with clients. Oftentimes, this can be even more important when working with clients who have suffered from domestic violence and/or child abuse in the past or currently. View CILA's webinar, *Caring for Yourself While Advocating for Your Clients: Working with Clients Living with Domestic or Intimate Partner Violence* and a presentation featured at CILA's 2023 5th Annual Champions for Immigrant Youth Symposium, *Vicarious Trauma: Best Practices for Serving and Honoring Sexual Abuse Victims*. Also, review materials that accompanied both trainings to learn more.

## The Significance of a Trauma-Informed Approach

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

Signs of trauma vary person to person and will also depend on your client's age.<sup>43</sup> According to [The National Child Traumatic Stress Network](#),

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

For children in immigration proceedings, there are additional factors to consider when employing a trauma-informed approach, including potential difference in language, power dynamics, adjustment to a new culture, placement of your client (i.e., detained, released to family, released to non-family), and potential lack of trust.<sup>44</sup>

### Important Resources

#### [Childhelp National Child Abuse Hotline:](#)

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

#### [National Domestic Violence Hotline:](#)

24/7 phone line where advocates are available to talk in more than 200 languages 1-800-799-SAFE (7233), TTY 1-800-787-3224, text (START to 88788), and chat tool.

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

<sup>43</sup> *Trauma Informed Care for Children Exposed to Violence Tips for Agencies working with Immigrant Families*, Office of Juvenile Justice and Delinquency Prevention, [https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/programs/safestart/TipSheetFor\\_ImmigrantFamilies.pdf](https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/programs/safestart/TipSheetFor_ImmigrantFamilies.pdf) (last visited Aug. 30, 2023).

<sup>44</sup> Many of the concepts in this section were presented in a CILA Boot Camp training by team members from the Trauma and Grief Center at Texas Children's Hospital/Baylor College of Medicine, *Exploring Trauma and Grief in Children and Teens*, Sept. 25, 2019.

Often, the nature of our work requires us to work with clients as they recount prior trauma because it directly relates to the case. Employing a trauma-informed approach to your representation is essential because it is ethically necessary<sup>45</sup> and because it is important to treat clients with respect and compassion. Our goal is to reduce re-traumatization of our clients while we work with them on their case.

It is important to remember that “[a]though many immigrant and refugee youth have experienced adversity and hardship, first and foremost, they are people who have also drawn on significant internal and external strengths to have survived their past experiences.”<sup>46</sup> In practice, it can be best to apply a strengths-based approach. “[A] strengths-based approach focuses on growth and development and recognizes that acknowledging strengths can build resilience and promote healing. The simple act of identifying and drawing attention to children’s strengths can promote resilience . . . .”<sup>47</sup> By working with a child-centered and strength-based approach, advocates have an opportunity to be a part of their client’s healing process, to be a protective factor and supportive adult working alongside them.<sup>48</sup>

Advocates can consider practicing with a framework that incorporates these four actions: (1) inform and prepare your client; (2) offer choices; (3) offer praise and gratitude; and (4) check-in with your client. Keeping in mind these four actions or themes at each stage of the representation and in each meeting can help advocates practice with trauma-informed care. Review CILA’s helpful resource, *Tips for Working with Migrant Children and Trauma-Informed Lawyering*, to learn more about these themes and additional tips to use in your practice. Some tips to help you have trauma-informed advocacy are also included below.

### Working with LGBTQ+ Youth

- CILA webinars: *Best Practices for Serving LGBTQIA+ Unaccompanied Youth* and *Being an Ally: Working with and Advocating for LGBTQ+ Unaccompanied Youth*
- Immigration Equality: [Resources](#)
- LGBT Freedom Asylum Network: [Best Practice Guide: Supporting LGBT Asylum Seekers in the United States](#)
- CDC: [LGBTQ+ Youth Resources](#)
- Gay-Straight Alliance (GSA) Network: [Mission, Vision, & History](#)
- GLSEN (Gay, Lesbian, & Straight Education Network): [Educator Resources](#)
- Anti-Violence Project: [About Us](#)
- United We Dream: [Who We Are](#)

<sup>45</sup> Rule 1.1 of the ABA Model Rules of Professional Responsibility addresses competence and mandates that “a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ABA Model Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” This Model Rule is explained in comments, which state that “a lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

<sup>46</sup> Miller, K. K., Brown, C. R., Shramko, M., and Svetaz, M. V. (2019). *Applying Trauma-Informed Practices to the Care of Refugee and Immigrant Youth: 10 Clinical Pearls*. *Children* (Basel, Switzerland), 6(8), 94, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6721394/pdf/children-06-00094.pdf>.

<sup>47</sup> *Id.*

<sup>48</sup> See Marissa Barrera, *Working with Unaccompanied Children: Mental and Behavioral Health Toolkit*, Section 3, CILA (May 2022), <https://cilacademy.org/social-work-program/social-services-resources/>.

## TIPS FOR PRACTICING TRAUMA-INFORMED LAWYERING<sup>49</sup>

### Build trust with your client:

- Build rapport with your client. Get to know their interests and who they are on a personal level. Remember that building rapport and trust with your client takes time. Make an attempt at each meeting to have time to build rapport with your client.
- You may even want to have a meeting where you do a fun game or activity with your client, or something that they enjoy, so you can get to know them better as a person and build rapport. While it is easy to want to dive right into the case, this may help you build trust with your client, which can help your working relationship and the case too.
- Be vulnerable. Share with your client your purpose in working on their case, as well as a little bit about yourself. This will help create a safe space for them to share with you.
- Help your client feel comfortable. For example, if possible, try to create an environment where it will be comfortable to talk. Maybe this will be a private room or a room with windows and an easy exit.
- Set the tone from the beginning of a meeting. Be welcoming and friendly by offering water or coffee, for example.
- Use language such as “we” or “us.” For example, “We will work together on this.”
- Go over confidentiality and your role as your client’s attorney.
- Use empathetic listening skills. See [Section II.C](#).
- Be creative and engaging. For a list of ideas on how to engage youth in the process, review CILA’s resource, *Tips for Working with Migrant Children and Trauma-Informed Lawyering*.

### Communicate clearly with your client:

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

<sup>49</sup> Many of these ideas were represented in Torture Abolition and Survivors Support Coalition (TASSC) International and CLINIC’s webinar, *Developing a Trauma-Informed Consciousness for Legal Practitioners*, Presenter Caitlin Tromiczak, LICSW-C, LCSWC, Moderator Helen Chen, Esq. (Oct. 23, 2019), <https://cliniclegal.org/training/archive/developing-trauma-informed-consciousness-legal-practitioners>. Watch this informative webinar to learn more.

## TIPS FOR PRACTICING TRAUMA-INFORMED LAWYERING (continued)

### Empower your client:

- View your client as a survivor rather than a victim.
- Identify and express your client's strengths.
- Keep in mind that certain behaviors exhibited by your client may be what has served your client well in the past.<sup>50</sup>
- Help your client exercise control.
  - Give your client some options in the process when you ask your client to talk about difficult subjects. For example, give the client options of how to provide information to you and when.
  - Ask your client if they are willing to share their story.
  - Give your client the option to prepare for the meeting or not prepare. For instance, if you are helping your client with a declaration about a traumatic past event, you can offer the option to write their story in advance or not. For some, this may take some pressure off from recounting details on the spot. On the other hand, writing the story down may be overwhelming for some clients.
  - Offer choices to your client whenever you can. Be sure to remember when offering choices to present them as neutral options without persuasion toward one option over another. Decisions should be made by the client, and your role is to offer them the information they need to make informed decisions, and not to make decisions for them.



<sup>50</sup> “[Y]outh who have experienced trauma use coping mechanisms to manage chronic stress. These coping mechanisms may have even been adaptive and even necessary for survival in prior circumstances, especially for youth who have experienced extreme violence. However, under less life-threatening circumstances, the coping mechanisms that have served the youth well in the past may create difficulties in the new environment.” Miller, Brown, Shramko, Svetaz, *supra* note 46.

## TIPS FOR PRACTICING TRAUMA-INFORMED LAWYERING (continued)

### **Give your client space when talking about tough subjects:**

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



## SECONDARY TRAUMATIC STRESS

Secondary traumatic stress is a common and natural response to exposure to someone else's trauma, injustices, accounts of violence, and other frightening circumstances.<sup>51</sup> "Secondary traumatic stress is the emotional duress that results when an individual hears about the firsthand trauma experiences of another."<sup>52</sup> There is a growing acknowledgment of the occurrence of secondary traumatic stress for attorneys, and as such there are more resources available to help as well.<sup>53</sup> Experiencing secondary traumatic stress could result in changes in your behavior which can come through in many ways, such as irritability, tearfulness, numbness, hypervigilance, sleep disturbance, and nightmares.<sup>54</sup> It is important to take care of yourself and seek support and help if you are experiencing these types of changes. Reach out to friends, family, colleagues, or a counselor. Check in with yourself for signs of vicarious trauma, take breaks, and pace yourself. Consider the strategies for prevention and intervention outlined in The National Child Traumatic Stress Network's *Secondary Traumatic Stress: A Fact Sheet for Child-Serving Professionals*. Also, view CILA's webinar, *Secondary Traumatic Stress and Self-Care*, and the ABA Commission of Immigration webinar, *The Lifeguard is Drowning: Identifying and Combating Burnout and Secondary Trauma in Asylum Practitioners*.

## CILA Resources to Help Advocates Support Youth

- **CILA webinar to help advocates connect youth with resources and services:** *Tips and Guidance for Helping Unaccompanied Immigrant Youth Access Publicly Funded Benefits and Services*, April 2023.
- **CILA toolkit for advocates:** *A Toolkit for Navigating Difficult Conversations: Guidance and Examples*, August 2023. This interdisciplinary resource includes ethical considerations, practical tips, and self-care strategies. The resource also includes example scripts in English and Spanish, covering topics advocates and/or clients may struggle discussing.
- **CILA toolkit for youth:** *A New Path: My Toolkit for Navigating Life in the United States*, available in English and Spanish, June 2023. The toolkit explores a variety of topics including mental health, trauma, building resiliency, self-care, and navigating immigration procedures. For more information for youth, view information on ImportaMi's [website](#) and visit CILA's youth webpage, available in [English](#) and [Spanish](#).
- **CILA toolkit for sponsors to provide information and support during a time of transition:** *Reunification Challenges: A Toolkit for Sponsors of Unaccompanied Minors*, available in both English and Spanish, August 2022.

51 Learn more about different types of indirect trauma such as secondary trauma, vicarious trauma, compassion fatigue, and burnout in the presentation, *Keeping the Work Sustainable: The Inside & Out of Trauma Informed Immigration Practice with Children*, held at CILA's 2023 5th Annual Champions for Immigrant Youth Symposium.

52 *Secondary Traumatic Stress*, The National Child Traumatic Stress Network, <https://www.nctsn.org/trauma-informed-care/secondary-traumatic-stress> (last visited June 23, 2023).

53 See William C. Silverman, *How to Identify and Address Secondary Trauma*, The National Law Review (Feb. 6, 2019), <https://www.natlawreview.com/article/how-to-identify-and-address-secondary-trauma>; Jeena Cho, *When caring costs you: Lawyers can experience vicarious trauma from work*, ABA Journal (Feb. 1, 2020), <https://www.abajournal.com/magazine/article/when-caring-costs-you-lawyers-can-experience-vicarious-trauma-from-work>. Consider using a pocket card designed for helpers with important self-care reminders. General Helper Card, Professional Quality of Life (ProQOL), <https://proqol.org/help-er-pocket-card> (last visited June 13, 2023).

54 See Christina Rainville, *Understanding Secondary Trauma: A Guide for Lawyers Working with Child Victims*, ABA (Sept. 1, 2015), [https://www.american-bar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/](https://www.american-bar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/september-2015/understanding-secondary-trauma--a-guide-for-lawyers-working-with/).

## Important Resources

- Research any available local mental health referrals for counseling services.
- In most states you can dial [211](#) to find out about local services such as access to food, housing, and health clinics. This service is confidential and available 24 hours per day, every day. The service is available in 180 languages.
- The Hackett Center for Mental Health's Trauma and Grief Center provides [resources](#) to help children experiencing grief.
- [National Human Trafficking Hotline](#): 1-888-373-7888, TTY 711, text (233733), and chat. This service is confidential and available 24 hours per day, every day. The service is available in more than 200 languages.
- [988 Suicide & Crisis Lifeline](#): Call 988, TTY users: 711 and then 988, and chat. This service is confidential and available 24 hours per day, every day. Interpretation is offered in over 240 languages when calling 988.

## Links to Learn More About TRAUMA-INFORMED LAWYERING

- Check out CILA's 101 [webinar](#): *Trauma Informed Lawyering with Unaccompanied Children* (1 hour, 25 minutes).
- Review CILA's resource, [Tips for Working with Migrant Children and Trauma-Informed Lawyering](#), to learn practical tips for your advocacy efforts.
- Review CILA's resource, [A Toolkit for Navigating Difficult Conversations with Child Clients: Guidance Examples](#), August 2, 2023.
- View CILA's [training](#) *Trauma-Informed Representation and Advocacy*, ABA Commission on Immigration's *Defend Asylum Together! Essentials of Immigration Law for Effective Pro Bono Representation (Day 2)*, January 2021.
- Check out U.S. Department of Health and Human Services Administration for Children & Families [Resources Specific to Immigrant or Refugee Populations](#).
- Check out the ABA's [Establishing a Trauma-Informed Lawyer-Client Relationship \(Part One\)](#) and [Communicating with Youth who Have Experienced Trauma \(Part 2\)](#), Eliza Patten, JD, CWLS and Talia Kraemer, JD, October and November 1, 2014.
- Check out Casa de Esperanza's [Trauma Informed Principles Through a Culturally Specific Lens](#), Josie Serrata, PhD and Heidi Notario, MA.
- Check out Tend, [Tools to Reduce Vicarious Trauma/Secondary Trauma and Compassion Fatigue](#), Tasha Van Vlack, November 3, 2017.
- Check out the [webinar series](#) created by Houston Immigration Legal Services Collaborative ([HILSC](#)) and member organizations (Tahirih Justice Center, Justice for Our Neighbors, CILA) and Rosalie Hyde, LCSW (Houston Galveston Trauma Institute). The series *Mental Health Evaluations for Immigrant Clients: From your First Interview to the Merits Hearings* covers topics such as listening to client's stories with a trauma-informed lens and setting up forensic evaluations.
- Consult Project TRUST's resource [Applying Person-Centered and Trauma-Informed Engagement Practices](#).



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

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

## C. Interviewing Tips and Strategies

### Tips and Strategies to Effectively Interview Children<sup>55</sup>

#### **Understand your client and meet them where they are at:**

- **Child's age:** Use age-appropriate language when communicating with your client. This may require more preparation than interviewing an adult. Think about what you need to communicate and how you can do so in a way that is simple and easy to understand.
- **Child's developmental stage:** A wholistic approach to youth development considers their emotional and mental stages. Keep these factors in mind when planning what to discuss, how to bring up topics, and what you can cover in a meeting.
- **Child's cognitive ability:** Consider your client's cognitive abilities when thinking about the questions you will ask and the information you will need to gather in each meeting. In addition to using child-friendly language, you may need to check for understanding, by asking the same question in different ways. Creative analogies can also help to explain tougher concepts. For example, legal service providers have explained court proceedings to children as analogous to a soccer game, identifying the different "teams" (the client/attorney and the government) and the "umpire" (the judge).
- **Any trauma history:** Prior trauma can have an ongoing impact on children which may affect their ability to communicate and concentrate and impact other aspects of their behavior. Overall, this could affect the quality of an interview. Practice a trauma-informed approach by being aware of the implications of trauma as well as how you can help your client feel more at ease. See [Section II.B](#).

**Have a plan for the interview location:** Consider the interview location, and try to make this a private, comfortable space in which the child feels safe. If you are meeting at your law firm's office, consider rooms without large interior windows and spaces with comfortable seating like a couch or carpeted flooring.

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<sup>55</sup> Many of these ideas were represented in CILA's Boot Camp Training *Child Interviewing Techniques*, The Young Center for Immigrant Children's Rights. You can view an April 2021 recording of this presentation on CILA's [website](#).

## Key Tools for Conducting the Interview:

- Grounding Techniques:
  - Let the child fidget with a pipe cleaner or other toy.
  - Let the child color, draw, or play with playdough.
  - Practice breathing exercises with your client.<sup>56</sup>
  - Try out the 5-4-3-2-1 Grounding Technique.<sup>57</sup> Check out the graphic in this section for more information on how to use this technique.

### 5-4-3-2-1 Grounding Technique in English and Spanish

Do you remember what your five senses are? Sight, touch, smell, taste, and hearing. These five senses are engaged in sync with your mindfulness. Mindfulness and grounding help our brain disconnect from those kinds of thoughts and activate our five senses so that we consciously return to the present, to this time when our bodies and mind are living, and we can cleanse our mind and move on. Below is the language you can use to lead someone through this grounding technique:

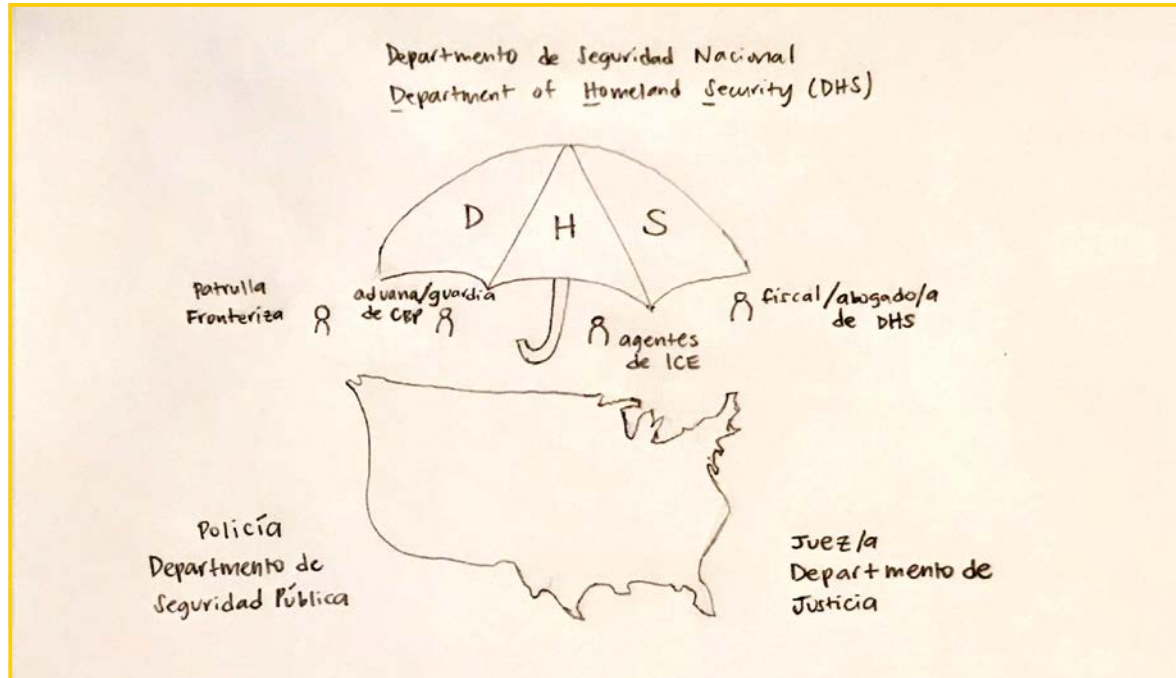
5	Identify five things you see around you. Look around you / Identifique cinco cosas que ves a tu alrededor. Mira a tu alrededor
4	Identify four things you can touch, using your sense of touch, whether with your feet, legs, hands, or your entire body / Identifique cuatro cosas que puedes tocar, usando tu sentido del tacto, ya sea con tus pies, piernas, manos o todo tu cuerpo.
3	Identify three things you can hear. Using your sense of hearing, what can you hear around you? / Identifique tres cosas que puedes escuchar. Usando tu sentido del oído, ¿qué puedes escuchar a tu alrededor?
2	Identify two things you can smell. What are two smells that are hidden in the corners of what you can observe, feel, and hear right now? / Identifique dos cosas que puedes oler. ¿Cuáles son dos olores que están ocultos en las esquinas de lo que puedes observar, sentir y escuchar en este momento?
1	Identify one thing you can taste. What is one thing you can savor right now? / Identifique una cosa que puedes probar. ¿Qué es una cosa que puedes saborear en este momento?

This exercise and others are featured in CILA's *Working with Unaccompanied Children: Mental and Behavioral Health Toolkit*. The toolkit aims to provide context to unaccompanied children's experiences and 101 essential information regarding mental and behavioral health, as well as tools and resources in English and Spanish.

<sup>56</sup> See *How to Teach Your Child Calm Breathing*, Anxiety Canada, [https://www.anxietycanada.com/sites/default/files/calm\\_breathing.pdf](https://www.anxietycanada.com/sites/default/files/calm_breathing.pdf) (last visited June 23, 2023). See also *Breathing Strategy - Flower and Candle*, Momentous Institute, <https://www.youtube.com/watch?v=Wc9pBY11-Mk> (last visited June 23, 2023); *Roller Coaster breathing*, Logos Academy, <https://www.youtube.com/watch?v=drb-VT9FlwE> (last visited June 23, 2023); *Breathing Hands*, University of Nebraska Medical Center, <https://buffettinstitute.nebraska.edu/-/media/beci/docs/1-15-20-breathing-hands-prek.pdf?la=en> (last visited June 23, 2023).

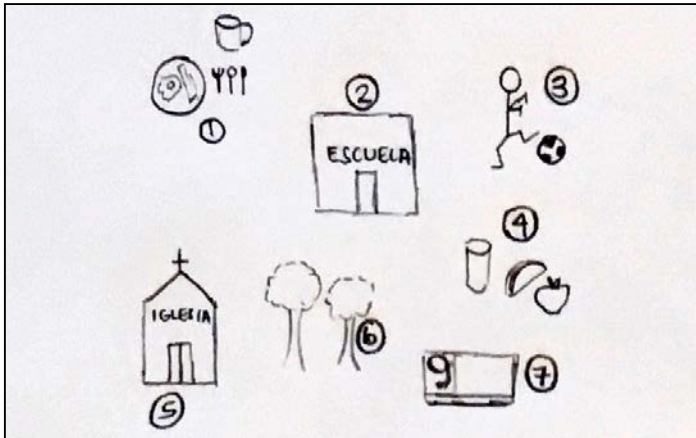
<sup>57</sup> See Sara Smith, BSW, *5-4-3-2-1 Coping Technique for Anxiety*, University of Rochester Medical Center's Behavioral Health Partners Blog (Apr. 2018), <https://www.urmc.rochester.edu/behavioral-health-partners/bhp-blog/april-2018/5-4-3-2-1-coping-technique-for-anxiety.aspx>.

- Empathetic Listening:
  - Listen carefully.
  - Be patient. Long pauses are okay.
  - “Think of yourself as a mirror. Repeat the speaker’s thoughts and feelings back to them.”<sup>58</sup>
  - At times, express understanding as your client speaks.
  - Be open, not judgmental. Listen without projecting your perspective and opinions onto your client.
- Visuals
  - Drawing pictures can be a powerful communication tool when working with youth. Consider bringing paper and crayons so you can use visuals to help the youth tell their story or to explain key concepts like in the examples provided below. Younger children often like to draw, but often this technique works with older children as well.
  - **Example 1:** Who are the agencies? You can draw images to help explain the legal process. This sample drawing is based on a visual from the South Texas Pro Bono Asylum Representation Project (ProBAR). It shows that DHS houses border patrol (patrulla fronteriza) and customs/guard (aduana/guardia de CBP) both in CBP, ICE agents (agentes de ICE), and the government attorney (fiscal/abogado/a de DHS). It shows that the immigration judge (juez/a) is under the Department of Justice (DOJ) (Departamento de Justicia) and that the police/public security department (policía/Departamento de Seguridad Pública) is also separate from DHS. To see an example of a drawing showing who will be present in immigration court, please refer to [Section IV.C](#).

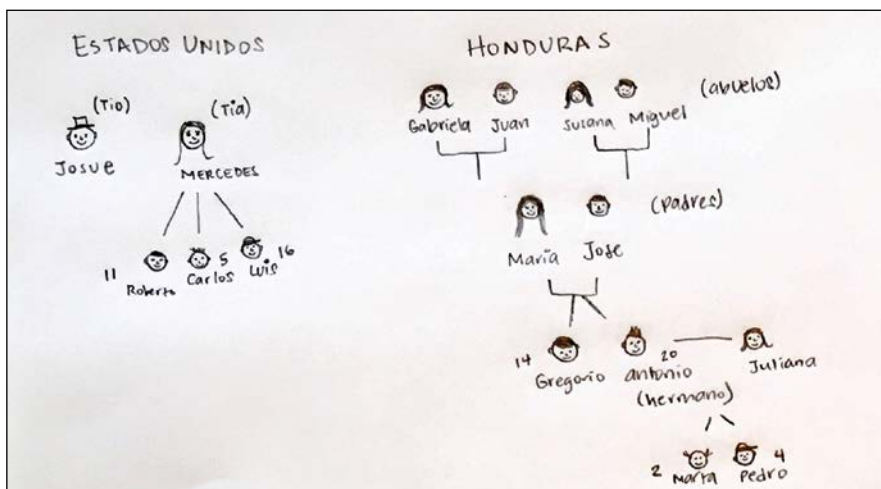


<sup>58</sup> Empathetic Listening Going Beyond Active Listening, MindTools, <https://www.mindtools.com/CommSkill/EmpathicListening.htm> (last visited Aug. 30, 2023).

- **Example 2: What is your daily life?** You might ask your client to draw pictures of how they used to spend an average day in their home country. This can help you learn about your client and their life, and later, you can use the same technique to gain more information that will pertain to their potential legal relief. This is an example of a drawing from hypothetical client, Gregorio. In the drawing, Gregorio drew his typical day noting he usually: (1) eats breakfast; (2) goes to school (escuela); (3) plays soccer; (4) has lunch; (5) goes to church (iglesia) after school; (6) spends time outside; (7) and then goes to bed.



- **Example 3: Family Tree.** You could also ask your client to draw a family tree. You or your client can draw little faces or stick people as you review the family members in the child's life. As you draw, you can ask other questions to get to know more about your client's life. You can add onto the family tree notes regarding the youth's family members' ages and relationships. The drawing below from hypothetical client Gregorio shows a family tree, including his grandparents (abuelos), parents (padres), and his brother (hermano) and his brother's wife and kids, who still live in Honduras. He also drew pictures of family members he has in the United States (Estados Unidos) including his aunt and uncle (tía and tío) and his cousins. He provided some of their ages in the drawing.



## Important Tips to Remember:

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

## Links to Learn More About INTERVIEWING CHILD CLIENTS

- Watch CILA's recorded training, *Child Interviewing Techniques* (40 minutes).
- Read the resource developed by CILA & Loyola's Center for the Human Rights of Children (CHRC), *Considerations for Tender-Aged Children in Immigration Court Proceedings*, September 28, 2023.
- View the [training](#), *Legal Services for Tender-Age Children and Best Practices When Providing Services Remotely* (56 minutes), for some ideas. ProBAR legal staff presented on the topic at CILA's 3rd Annual Texas Champions for Immigrant Youth Symposium.
- Watch the presentation, *Innovative Communication Tools and Resources – Using Play, Active Engagement, and Trust Building with Unaccompanied Children*, presented at CILA's 2022 4th Annual Champions for Immigrant Youth Symposium (1 hour, 1 minute).
- Review CILA's resource, *A Toolkit for Navigating Difficult Conversations with Child Clients: Guidance Examples*, August 2, 2023. This interdisciplinary resource includes ethical considerations, helpful context for conversations, practical tips for supporting clients, and self-care strategies. The resource also includes example scripts in English and Spanish, covering topics advocates and/or clients may struggle discussing openly.
- View Stanford's Center for Health Education and UT-RGV excellent four part short [video series](#) on trauma-informed interviewing techniques which provides examples of what to say when interviewing immigrant children: *Trauma-informed Techniques for Interviewing Immigrant Children*.
- Read Society for Research in Child Development's *Questioning Unaccompanied Immigrant Children: Lessons from Developmental Science on Forensic Interviewing*, October 25, 2019.



- Read the ABA article, [Representing Child Abuse Victims: Forensic Interviewing Tips](#), Claire Chiamulera, November 16, 2017.
- Read *The New Yorker*, “[An Immigration Attorney on What it’s like to Represent Small Children Taken from their Parents](#),” Alexandra Schwartz, June 19, 2018.

## D. Working with Interpreters and Translators

Language access is an important issue when working with immigrant youth.<sup>59</sup> First, it is important to determine your client’s preferred/best language. While you may think you know your client’s language based on an intake form or other paperwork you receive, it is good practice to double-check this information. Your client may speak multiple languages, but it is important to ask them what language they may feel most comfortable speaking and understand the best. Keep in mind that your client’s preferred spoken language may be different from their preferred written language.

Remember that interpretation and translation are not one and the same. Translators work with the written word and written material, while interpreters work with the spoken word. For example, a translator may translate a birth certificate from Spanish to English, while an interpreter may provide interpretation services during a meeting so an English-speaking attorney can communicate with a client who speaks Spanish. It is very possible that you will need to work with someone to help you translate and/or interpret during your pro bono representation. Translation and interpretation involve different skill sets; however, sometimes, it is possible to work with one person to assist to provide this case support.

Read the below tips for success when working with an interpreter and/or a translator.

### **Tips Relevant to Working with an Interpreter or Translator**

- Remember ethical duties when working with an interpreter and/or translator. See [Section II.E](#).
- Prepare the interpreter or translator by briefly explaining the purpose for the call/meeting.
- Review confidentiality with your client and the interpreter or translator. Ask the interpreter or translator to sign a statement regarding confidentiality and your client to sign a release.
- Remind the interpreter or translator to use word-for-word and first-person narration, if applicable.
- Keep in mind you that you will likely need signature(s) and/or statements from the interpreter or translator regarding accuracy of interpretation if they are helping with any immigration forms or other documents that will be formally submitted. For instance, see [Immigration Court Practice Manual Ch. 3.3\(a\)](#).

<sup>59</sup> See [EOIR PM 23-02, Language Access in Immigration Court](#), June 6, 2023.

## Tips Relevant to Working with an Interpreter

- Keep in mind your client may prefer working with an interpreter of a particular gender generally or for certain tasks. Ask your client regarding their comfort level and preference.
- Ensure expectations and roles are clearly communicated and identified for both the interpreter and your client.
  - The interpreter should be a neutral party, rather than a family member or friend.
  - The interpreter should interpret exactly what you say and not answer questions themselves or add commentary.
- If possible, in-person interpretation is best.
- Interpretation takes time. Plan accordingly. Be patient.
- Confirm that both the interpreter and child can understand each other.
- Use simple, clear language. Use short sentences.
- Provide explanations of terms and concepts, as needed, to avoid confusion.
- Speak slowly and pause as you go.
- Be respectful of your client and the interpreter. Consider your tone. Try not to interrupt. Ask for clarification if needed.
- Give your client and the interpreter opportunities to take breaks.
- Speak directly to your client. Give your client eye contact and engage with your client rather than the interpreter. Make sure the setup of the room helps facilitate dialogue directly with your client.

## Tips Relevant to Working with a Translator

- If you have the time and capacity, read the translated documents or have another individual review the translation to check for accuracy, client's voice, and word-for-word translation.
- Emphasize the necessity of word-for-word translation to the translator—even with usages of slang, misspellings, and incorrect grammar.
- Additionally, pro bono attorneys with language skills assisting clients should not do their own translation because if there is an issue with the document's translation, ethically they cannot be considered a witness in the case.



### Links to Learn More About WORKING WITH INTERPRETERS AND TRANSLATORS

- Read CILA's resource, *Practical and Ethical Considerations and Reminders when Working with Translators and Interpreters*, April 14, 2023.
- Review CILA's resource, *ABA CILA & COI Pro Bono Program Resources and Templates Toolkit* and particularly the "Resource for Pro Bono Attorneys: FAQ on Pro Bono & Interpreters and Translators"



to see tips and ideas to find an interpreter or translator, July 25, 2022.

- Check out CILA’s [webinar](#): *Making Interpretation Seamless: Best Practices for Attorneys* (59 minutes).
- Check out Ayuda’s [Working with Interpreters Outside of the Courtroom: A Guide for Attorneys](#), 2016.
- Review CILA’s [Resources for Working with Indigenous Individuals](#), June 21, 2022.

## E. Ethical Considerations

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

It is important to know that attorney conduct is regulated by the Federal Rules of Practitioner Conduct when practicing before the Executive Office for Immigration Review (EOIR) or U.S. Citizenship and Immigration Services (USCIS).<sup>60</sup> It is also important to be aware of ethical rules in the state where you are licensed and practicing. The below chart will point primarily to the [ABA Model Rules of Professional Conduct](#) as an example and guide for how to address some of these common ethical questions.

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
Can I represent a child? Bottomline answer: Yes.	<ul style="list-style-type: none"><li>• <a href="#">In re Gault</a>, 387 U.S. 1 (1967)—juvenile justice</li><li>• <a href="#">ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States</a>—Section III.H. Right to Attorney</li></ul>
What does representation cover?	<ul style="list-style-type: none"><li>• Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer<ul style="list-style-type: none"><li>- What is reasonable?</li><li>- Has the client given informed consent?</li></ul></li><li>• <b>TIP:</b> It is important to define the scope of representation, including whether it will include appellate work. This becomes even more important when only working on a discrete part of a case.</li></ul>

<sup>60</sup> See 8 C.F.R. §§ 1292.3, 292.3, 1003.101, & 1003.102. See also [Immigration Court Practice Manual \(ICPM\) Ch. 10.4](#). Also, be aware of the McHenry [EOIR Policy Memorandum \(PM\) 19-06](#), *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct*, Dec. 18, 2018.

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
<p>How do I represent a child? Do I represent the child's wishes or best interest?</p> <p>Bottomline answer: the child's wishes.</p>	<ul style="list-style-type: none"> <li>• Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer <ul style="list-style-type: none"> <li>- (a) "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."</li> </ul> </li> <li>• Rule 1.14 Client with Diminished Capacity <ul style="list-style-type: none"> <li>- (a) "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."</li> <li>- Comment 1: "For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."</li> </ul> </li> <li>• Rule 1.4 Communications</li> <li>• Rule 2.1 Advisor</li> <li>• <i>ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States</i> – Section V.A. The Attorney's Role</li> </ul>
<p>Can I share information with a 3rd party?</p> <ul style="list-style-type: none"> <li>• I was referred the case from a non-profit organization and we continue to communicate about the case.</li> <li>• I am working with an interpreter or translator.</li> <li>• How can we keep information confidential and under privilege?</li> </ul>	<ul style="list-style-type: none"> <li>• Rule 1.6 Confidentiality of Information</li> <li>• Rule 1.4 Communications <ul style="list-style-type: none"> <li>- Has the client given informed consent? <i>See</i> 1.0(e) for the definition of "informed consent."</li> </ul> </li> <li>• Rule 5.3 Responsibilities regarding nonlawyer assistance</li> <li>• <b>TIP:</b> Is there a Memorandum of Understanding regarding the working relationship between the attorney and organization?</li> <li>• <b>TIP:</b> Do you have a confidentiality agreement with the interpreter/translator? Do you have a release from your client?</li> </ul>

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
I am new to immigration law, what are my obligations to learn the law?	<ul style="list-style-type: none"> <li>• Rule 1.1 Competence</li> <li>• Rule 1.3 Diligence</li> </ul>
I found out the child I represent was abused by their parent; do I have to report this to child protective services?	<ul style="list-style-type: none"> <li>• Look to state law, does the state where you practice or where you are licensed have a duty to report? Is this mandatory? Is this prohibited absent client consent?</li> <li>• Consider questions relating to privilege and confidentiality as well. <ul style="list-style-type: none"> <li>- Rule 1.6 Confidentiality</li> </ul> </li> <li>• <b>TIP:</b> If your state has a mandatory duty to report, it helps to talk with your client about this at the beginning of representation and include language regarding this in your engagement letter. Explain what abuse is and your obligations to report.</li> </ul>
My client asked me to keep something important from the immigration court or USCIS, what do I do?	<ul style="list-style-type: none"> <li>• Rule 3.3 Candor toward the Tribunal</li> <li>• Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer</li> <li>• Rule 1.6 Confidentiality of Information</li> <li>• Rule 1.7 Conflict of Interest: Current Clients</li> <li>• Rule 1.16 Declining or Terminating Representation</li> </ul>
I would like to represent the child and their parent in state court, is that okay?	<ul style="list-style-type: none"> <li>• Rule 1.7 Conflict of Interest: Current Clients</li> <li>• Rule 1.8 Conflict of Interest: Current Clients: Specific Rules</li> <li>• Rule 1.9 Duties to Former Clients</li> </ul>
When is withdrawal allowed?	<ul style="list-style-type: none"> <li>• Rule 1.16 Declining or Terminating Representation</li> <li>• Rule 1.3 Diligence</li> <li>• Rule 1.4 Communications</li> <li>• Rule 2.1 Advisor</li> <li>• Rule 3.1 Meritorious Claims and Contentions</li> <li>• <b>NOTE:</b> Keep in mind many nonprofit organizations do not have capacity for a case to be given back to them.</li> </ul>

COMMON ETHICAL QUESTIONS OR SCENARIOS	WHERE TO LOOK FOR GUIDANCE
<p>I have concerns about my child client's capacity and/or competency. What do I do?</p>	<ul style="list-style-type: none"> <li>• Rule 1.14 Client with Diminished Capacity</li> <li>• Rule 1.2 Scope of Representation &amp; Allocation of Authority Between Client &amp; Lawyer</li> <li>• <a href="#">ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States</a> – Section V.A. The Attorney's Role, Section X.C. Determinations of Competency in Immigration Adjudications</li> <li>• <b>NOTE:</b> When a child client expresses that they want to take a certain course of action that you think is not in their best interest, this in and of itself does not mean that they lack capacity/or competency. <i>See</i> Rule 1.2.</li> <li>• <b>TIP:</b> If you are concerned about the child's ability to make choices and meaningfully participate in their immigration case, you might consider submitting a referral for a child advocate through The Young Center, discussed below.</li> <li>• <b>TIP:</b> If your client is in removal proceedings, and you are concerned about competency, you may need to raise the issue in immigration court and seek safeguards in line with <a href="#">Matter of M-A-M-</a>, 25 I&amp;N Dec. 474 (BIA 2011).</li> </ul>

If you think it is necessary to have a [best interest](#) opinion in the case, contact the [Young Center](#) for Immigrant Children's Rights (Young Center) to [refer](#) a child for the appointment of a child advocate. This is particularly helpful, for example in challenging cases and cases that involve very young children. [EOIR DM 23-03](#) describes when a child advocate can be appointed. Child advocates can be appointed for child trafficking victims and other vulnerable unaccompanied children, and the DM provides several examples.<sup>61</sup> The Young Center provides examples on their website of vulnerable children it may be appointed to serve including: "children who have been abused, infants who are the subject of international custody battles, children who have developmental disabilities, young girls who want to live with their traffickers, those who have lost their parents to violence, and more."<sup>62</sup>

If you have an ethics question, after reading your state's ethics rules, comments, and opinions, then consider consulting with others you trust on the matter including a pro bono coordinating attorney, if there is one at the organization who referred the case to you. Many state bars have an ethics hotline who you can contact for assistance, which is a very helpful tool. Also, look for other helpful resources in your area. For instance, you can reach out to CILA with technical assistance questions. Those providing pro bono assistance for cases posted to [CILA's platform](#) or in connection with certain legal services providers are welcome to contact the CILA team with [technical assistance](#) questions. Read more about CILA's services in [Section I.A.](#)

<sup>61</sup> *The Role of Child Advocates in Immigration Court*, [EOIR DM 23-03](#) (July 5, 2023).

<sup>62</sup> *Child Advocate Program*, The Young Center for Immigrant Children's Rights, <https://www.theyoungcenter.org/child-advocate-program> (last visited June 27, 2023).

## **Links to Further Support Your Knowledge of ETHICAL ISSUES IN CHILDREN'S CASES**

- Check out CILA's 101 [webinar](#): *Ethical Representation for Unaccompanied Children* (52 minutes).
- View CILA's [webinar](#): *Sticky Issues: Ethical Challenges in Representing Unaccompanied Children* (1 hour, 33 minutes). This webinar also points to relevant Texas Disciplinary Rules of Conduct.
- Review CILA's resource, [A Toolkit for Navigating Difficult Conversations with Child Clients: Guidance Examples](#), August 2, 2023. This interdisciplinary resource includes ethical considerations, helpful context for conversations, practical tips for supporting clients, and self-care strategies.
- Read Markkula Center for Applied Ethics at Santa Clara University 2018: [A Framework for Ethical Decision Making](#), November 18, 2021.
- Review the [ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States](#), August 2018.
- Learn about Cultural Competency with CILA's Guide: [Cultural Competency and Humility When Representing Unaccompanied Children](#).
- Read Lowenstein Sandler's Memorandum: [Ethical Obligations in Representing Children Without Capacity in Immigration Proceedings](#), December 13, 2018.
- Check out CILA's Practice Advisory [Ethical Considerations when Discussing Social Media with your Immigrant Client](#) and [How to Discuss Social Media with Child Clients](#).
- For family unit cases, review ethical considerations in the ABA Commission on Immigration's [Family Group Dedicated Docket Pro Bono Manual](#), November 3, 2022.



# SECTION III.



# III. COMMON FORMS OF RELIEF

## A. Assessing Forms of Relief

### The Screening Process

A referring organization may conduct an initial intake to screen for relief and provide recommendations for the types of legal relief to pursue. The pro bono attorney should still be familiar with the different types of potential relief in immigration cases and screen throughout the case for potential relief.<sup>63</sup> Before meeting with your client, research the different types of relief available and prepare by organizing your notes and questions in advance. You want to understand the key requirements for each type of potential relief as well as the potential pros and cons of seeking that form of relief. While you provide advice, remember that the client must ultimately decide what relief they want to pursue.

**TIP:** Even if the case file has an intake form, remember that children may not always be forthcoming in their initial meetings and that you should always conduct your own evaluation of the case. Review [Section II.C.](#) for interviewing tips and strategies. Check out these intake materials from [COI and CILA](#) (template for children's cases starting on page 49), [CLINIC](#), and [ILRC](#).

### SEEKING MULTIPLE FORMS OF RELIEF

Your client may simultaneously apply for multiple forms of relief. In fact, it is often best to preserve options by pursuing multiple forms of relief at the same time, if available to your client. Be clear at the outset of the case what role you will play in your client's case. If you will only be helping with seeking one type of legal relief, you should clearly explain that at the outset and make the scope of representation clear in your legal representation agreement. You may also need to clarify the scope of your representation when entering an appearance with USCIS or in immigration court.

#### TIPS FOR ASSESSING MULTIPLE FORMS OF RELIEF

It helps to understand your client's goals and priorities for their legal case when discussing relief options and making a case strategy plan. Considerations to discuss may include:

- What is the impact on any ongoing removal proceedings? Who will be the adjudicator of the claim?
- How much does the application for relief cost? Are fee waivers available?
- What is the timeline for seeking this form of relief? Are there significant delays or backlogs?
- Will seeking an additional form of relief impact the process and/or timeline? How so?
- Does your client want to travel in the future to their country of origin?
- Does your client want to help family members or parents obtain benefits in the United States?
- Does your client want to seek work authorization?
- Does your client have any criminal history? Check out CLINIC's [Relief Chart](#) for helpful information on assessing eligibility for immigration relief despite criminal record issues.

<sup>63</sup> CILA has a series of blog posts on best practices for consistently keeping in contact with clients and re-screening for relief, especially in cases that last a long time. Here are the posts on [U Visas](#) and [T visas](#).

## HUMANITARIAN-BASED RELIEF

Immigration law is expansive and includes employment-based, family-based, and humanitarian-based options.<sup>64</sup> Most cases involving unaccompanied children involve humanitarian-based relief. This Guide focuses on the following:

- [Asylum](#)<sup>65</sup>
- [Special Immigrant Juvenile Status \(SIJS\)](#)
- [U Visas](#)
- [T Visas](#)
- Relief and family petitions under the [Violence Against Women Act \(VAWA\)](#)

The following chart provides a starting point for comparing these forms of relief. You should review the detailed sections of the Guide to better understand each of them.

	ASYLUM	SIJS	U VISA	T VISA	VAWA
<b>Pathway to lawful permanent residency</b>	Yes, 1 year after grant of asylum	Yes, but subject to long waitlist	Yes, 3 years after visa approval and long waitlist for visa approval	Yes, 3 years after visa approval	Yes, but may be subject to wait for availability
<b>Derivative applicants allowed</b>	Yes	No	Yes	Yes	Yes
<b>Travel to country of origin allowed<sup>66</sup></b>	No <sup>67</sup>	Yes	Yes	Yes	Yes
<b>Parental benefits</b>	Yes	No	Yes	Yes	Yes
<b>Work authorization eligibility</b>	Yes, while asylum application is pending	Yes, if deferred action is granted	Yes, if receive bona fide determination	Yes, if approved	Yes, if approved

<sup>64</sup> While uncommon, some unaccompanied children may qualify for family-based relief if they are related to U.S. citizens or Legal Permanent Residents (LPRs). This is why it is important to ask about the legal status of any family members in the United States.

<sup>65</sup> The Guide also discusses how to seek [Withholding of Removal](#) and relief under the [Convention Against Torture \(CAT\)](#) as alternatives to asylum.

<sup>66</sup> Options for traveling anywhere outside of the United States are very limited until the applicant receives permanent residency. You should always review the requirements and processes involved and advise your clients of any risks of traveling. For example, Tahirih Justice Center has more information about travel issues in their overviews of what happens after a [T Visa](#) or [U Visa](#) is approved.

<sup>67</sup> See Asylum Seeker Advocacy Project, *Moving and Traveling*, <https://help.asylumadvocacy.org/faqs-moving-traveling/#travel-outside-united-states> (last visited Aug. 2, 2023); 8 U.S.C. § 1158(c).

## A NOTE ABOUT TEMPORARY PROTECTED STATUS (TPS) & HUMANITARIAN PAROLE

While not the focus of this Guide, there are two types of temporary relief options to be aware of. First, TPS is a form of temporary immigration relief that allows people from certain countries to remain in the United States for a set period of time, typically from 6 to 18 months.<sup>68</sup> During that time, they cannot be removed and are eligible for work authorization. While TPS does **not** provide a pathway to legal permanent residency, recipients can apply for other relief options, and it is possible for the designation period to be extended. Applications for TPS must be submitted during a set eligibility period. Example designated countries for TPS have included [Afghanistan](#), [El Salvador](#), [Honduras](#), [Nicaragua](#), [Ukraine](#), and [Venezuela](#).

Second, parole into the United States may be available for people who are physically outside the country and from certain countries, including [Afghanistan](#), [Ukraine](#), [Haiti](#), [Cuba](#), [Nicaragua](#), or [Venezuela](#).<sup>69</sup> Parole typically lasts for 2 years. Like TPS, parole generally does **not** provide a pathway for permanent residency but does protect against removal and allow recipients to seek other relief and work authorization. If your client is considering parole, review the eligibility requirements closely as they can vary by country. The process usually requires a sponsor in the United States, although a sponsor was not necessarily required for individuals fleeing Afghanistan.

**TIP:** This is an area of law with frequent changes, and TPS or parole eligibility for some of the countries is set to expire soon. Be sure to check for any legal updates or for the risk of any upcoming policy changes.

## Central American Minors (CAM) Refugee and Parole Program

Youth from El Salvador, Guatemala, or Honduras with a parent or legal guardian living in the United States may be eligible for relief under the [CAM Refugee and Parole Program](#). This program was designed to reunite youth with their parents and applies only if the parent or guardian has a certain legal status in the United States. If your client might be eligible, review this [Practice Advisory](#) from ILRC. Be aware that since its creation in 2014 the program's viability and eligibility criteria has differed with each president. Learn more about recent changes in CLINIC's [Updates to the Central American Minors Program](#) (April 26, 2023).

## Links to Help You with ASSESSING YOUR CLIENT'S RELIEF OPTIONS

- Check out the ABA Commission on Immigration (COI) & CILA's 101 [webinar](#) for pro bono attorneys on *Representing Children and Families in Immigration Matters* (3 hours 58 minutes).
- Review the sample intake forms and other resources in CILA & COI's [Pro Bono Program Resources & Templates Toolkit](#).
- Check out CILA's [webinar](#), *Tips and Guidance for Helping Unaccompanied Immigrant Youth Access Publicly Funded Benefits and Services* (1 hour, 54 minutes).
- Watch the COI [webinar](#), *Common Forms of Immigration Relief for Family Groups and How to Screen for Them* (1 hour 31 minutes).
- Read CILA's ongoing [blog series](#) on *Supporting Our Clients in the Interim by Rescreening for Relief*.
- Review CLINIC's [Guide to Client Documentation and Benefits for Afghan Parolees](#) and [FAQs](#) about TPS for Afghans.

<sup>68</sup> See USCIS, *What is TPS?*, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last reviewed/updated Oct. 10, 2023); KIND, *Chapter 9: Temporary Protected Status (TPS)*, <https://supportkind.org/wp-content/uploads/2015/04/Chapter-9-Temporary-Protected-Status-TPS.pdf> (last visited July 5, 2023).

<sup>69</sup> See USCIS, *What is Parole?*, [https://www.uscis.gov/humanitarian/humanitarian\\_parole](https://www.uscis.gov/humanitarian/humanitarian_parole) (last reviewed/updated Oct. 23, 2023).

## B. Asylum

If your client is afraid to return to their country of origin, it is important to discuss the option to apply for asylum. Asylum is a common form of potential relief in many youths' cases because many children are fleeing violence in their country or other dangerous conditions. There are many reasons children flee to the United States and many reasons they fear going home. These reasons are often intersecting.<sup>70</sup> The root causes of migration could include targeted violence because of the child or their family's race or ethnicity, religion, sexual orientation, political opinion, refusal to become a gang member or a girlfriend of a gang member, sexual violence or child abuse, or because their parent or caregiver suffered harm. There are many reports on the general conditions in many countries around the world. Every child has a unique story. It is important to discuss these matters in detail, and the option of asylum as a potential form of relief.

[Form I-589, Application for Asylum and for Withholding of Removal](#) is the correct form to use to apply for asylum. Additionally, an asylum applicant may be able to seek employment authorization while their claim is pending after a waiting period has passed.<sup>71</sup>

### Eligibility Requirements

To be eligible for asylum, an individual must be physically present in the United States and meet the definition of a refugee under the Immigration and Nationality Act (INA) § 101(a)(42)(A). The INA defines a refugee<sup>72</sup> as:

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

INA § 101(a)(42)(A).

### New to Asylum Law?

There are many resources included throughout this section to support you in your advocacy of a child seeking asylum. Get started by watching CILA's [101 webinar](#) on asylum law and use CILA's [Asylum Case Theory and Evidence Matrix](#) to help you stay organized as you work with the child to develop the case.

<sup>70</sup> See United Nations High Commissioner for Refugees (UNHCR) Report, *Children on the Run*, <https://www.unhcr.org/en-us/children-on-the-run.html> (last visited June 27, 2023).

<sup>71</sup> See *infra* page 66 for more information about how asylum seekers can obtain employment authorization.

<sup>72</sup> *INS v. Cardoza-Fonseca* states that, "[i]n interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on the Procedures and Criteria for Determining Refugee Status (Geneva, 1979)." 480 U.S. 421, 437-39 (1987). The decision also says that, "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform." *Id.* at 439, n.22. Notably, UNHCR's *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* states,

As with gender, age is relevant to the entire refugee definition. As noted by the UN Committee on the Rights of the Child, the refugee definition: . . . must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.

**Elements of an asylum claim**—An individual must be:

- Unable or unwilling to return to their home country because they
- Either suffered past persecution OR have a well-founded fear of future persecution
- Perpetrated by the government OR an entity the government cannot or will not control
- On account of (nexus) one of the five protected grounds (actual or imputed<sup>73</sup>):
  - Race
  - Religion
  - Nationality
  - Membership in a particular social group (PSG)
  - Political opinion<sup>74</sup>
- Additionally, they must merit favorable discretion<sup>75</sup> and must not be subject to any bars to asylum.



<sup>73</sup> While most claims involving an imputed protected ground involve political opinion, other protected grounds can be imputed as well. See, e.g., *R-A-E*, AXXX XXX 933 (BIA Dec. 28, 2016) (granting withholding of removal based on particular social group of “imputed homosexual(s)” for a man from El Salvador); *J-C-J*, AXXX XXX 315 (BIA May 29, 2019) (finding a man suffered past persecution on account of an imputed nationality, where he was a Mexican national, but the police might have mistaken him to be a United States citizen).

<sup>74</sup> According to UNHCR,

The application of the Convention ground of ‘political opinion’ is not limited to adult claims. A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods. Whether or not a child is capable of holding a political opinion is a question of fact and is to be determined by assessing the child’s level of maturity and development, level of education, and his/her ability to articulate those views.

UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc HCR/GIP/09/08 (Dec. 22, 2009), <https://www.unhcr.org/media/guidelines-international-protection-no-8-child-asylum-claims-under-articles-1-2-and-1-f-1951>.

<sup>75</sup> USCIS issued a policy alert in July 2020 regarding updating the USCIS Policy Manual on “application of discretion in applications.” USCIS, *Policy Alert: Applying Discretion in USCIS Adjudications*, PA-2020-10 (July 15, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>. The update includes a non-exhaustive list of factors for officers to consider. See *USCIS Policy Manual* Vol. 1, Pt. E, Ch. 8. It is important to consider this section of the USCIS Policy Manual since discretion will be a consideration in asylum claims. For more information, review ILRC’s practice advisory. Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion* (Mar. 2021), <https://www.ilrc.org/uscis-policy-manual-makes-sweeping-changes-discretion>.



## Asylum Key Sources of Law

- INA § 208; 8 U.S.C. § 1158
- INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A)
- INA § 209; 8 U.S.C. § 1159 (adjustment of status)
- 8 C.F.R. § 208.13
- Case Law—[Board of Immigration Appeals \(BIA\) decisions](#), Circuit Courts of Appeals decisions, Supreme Court decisions
- Persuasive Authorities:
  - Other Circuit Court decisions
  - International law—Treaties
  - [UNCHR Handbook on Procedures and Criteria for Determining Refugee Status & Guidelines on International Protection](#) (Particularly, see *UNHCR Guidelines on International Protection: Child Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* starting on page 145.) See also [UNHCR's Views on Children's Asylum Claims: Using International law to support claims of children seeking protection in the United States](#), Sept. 2022; [UNHCR's Views on Asylum Claims from Individuals Fleeing Violence by Gangs and Other Organized Criminal Groups in Central America and Mexico: Using International law to support claims of children seeking protection in the United States](#), Sept. 2022. More information can be found on UNHCR's webpages on [U.S. Asylum Resources](#) and [Children's Claims](#).
- Field Manuals and Agency Guidelines:
  - [USCIS Policy Manual](#) (replaced the USCIS Adjudicator's Field Manual)
  - USCIS Asylum Division [Affirmative Asylum Procedures Manual](#)
  - [EOIR Reference Materials](#)
  - Asylum Officer Basic Training Course Lessons Modules. Search for the modules in USCIS's [Electronic Reading Room](#). Additionally, the [RAIO Combined Training Program Children's Claims Training Module](#) is very helpful.

There have been many recent changes and attempted changes to asylum law.<sup>76</sup> This Guide notes some but not all of the recent proposed changes, and instead accounts for the current state of the law as it pertains to unaccompanied children, as of publication. Moreover, it is likely that additional rulemaking related to asylum is forthcoming.<sup>77</sup> Therefore, it is important to conduct research and consult other resources regarding any updates.

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

- **Previous Asylum Application:** If an individual previously applied for and was denied asylum, they cannot reapply unless there are changed circumstances.<sup>78</sup> This also applies to unaccompanied children.
- **Safe Third Country:** This is not applicable to unaccompanied children. Typically, an individual can be removed to a country other than their own, in which the United States has a bilateral or multilateral agreement, if the individual's life or freedom would not be threatened on account of one of the five protected grounds in that country. Additionally, the individual must have access to a full and fair procedure to determine asylum or other protection within that country.<sup>79</sup>
- **One-Year Filing Deadline:** Generally, asylum applications must be filed within one year after the date the individual arrived in the United States.<sup>80</sup> However, the one-year filing deadline is not applicable to unaccompanied children.<sup>81</sup>

There are also **several bars** to obtaining asylum.<sup>82</sup>

- **Persecution of Others:** An individual who participated in persecution of others on account of one of the five grounds is barred from obtaining asylum.<sup>83</sup>
- **Particularly Serious Crime Conviction:** An individual who was convicted of a particularly serious crime is barred from obtaining asylum.<sup>84</sup>
- **Nonpolitical Crime:** If there is reason to believe an individual committed a serious nonpolitical crime

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76 For instance, in December 2020, DHS and DOJ published a [final rule](#), *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review* that sought to vastly change asylum and withholding of removal protections including changing key definitions. See 85 Fed. Reg. 80274; 85 Fed. Reg. 36264. This rule did not go into effect as a result of litigation in *Pangea Legal Services v. DHS*; a [preliminary injunction](#) enjoined the government from implementing, enforcing, or applying the rule. This is just one example of why it is important to check for changes to the law. Additionally, CILA's resource titled [Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?](#) can help with your research regarding changes to asylum law.

77 On February 2, 2021, President Biden issued Executive Order 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*. This Executive Order instructs the Attorney General and the Secretary of Homeland Security to “conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards.” Additionally, it directs them “within 270 days of the date of this order, [to] promulgate joint regulations consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group.’” For more information, review Aaron Reichlin-Melnick, *Biden Signals Big Changes to Legal Immigration and Asylum Law with Spring Regulatory Agenda*, Immigration Impact, American Immigration Council (June 16, 2021), <https://immigrationimpact.com/2021/06/16/biden-changes-legal-immigration-asylum/?emci=06f7bc3c-a3d2-eb11-a7ad-501ac57b8fa7&em-di=db095945-acd2-eb11-a7ad-501ac57b8fa7&ceid=9238371#.YPYrT2SmM->. Despite the passage of time beyond the 270 days, this possible rulemaking has not occurred as of publishing.

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

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

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

81 INA § 208(a)(2)(E); 8 U.S.C. § 1158(a)(2)(E). However, be mindful of the possibility of losing the unaccompanied child designation if the child turns 18 or is reunified with a parent or legal guardian. According to the USCIS “[Kim Memo](#),” it takes an affirmative act by HHS, ICE, or CBP to terminate the unaccompanied child designation/determination. It may also help to read the National Immigration Project’s (NIPNLG) [Fact Sheet](#) on the *J.O.P.* litigation. While this covers a separate issue, whether USCIS or EOIR has initial jurisdiction over an unaccompanied child’s asylum case, it involves an overlapping issue—the designation/determination of unaccompanied child status. Read more later in this Guide on page 53.

82 Several new bars to asylum were created by rulemaking in 2018 through 2023. However, not all of the rules went into effect as a result of litigation and some rules have not applied to unaccompanied children. Bars covered issues such as transit through a third country en route to the United States, criminal offenses, and public health concerns. CILA has a resource titled [Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?](#) on CILA’s [website](#) that you can check for more information regarding changes to asylum law.

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

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

outside of the United States, the individual is barred from obtaining asylum.<sup>85</sup>

- **Danger to U.S. Security:** If there are reasonable grounds that an individual is a danger to U.S. security, then the individual will be barred from obtaining asylum.<sup>86</sup>
- **Terrorism-Related Grounds:** An individual can be barred from obtaining asylum based on terrorism-related grounds.<sup>87</sup>
- **Firm Resettlement:** Asylum is barred if an individual firmly resettled in another country prior to arriving in the United States.<sup>88</sup>

## Asylum Law is a Dynamic Area of Law

- As a result of rulemaking, policy changes, and case law, asylum law is a dynamic area of law.
- Particularly since 2018, asylum law has endured frequent changes to curtail and limit the form of protection. The changes have sometimes focused on a particular area of the law, and in other instances a rule addressed numerous areas and if implemented, would vastly change asylum and withholding of removal protection. Some rules have excluded unaccompanied children, but directly or indirectly, many of these changes have affected unaccompanied children. Frequently, litigation followed the change, and in several instances, the proposed changes never took effect because of litigation efforts.
- The Guide presents information on asylum law, current at the time of publication, but it is important to know this is a dynamic area of law with frequent changes. Be aware that the regulations posted on the government's [website](#) includes rules that have been [enjoined](#), so practitioners should check other sources for the current law. Read the post on AILA's *Think Immigration* blog, "[The Death to Asylum Regulations Continue to Harm Asylum Seekers Even Though They are Enjoined](#)" to learn more about this issue and review NIPNLG's *Enjoined Asylum Regulations "Cheat Sheet"* to help you in your research.
- CILA created a resource *Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?* posted on CILA's [website](#) to help practitioners stay up to date on the status of the changes and know how the changes impact youth.

## BURDENS OF PROOF

An applicant has the burden to prove they are a refugee as defined by the INA.<sup>89</sup> An individual can establish asylum eligibility by proving that they have suffered persecution or that they have a well-founded fear of persecution on account of one of the five protected grounds. If an applicant proves they have suffered past persecution, then it is also presumed that they have a well-founded fear of persecution on that same basis.<sup>90</sup>

If the applicant meets their burden, it becomes the government's burden to rebut the presumption of a

<sup>85</sup> INA § 208(b)(2)(A)(iii); 8 U.S.C. § 1158(b)(2)(A)(iii).

<sup>86</sup> INA § 208(b)(2)(A)(iv); 8 U.S.C. § 1158(b)(2)(A)(iv).

<sup>87</sup> INA § 208(b)(2)(A)(v); 8 U.S.C. § 1158(b)(2)(A)(v).

<sup>88</sup> INA § 208(b)(2)(A)(vi); 8 U.S.C. § 1158(b)(2)(A)(vi). *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011); *Matter of K-S-E-*, 27 I&N Dec. 818 (BIA 2020).

<sup>89</sup> INA § 208(b)(1)(B); 8 U.S.C. § 1158(b)(1)(B); 8 C.F.R. § 208.13(a).

<sup>90</sup> 8 C.F.R. § 208.13(b)(1).

well-founded fear of persecution by showing by a preponderance of the evidence that, (1) “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality”<sup>91</sup> or (2) “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality.”<sup>92</sup> For the second option, the internal relocation must be *reasonable*.<sup>93</sup> In determining reasonableness, factors such as “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties” should be considered.<sup>94</sup> For children, USCIS training materials instruct that “[i]t is generally not reasonable to expect a child to internally relocate by himself or herself; however, you should examine whether circumstances show that internal relocation would be reasonable.”<sup>95</sup>

## CREDIBILITY

Credibility is always at issue in an asylum case. The decision maker will determine your client’s credibility by their statements in the I-589 application, declaration, and evidence in the packet submitted. Statements given during any testimony in immigration court or during an asylum interview will also be assessed to determine your client’s credibility.<sup>96</sup> Consistent truthful statements are imperative. An applicant’s “own testimony in an asylum case may be sufficient, without corroborative evidence, to prove a well-founded fear of persecution where that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.”<sup>97</sup>

It is also important to know there are significant consequences if it is determined that your client has “knowingly made a frivolous application.”<sup>98</sup> In this situation, the applicant will be permanently ineligible from any immigration benefit under the Act, except withholding of removal.<sup>99</sup> “[A]n asylum application is frivolous if any of its material elements is deliberately fabricated.”<sup>100</sup>

## Common Issues Impacting Unaccompanied Children

### ONE-YEAR DEADLINE

Generally speaking, applicants must submit an asylum application within one year of entry into the country;<sup>101</sup> however, the one-year rule does not apply to unaccompanied children.<sup>102</sup> If a child loses status as an unaccompanied child, then they also lose this exception. Therefore, it is best practice to submit the asylum application within one year of entry, and if at all possible, before the unaccompanied child turns 18.

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91 8 C.F.R. § 208.13(b)(1)(i)(A). Keep in mind a change in personal circumstances can include changes in age and becoming an adult. *E.g. Hui v. Holder*, 769 F.3d 984, 987 (8th Cir. 2014) (“We conclude that substantial evidence supports the determination by the IJ and the BIA that Hui’s age was a fundamental change in circumstances such that her life or freedom would not be threatened if she returned to Hong Kong.”).

92 8 C.F.R. § 208.13(b)(1)(i)(B).

93 8 C.F.R. § 208.13(b)(3).

94 8 C.F.R. § 208.13(b)(3).

95 RAO Directorate, *RAIO Combined Training Program Children’s Claims Training Module*, USCIS (Dec. 20, 2019), at 51-52, [https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Childrens_Claims_LP_RAIO.pdf); see also UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), <https://www.unhcr.org/50ae46309.html>.

96 See RAO Directorate, *RAIO Combined Training Program Children’s Claims Training Manual* at 38-43. Additionally, the USCIS training manual for children’s claims states that, “[t]he child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances.” *Id.* at 41.

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

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

99 *Id.*

100 8 C.F.R. § 208.20. See also *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007).

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

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

If your child client is not designated as an unaccompanied child or loses the unaccompanied child designation<sup>103</sup> and misses the one-year deadline for the asylum application, then it is important to consider whether there are any exceptions. The exceptions to the one-year filing deadline include “the existence of changed circumstances” (e.g., change in country conditions or a change in the applicant’s circumstances) or “extraordinary circumstances relating to the delay.”<sup>104</sup> One example of “extraordinary circumstances” in the asylum regulations is a “[l]egal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival.”<sup>105</sup> It is important to argue age and competency as an extraordinary circumstance as a reason for the delay if this situation arises. For more information on the one-year deadline, read ILRC’s Practice Advisory *Unaccompanied Children and the One-Year Filing Deadline*.

## WHAT IS PERSECUTION?

Persecution can take many forms and is something that is determined by case law, so research is important to make factual comparisons. Generally, persecution is defined as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”<sup>106</sup> *Matter of Acosta* goes on to say that the “harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”<sup>107</sup> Persecution can include physical harm, such as beatings, kidnappings, sexual harm, torture, forced labor, or emotional harm or harm to one’s psychological or emotional health such as threats or bigotry. Depending on your Circuit Court of Appeals jurisdiction, threats without other harm can sometimes be considered past persecution, but it is important to consider the surrounding circumstances to prove that it rises to the level of persecution.<sup>108</sup>

An individual could also experience persecution as a result of family members or caregivers being harmed or witnessing others who are close to them being harmed. Consider as well any ongoing emotional trauma or effects of the persecution such as Post Traumatic Stress Disorder (PTSD) symptoms or a diagnosis of a mental health disorder.

In addition, the Board of Immigration Appeals (BIA) has recognized that persecution can sometimes be in the form of economic harm: “Nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution.”<sup>109</sup>

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<sup>103</sup> See the box “Where Should I File the Asylum Application?” on page 53 to learn more about designation issues.

<sup>104</sup> INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D). See also 8 C.F.R. § 208.4(a)(4)-(6).

<sup>105</sup> 8 C.F.R. § 208.4(a)(5)(ii). See also A-D-, XXXX XXX 526 (BIA May 22, 2017) (BIA remanded to consider whether respondent suffered from an extraordinary circumstance, after finding that all applicants under age 18 suffer from a per se “legal disability” and that youth between the age of 18 and 21 is a factor to be considered in whether the extraordinary circumstance exception is met).

<sup>106</sup> *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014) (“This court has declared, however, that credible threats of imminent death or grave physical harm can indeed be sufficient to amount to past persecution, provided they are credible, imminent and severe.” (citation omitted)); *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 208 (9th Cir. 2019) (“We have been most likely to find persecution where threats are repeated, specific, and ‘combined with confrontation or other mistreatment’” (citation omitted)); *Qorane v. Barr*, 919 F.3d 904, 910 (5th Cir. 2019) (“We have previously treated death threats as a question of future—not past—persecution.” (citation omitted)).

<sup>109</sup> *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007). According to UNHCR, “[a] violation of an economic, social or cultural right may amount to persecution. . . .” UNHCR’s *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* § 35. Moreover, “[m]easures of discrimination may amount to persecution when they lead to consequences of a substantially prejudicial nature for the child concerned. Children who lack adult care and support, are orphaned, abandoned, or rejected by their parents, are escaping violence in their homes may be particularly affected by such forms of discrimination.” *Id.* § 36.



## Where Should I File the Asylum Application?

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

If the unaccompanied child is also in removal proceedings, then you will also likely want to consider procedural options to have the case put on hold or closed while the asylum application is adjudicated by USCIS. Some options to consider include filing a copy of the USCIS filing receipt and seeking (1) a continuance, (2) placement on a status docket, (3) administrative closure, or (4) dismissal. These are discussed in more detail in [Section IV.C](#).

If a child either turned age 18 or reunified with a parent, then there is debate on who has jurisdiction to decide the child's asylum case. At publishing of this Guide, USCIS follows the "[Kim Memo](#)" from May 2013 regarding procedures for asylum applications filed by unaccompanied children. (USCIS issued the "[Lafferty Memo](#)" in May 2019 reversing the "Kim Memo"; however, USCIS was enjoined from applying the Lafferty Memo as result of litigation in [J.O.P. v. DHS](#), No. GJH-19-1944 (D. Md.). Therefore, the "Kim Memo" is still in effect.) Essentially, if a child was already designated an unaccompanied child and that designation is still in place when the application is filed, then the Asylum Office will adopt that decision without further inquiry.

Whereas, immigration judges may look to [Matter of M-A-C-O-](#), 27 I&N Dec. 477 (BIA 2018). According to [Matter of M-A-C-O-](#), "[a]n Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied [noncitizen] child but who turned 18 before filing the application." *Id.* at 477.

Take a look at these resources to learn more:

- NIPNLG's [Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings in Light of J.O.P. v. DHS, No. 19-01944 \(D. Md. filed July 1, 2019\)](#)
- CILA's [Overview of Designation as an "Unaccompanied \[non-citizen\] Child \(UAC\)"](#)
- CILA's [UAC Designation Flow Chart](#)

## EXPERIENCING HARM AS A CHILD

Whether an adult or child, the cumulative harm of an individual seeking asylum should be considered when determining whether they had past persecution.<sup>110</sup> Therefore, it is important to raise each harm your client suffered.

When working with youth, their age is also important when determining if they suffered past persecution. Arguments related to age can be raised even if your client is currently of majority but experienced harm as a child. According to the United Nations High Commissioner for Refugees' (UNHCR) *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*:

While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that may not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.<sup>111</sup>

USCIS similarly trains officers to “determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered” when assessing whether harm arises to the level of persecution.<sup>112</sup> Moreover, many federal courts have acknowledged that children experience events differently than adults and that age can be an important factor when assessing an asylum claim and witness credibility. Some examples include:

- *Saban-Cach v. Garland*, 58 F. 4th 716, 729-30 (3d Cir. 2023): “[A]ge can be a critical factor in determining whether a petitioner’s experiences meet the threshold of past persecution.”
- *Ordones-Quino v. Holder*, 760 F.3d 80, 92 (1st Cir. 2014): “Because the BIA failed to address the harms Ordones-Quino and his family experienced cumulatively and from the perspective of a child, its determination is not supported by substantial evidence in the record.”
- *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007): “[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution.”
- *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006): Noted that respondent due to his age was “necessarily dependent on both his family and his community.”
- *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004): “There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult.”
- *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004): Cited UNHCR guidance on children’s testimony and that asylum adjudicators should “keep[] in mind that very young children may be incapable of expressing fear to the same degree or with the same level of detail as an adult.”

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

111 UNCHR’s *Views on Children’s Asylum Claims* (Sept. 2022) similarly recognizes how children can experience harm differently. See also RAIO Directorate *RAIO Combined Training Program Children’s Claims Training Manual*, USCIS (Dec. 20, 2019) at 44-48.

112 RAIO Directorate, *RAIO Combined Training Program Definition of Persecution and Eligibility Based on Past Persecution*, USCIS (Dec. 20, 2019), at 16, [https://www.uscis.gov/sites/default/files/files/natedocuments/Persecution\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/natedocuments/Persecution_LP_RAIO.pdf).

## HUMANITARIAN ASYLUM

If an applicant suffered past persecution but does not have a well-founded fear of future persecution, the decision maker has discretion to grant asylum if the applicant suffered severe past persecution<sup>113</sup> or if the applicant shows that there is a reasonable possibility that they may suffer other serious harm upon removal.<sup>114</sup> An applicant must still be able to prove the other requirements for asylum including nexus to a protected ground.

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

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

## WELL-FOUNDED FEAR OF FUTURE PERSECUTION

An applicant must show based on the objective and subjective evidence that “a reasonable person in his circumstances would fear persecution.”<sup>115</sup> Additionally, “[a]n applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all circumstances it would be reasonable to expect the applicant to do so.”<sup>116</sup>

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

It is important to note that the standard for a well-founded fear is not “more likely than not”; in fact, if there is a 1 in 10 chance that the event would happen, then this is enough to show a well-founded fear.<sup>117</sup> As you can see, this burden is quite low compared to burdens of proof in other types of cases.

The BIA recognizes four criteria that must be shown for an individual to establish an individualized well-founded fear including:

- (1) the [applicant] possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the [applicant] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [applicant]; and (4) the persecutor has the inclination to punish the [applicant].<sup>118</sup>

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113 See *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). See also unpublished opinions: *Y-H-*, AXXX XXX 948 (BIA Sept. 24, 2020) (granted asylum to Chinese respondent based on severity of past persecution where respondent was victim of two forcible abortions); *F-K-*, AXXX XXX 026 (BIA Jan. 16, 2020) (granted asylum to Ethiopian respondent who underwent female genital mutilation (FGM) as a child and was unable to engage in personal relationships with men and continued to experience mental anguish); *A-A-O-*, AXXX XXX 913 (BIA Apr. 4, 2019) (reversed denial of humanitarian asylum to Nigerian respondent who was physically and sexually assaulted by multiple men); *C-M-J-*, AXXX XXX 286 (BIA Feb. 21, 2019) (remanded to consider humanitarian asylum for Guatemalan respondent who experienced abuse by her father). Additional unpublished decisions are available through the Immigrant & Refugee Center's [Index of Unpublished Decisions of the Board of Immigration Appeals](#).

114 See *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). 8 C.F.R. § 208.13(b)(1)(iii).

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

116 8 C.F.R. 208.13(b)(2)(ii).

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

118 *Matter of Acosta*, 19 I&N Dec. at 226. The BIA confirmed these requirements in *Matter of Mogharrabi*, 19 I&N Dec. at 446.

The applicant does *not* have to show they would be “singled out individually for persecution.”<sup>119</sup> It is enough to show a “pattern or practice . . . of persecution of a group of persons similarly situated to the applicant” if the persecution is on account of one of the five protected grounds and the applicant can show that they are included in that group of persons so “fear of persecution upon return is reasonable.”<sup>120</sup>

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

When talking with your client, it is important to understand from your client whom they fear and who is the persecutor. Is it the government or an employee of the government? Is it someone else like a gang member or family member? Or does your client fear both the government and a private (non-governmental) actor? If your client fears a private actor, then the question becomes whether the government in their country of origin is able and willing to control the persecutor.<sup>121</sup>

Here, country conditions reports and perhaps a country conditions expert become important to help establish that the government is unable or unwilling to control the persecutor. Expert testimony, reports, and/or articles can show evidence of corruption, impunity, pervasive problems, inadequate protection, lack of enforcement, and other government-involved criminal acts and violence.

Another issue that may arise is whether and to what extent past harm was reported to the government. While adjudicators often ask questions about this and it can be relevant, keep in mind that reporting a past harm is not required. This may be especially true when working with children. USCIS training materials provide that “[r]easonable explanations for why a child did not seek protection” may include evidence that the “applicant was so young that he or she would not have been able to seek government protection,” the “government has shown itself unable or unwilling to act in similar situations,” or the “applicant would have increased his or her risk by affirmatively seeking protection.”<sup>122</sup> Additionally, the BIA determined in *Matter of C-G-T-*, 28 I&N Dec. 740 (BIA 2023), that “[a] respondent’s failure to report harm is not necessarily fatal to a claim of persecution if the respondent can demonstrate that reporting private abuse to governmental authorities would have been futile or dangerous.” In that decision, the BIA also stated that these are “fact-specific inquiries” and acknowledged “that there may be a substantial difference in the ability of a young child to report abuse or recognize mistreatment as abuse, as compared to an older child” or compared to an adult.

## NEXUS AND MIXED MOTIVES

Nexus is the connection between the persecution/harm feared and the protected ground. It is the “why,” the “because of,” the “on account of.” You must prove the connection; how your client knows or believes the past persecution or feared persecution is because of the protected ground.<sup>123</sup> The persecutor can have mixed motives for causing harm to the applicant. The law requires that one of the five protected grounds “be at least one central reason for persecuting the applicant.”<sup>124</sup>

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119 8 C.F.R. § 208.13(b)(2)(iii).

120 *Id.*

121 In June 2018, the then-Attorney General issued a certified decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), that attempted to change this standard to *complete helplessness* of the government. However, the D.C. Circuit in *Grace v. Whitaker* enjoined enforcement of certain parts of that decision, and the June 2018 *Matter of A-B-* decision was ultimately vacated by another Attorney General certified decision issued in June 2021 in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021).

122 RAO Directorate, *RAIO Combined Training Program Children’s Claims Training Module*, USCIS (Dec. 20, 2019), at 4-50.

123 “[S]ome evidence of it [the persecutor’s motive], direct or circumstantial” is required. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). The RAO Directorate states asylum officers should consider a child’s age and maturity when assessing how they articulate their claims and includes the possibility that children will have a lack of understanding of the situation or an inability to articulate nexus during testimony. In this case, evidence other than the child’s testimony will be necessary, such as supporting letters, country conditions evidence, and/or expert testimony and/or declaration. See *RAIO Combined Training Program Children’s Claims Training Module*, USCIS (Dec. 20, 2019), at 52-53.

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

## CRAFTING A PSG

Generally<sup>125</sup>, a PSG delineation requires:

- Members of the group share an immutable characteristic<sup>126</sup>
- The group must be defined by particularity<sup>127</sup>
- The group must be socially distinct within the society in question<sup>128</sup>

If you are in immigration court, then you will likely be subject to the “exact delineation” requirement, which means the respondent must “clearly indicate” before the immigration judge “the exact delineation of any particular social group(s) to which she claims to belong.”<sup>129</sup> An appeal of the IJ’s asylum decision to the BIA may also be limited to PSGs that were delineated before the IJ.<sup>130</sup> Regardless of where the asylum claim is being heard—an Asylum Office or immigration court—delineating several PSGs for the decision maker to consider is often necessary to preserve the record. It is also important to brief each proposed PSG with supporting arguments.

The following table provides some guidance on some of the most common types of PSGs in children’s asylum cases.

COMMON ISSUES IN CHILDREN’S CASES THAT MAY LEAD TO AN ASYLUM CASE	INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.
LGBTQ Claims	<p>In <i>Matter of Toboso-Alfonso</i>, 20 I&amp;N Dec. 819 (BIA 1990), the BIA found that sexual orientation may form the basis for persecution on account of a PSG.<sup>131</sup></p> <p>In <i>Matter of C-G-T-</i>, 28 I&amp;N Dec. 740 (BIA 2023), the BIA found “[w]hen considering future harm, adjudicators should not expect a respondent to hide his or her sexual orientation if removed to his or her native country.”</p>

125 Keep in mind if you are in the Seventh Circuit that the court has deferred to the BIA’s approach in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) rather than using social distinction/visibility and particularity tests. See *Cece v. Holder*, 733 F.3d 662 669 (7th Cir. 2013) (citing *Matter of Acosta* and noting that a PSG is “defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change”); *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018) (“Whether the Board’s particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.”).

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

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

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

129 *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (internal quotation marks and citation omitted). See also *Cantarero-Lagos v. Barr*, 924 F.3d 145, 151 (5th Cir. 2019) (“[T]he BIA’s acknowledgement that applicants have a responsibility to articulate their PSG to the IJ does not in any way impede IJs’ ability to assist applicants in carrying out [their] responsibility.”).

130 The BIA typically has discretion to remand for consideration of additional PSGs and in fact they may be required to do so in some circumstances. For instance, the Fourth Circuit recognized in *Quintero v. Garland* that the “exact delineation” requirement should not apply to a pro se asylum seeker and that “where the Board of Immigration Appeals finds that an immigration judge failed to probe into and consider a potential social group supported by the applicant’s circumstances, it usually must remedy the error by remanding the case for further factfinding and consideration of that group.” 998 F.3d 612, 635-36 (4th Cir. 2021) (footnotes omitted). See also Daniel Kowalski, *Blockbuster CA4 Decision: Arevalo Quintero v. Garland*, LexisNexis Legal News Room (May 26, 2021), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insideneews/posts/blockbuster-ca4-decision-arevalo-quintero-v-garland>.

131 The Ninth Circuit in early 2023 remanded a case to the BIA for consideration of whether perceived or imputed sexual orientation may be a cognizable PSG. See *Antonio v. Garland*, 58 F. 4th 1067 (9th Cir. 2023).



COMMON ISSUES IN CHILDREN'S CASES THAT MAY LEAD TO AN ASYLUM CASE	INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.
Family-Based Claims	<p>Family-based PSGs generally refer to groups based on an individual's family or kinship ties. They were long-considered quintessential PSGs and remain viable claims.<sup>132</sup> But the legal landscape was complicated by a July 2019 Attorney General certified decision in <i>Matter of L-E-A-</i>, 27 I&amp;N Dec. 581 (A.G. 2019). That 2019 decision was vacated in its entirety by another Attorney General certified decision issued on June 16, 2021 in <i>Matter of L-E-A-</i>, 28 I&amp;N Dec. 304 (A.G. 2021). The 2021 decision instructed the BIA and IJs to no longer follow the 2019 decision when deciding pending and future cases. It also noted the "pending completion of the ongoing rulemaking process and the issuance of a final rule addressing the definition of 'particular social group.'" Advocates should consider whether any additional relevant rulemaking has occurred.</p> <p>The National Immigrant Justice Center (NIJC) has <a href="#">information and resources</a> that discuss the impact of the Attorney General decisions on family-based claims and can provide some guidance for how to make these types of claims, especially if you are practicing in the Seventh Circuit. Contact <a href="#">CGRS</a> for more information regarding representing a client with a family-based PSG.</p>
Gender-Based Claims	<p>In <i>Matter of Acosta</i>, 19 I&amp;N Dec. 211 (BIA 1985), the BIA found that gender alone may form the basis for a PSG.</p> <p>In <i>Matter of Kasinga</i>, 21 I&amp;N Dec. 357 (BIA 1996), the BIA found that gender, along with other characteristics, may form the basis for a PSG. The BIA recognized "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" as a PSG.</p> <p>Unpublished BIA decisions have remanded for the courts to consider whether gender + nationality is a cognizable PSG: <i>Y-M-L-</i>, AXXX XXX 294 (BIA Sept. 10, 2019) regarding women in Guatemala; <i>X-G-C-D-</i>, AXXX XXX 474 (BIA Dec. 11, 2018) regarding women in Mexico.</p>

<sup>132</sup> For example, the Fourth Circuit in *Tomas-Ramos v. Garland* held that the IJ erred by finding that an immediate family cannot be a qualifying PSG, reasoning that "[a]s we have explained, 'the family provides a prototypical example of a particular social group.'" 24 F. 4th 973, 983 (4th Cir. 2022) (quoting *Crespin-Valladares v. Holder*, 632 F. 3d 117, 125 (4th Cir. 2011)).

COMMON ISSUES IN CHILDREN'S CASES THAT MAY LEAD TO AN ASYLUM CASE	INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.
Domestic Violence & Child Abuse Claims	<p>Child abuse PSGs historically track domestic violence cases, although most of the relevant case law is focused on partner violence. The <a href="#">2009 UNHCR Guidelines</a> for children's asylum claims discuss in ¶ 32 how all violence against children can cause harm and that there is sometimes a need to differentiate between disciplinary measures and the "deliberate and punitive use of force to cause pain or humiliation."</p> <p>There were a series of Attorney General certified decisions in <i>Matter of A-B-</i> from 2018 to 2021 that impacted domestic violence/child abuse claims:</p> <ul style="list-style-type: none"> <li>• <a href="#">Matter of A-B-</a>, 27 I&amp;N Dec. 316 (A.G. 2018)</li> <li>• <a href="#">Matter of A-B-</a>, 28 I&amp;N Dec. 199 (A.G. 2021)</li> <li>• <a href="#">Matter of A-B-</a>, 28 I&amp;N Dec. 307 (A.G. 2021)</li> </ul> <p>The most recent 2021 decision vacated the 2018 decision and generally provides a way for advocates to bring domestic violence claims. A number of organizations have guidance related to these decisions, such as this <a href="#">reference guide</a> from NIJC.</p> <p>It is especially important with cases involving domestic violence/child abuse to search for legal updates and to be familiar with decisions from the applicable federal court of appeals as these may impact how you craft the PSGs in your case. If you are practicing in the Fifth Circuit, it is recommended to consider <a href="#">Jaco v. Garland</a>, 24 F. 4th 395 (5th Cir. 2021) and review CILA's <a href="#">resource</a> on <i>The Fifth Circuit's Opinion in Jaco v. Garland and Strategy Considerations for Your Unaccompanied Child Client's Asylum Case</i>.</p> <p>Keep in mind too that it may be possible to bring a PSG related to a different issue such as gender-based or family-based PSGs in these cases. These cases can also include facts that make political opinion or another protected ground a viable claim in addition to PSGs. Remember to raise all potential arguments.</p> <p>Contact <a href="#">CGRS</a> for more information regarding representing a client with a domestic violence or child abuse PSG.</p>

COMMON ISSUES IN CHILDREN'S CASES THAT MAY LEAD TO AN ASYLUM CASE	INFORMATION AND CASE LAW TO CHECK OUT AND RESEARCH FURTHER. THIS IS NOT COMPREHENSIVE AND ONLY A STARTING POINT.
Gang-Related Claims	<p>UNHCR recognizes that children living in El Salvador, Guatemala, Honduras, or Mexico “are vulnerable to a range of harms perpetrated by organized criminal actors.”<sup>133</sup> But cases involving gang violence can pose unique challenges for crafting PSGs.</p> <p>Legal research is crucial because there is negative case law regarding gang-related PSGs that you need to be aware of. For instance, in <i>Matter of S-E-G-</i>, the BIA held that “[n]either Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities nor the family members of such Salvadoran youth constitute a ‘particular social group.’” 24 I&amp;N Dec. 579, 579 (BIA 2008). However, there are still potential avenues for relief that should be explored in any gang-related case. The following is a non-exhaustive list of considerations. Remember to raise all viable arguments in the asylum application.</p> <p><b>Other protected grounds:</b> The facts may support raising additional protected grounds such as religion, ethnicity, or political opinion. An unpublished BIA case <i>V-R-F-</i>, AXXX XXX 637 (BIA May 31, 2019) provides an example of a gang-related case where the harm was found to be on account of religion.</p> <p><b>Cooperation with law enforcement/being a prosecutorial witness:</b> In <i>Matter of H-L-S-A-</i>, the BIA found that “[i]ndividuals who cooperate with law enforcement may constitute a valid particular social group under the Immigration and Nationality Act if their cooperation is public in nature, particularly where testimony was given in public court proceedings, and the evidence in the record reflects that the society in question recognizes and provides protection for such cooperation.” 28 I&amp;N Dec. 228, 228 (BIA 2021). For more information, check out CLINIC’s <a href="#">post</a>. Unpublished BIA cases involving PSGs related to being a witness include <i>M-S-</i>, AXXX XXX 870 (BIA Sept. 27, 2019) and <i>D-R-M-</i>, AXXX XXX 606 (BIA July 16, 2019). The type of cooperation may also matter in these cases. For instance, the Ninth Circuit found that “those who testify against cartel members are socially visible.” <i>Henriquez-Rivas v. Holder</i>, 707 F.3d 1081 (9th Cir. 2013). But the Eight Circuit in <i>Lemus-Coronado v. Garland</i>, 58 F.4th 399 (2023), held that someone who filed a police report was not.</p> <p><b>Analogous facts in another context:</b> Has the court in your jurisdiction found a PSG when there has been resistance to another group or practice in other countries, such as resistance to the FARC? This NIJC <a href="#">Practice Advisory</a> further explores this strategy idea on page 20 with references to Seventh Circuit law.</p> <p><b>Family membership:</b> Some gang violence cases may involve facts supporting family-based claims. See <i>supra</i> page 58 for additional information.</p>

<sup>133</sup> UNHCR, *Views on Asylum Claims from Individuals Fleeing Violence by Gangs and Other Organized Criminal Groups in Central America and Mexico* at 5 (Sept. 2022).

## TIPS WHEN CRAFTING A PSG

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



## TIPS TO DEVELOP AN ASYLUM CASE

### Know the Facts:

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

### Develop the Legal Theory:

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





## TIPS TO DEVELOP AN ASYLUM CASE (continued)

### Drafting the Application:

- Be prepared to file the I-589 and all submissions as soon as you can.
- Look at [USCIS's website](#) for the current I-589 application and instructions. Be sure to read the instructions. They are helpful!
- Do not leave any required aspect of the application blank. Use N/A, None, and Unknown as relevant. Additionally, if you indicate you are including an attachment, do not forget it. Previously, in 2019 through late 2020, USCIS rejected I-589 applications as incomplete if they had any blank areas. As a result of [litigation](#), USCIS stopped this practice but their [website](#) warns that leaving a *required* space blank, failing to explain why the applicant is applying for asylum, leaving out addendums, or failing to sign the application may still lead to a rejection.
- If you need extra space, simply include this information in an attached addendum. You can use one of the government's forms or type this up on your own. Make sure your supplemental sheet has the client's name, A#, signature, and date and be clear about what question you're answering.<sup>134</sup>
- Double-check the application after finishing to confirm it is in final form.
  - Review the application a final time with your client to confirm information.
  - Ensure no aspect of the application is blank.
  - Ensure you checked the box to also apply for withholding of removal under the Convention Against Torture (CAT) on the front page to preserve this option for your client. To learn more about withholding of removal and CAT relief, see [Section III.C](#).
  - Ensure the application is signed and dated by the applicant and person who prepared it.
  - Ensure you have attached all documents you indicated you would attach.
  - Remember everything must be in English and contain any necessary interpretation and translation certificates.<sup>135</sup>

### Drafting the Client's Declaration:

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

<sup>134</sup> See [I-589 instructions](#). Check <https://www.uscis.gov/i-589> for updates related to the application form and instructions.

<sup>135</sup> See EOIR, [Shared Practice Manual](#), App. G (Cert. of Translation).

## TIPS TO DEVELOP AN ASYLUM CASE (continued)

**Developing the Supporting Evidence:** You will want to gather as much supporting evidence as possible to verify your client's testimony and familiarize yourself with the specific requirements under the Real ID Act.<sup>136</sup> As relevant and if applicable to the claim, consider the following documentary evidence to support your client's story:

- What documents does your client have to prove identity such as a birth certificate, passport, ORR documentation, etc.?
- What documents can your client gather regarding other individuals on which your client's case is premised, such as a birth certificate, death certificate, marriage or divorce papers, etc.? (E.g., if your client's case is based on their maternal grandfather's death, try to obtain their mother's birth certificate and grandfather's death certificate to establish the familial relationship and substantiate his death and circumstances surrounding the death.)
- Are there news articles to show that your client or their family suffered harm?
- Are there health records to support the harm your client suffered? This could be physical health or mental health records including counseling records.
- Are there photos of injuries or scarring showing past harm your client or their family suffered?
- Are there school records to show that the child was missing school or struggling in school or getting help from a teacher or counselor?
- Can you get death certificate(s) to show that the death(s) your client informs you of occurred?
- Are there police reports to verify your client's story? If not, what were the barriers to making a police report? Is there evidence to show that as well? (E.g., statements, country conditions evidence, expert statements, etc.)
- Can you get statements from friends, neighbors, family, witnesses to corroborate your client's story?
- Is there evidence to support that your client's family owned a business that was being extorted?
- Is there evidence that your client's family owned land?
- Is there evidence to show that your client's family was known in the community?
- Is there evidence to support that your client or their family was involved in a political party? Evidence regarding the party's goals? Party membership cards/certificates? Pamphlets regarding the party?
- Is there evidence to support that your client was a member of that religion? Baptism or communion photos or certificates? Evidence of other religious participation?
- Is there evidence to show your client's race/ethnicity whether perceived by others or as your client personally identifies?
- Asylum claims are discretionary.<sup>137</sup> If there are negative factors, is there any evidence to show that your client has positive equities that might sway an adjudicator?

<sup>136</sup> See Immigration Equality, *Asylum Manual*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-real-id-act/> (last visited June 12, 2023).

<sup>137</sup> See information *supra* note 75.

## TIPS TO DEVELOP AN ASYLUM CASE (continued)

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

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

### Country Conditions Experts:

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

### Forensic Evaluations:

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

## Fact-Gathering and Developing Evidence Internationally

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

### BENEFITS OF AN APPROVED ASYLUM APPLICATION

There are many benefits to being granted asylum. For instance, benefits include authorization to work, the ability to seek derivative status for certain family members,<sup>138</sup> a pathway to adjustment of status, and then citizenship. After one year in the United States, an asylee can apply for lawful permanent residency (a green card) using [Form I-485, Application to Register Permanent Residence or Adjust Status](#).<sup>139</sup> Generally, a lawful permanent resident can apply for U.S. citizenship after five years; however, an asylee can apply for citizenship after four years because their admission to lawful permanent resident is retroactive to the date of approval for asylee status.<sup>140</sup> Asylees are also eligible for other services and benefits for a limited period through ORR. View the [ORR website](#) for more information regarding these benefits.

Your client may be able to seek authorization to work while their asylum application is pending.<sup>141</sup> Asylum applicants can apply for work authorization under the (c)(8) category—though special filing instructions apply to asylum applicants with pending asylum applications.<sup>142</sup> Keep in mind that a waiting period may apply before the applicant can file the I-765.<sup>143</sup>

[Section IV.D.](#) provides additional information about how to apply for employment authorization if your client is eligible.

### Links to Help You with YOUR CLIENT'S ASYLUM CASE

- Check out CILA's 101 [webinar: Introduction to Asylum for Unaccompanied Children](#) (1 hour, 7 minutes).
- Watch CILA's [webinar A Deep Dive Into Current Conditions in El Salvador, Guatemala, & Honduras with the Experts](#) (1 hour, 54 minutes).
- View CILA's resource: [Navigating Asylum Law Changes: What are the Impacts on Unaccompanied Children?](#) posted on CILA's [website](#) for more information regarding recent changes in asylum law.

<sup>138</sup> INA § 208(b)(3); 8 U.S.C. § 1158(b)(3); 8 C.F.R. § 208.21.

<sup>139</sup> INA § 209(b); 8 U.S.C. § 1159(b).

<sup>140</sup> *Id.* INA § 316(a); 8 U.S.C. § 1427(a); 8 C.F.R. § 209.2.

<sup>141</sup> USCIS recognizes that “[i]f you are granted asylum you may work immediately. Some asylees choose to obtain Employment Authorization Documents (EADs) for convenience or identification purposes, but an EAD is not necessary to work if you are an asylee.” *Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (last reviewed/updated May 11, 2023).

<sup>142</sup> Refer to USCIS, *Special Filing Instructions for Those With Pending Asylum Applications—(c)(8)* on page 20 of the Form I-765 Instructions and USCIS, [The 180-Day Asylum EAD Clock Notice](#) to learn more.

<sup>143</sup> On June 22, 2020, DHS issued a [final rule](#) removing the 30-day processing provision for asylum applicant-related employment authorization filings. On June 26, 2020, DHS issued a [final rule](#) changing asylum seekers' ability to seek employment authorization. The rule went into effect on August 25, 2020. In general, the rule changed the amount of time asylum seekers must wait before initially applying for an employment authorization document and limits those who are eligible for work authorization. The U.S. District Court for the District of Maryland issued a [preliminary injunction](#) enjoining provisions of the rules relating to asylum seekers' ability to obtain an employment authorization document as the rules pertain to members of the Asylum Seeker Advocacy Project (ASAP) and CASA de Maryland (CASA). Read more information about the case from ASAP on its webpage regarding [litigation updates](#). The case has now concluded. In February 2022, the U.S. District Court for the District of Columbia in [Asylumworks v. Mayaorkas](#) vacated both June 2020 final rules. Following the decision, DHS issued a new [final rule](#) on employment authorization for asylum applicants consistent with the court's vacatur to restore prior regulations. Additional information is also on USCIS's website regarding [restoration of the asylum regulations](#) and regarding [Form I-765](#) in general.

- Use CILA's *Asylum Case Theory and Evidence Matrix* chart posted on CILA's [website](#) to help you stay organized and create a case strategy. You can also view CILA's webinar [Getting Your Case Together: Asylum Affidavits & Exhibits](#) to get more help tips for organizing your case.
- View [Day 1](#) and [Day 2](#) recordings of the training *Defend Asylum Together! Essentials of Immigration Law for Effective Representation* hosted by the ABA Commission on Immigration (COI), CILA, the South Texas Pro Bono Asylum Representation Project (ProBAR), and the Immigration Justice Project.
- Read CILA's [Highlight on Resources & Services to Support Pro Bono Attorneys](#) to learn more about developing the record and helpful organizations like [Justice in Motion](#) and [Keep Families Together](#).
- Contact [CGRS](#) for a copy of their *Children's Asylum Manual*, other helpful country conditions information, and expert documentation.
- Read USCIS's Refugee, Asylum and International Operations (RAIO) Directorate's training module for children's claims: [RAIO Combined Training Program Children's Claims Training Module](#), Dec. 20, 2019.
- Check out the [Self Help Asylum Guide: Seeking Protection in the United States 2020](#) created by University of Maine's School of Law's Refugee and Human Rights Clinic, Penn State Law Center for Immigrants' Rights Clinic, Immigrant Legal Advocacy Project, and THRIVE International Programs.
- Explore Immigration Justice Campaign's training materials on [Asylum](#), [Withholding](#), and [CAT](#) to learn more about each step of the asylum process.
- Review NIJC's [Basic Procedural Manual for Asylum Representation Affirmatively and In Removal Proceedings](#), July 2021, IL.
- Consider sharing with your client Heartland Alliance's *Coping During the Asylum Process: A Guide for Youth*, available in [English](#), [Spanish](#), or [Dari](#).
- For more country conditions information on El Salvador, Guatemala, and Honduras, review Temple University Beasley School of Law and Washington Office on Latin America (WOLA)'s [Annotated Table of Contents](#), which includes resources on topics like state complicity and small business owners fleeing persecution. Additionally, visit Temple University Library's [Asylum Practicum—Country Conditions Research](#) for a helpful list of country condition sources.
- VECINA and the VIISTA Program at Villanova University provide [google docs](#) with country information for Afghanistan, Cameroon, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, and Venezuela.
- Check out Immigration Equality and Midwest Immigrant and Human Rights Center's *Preparing LGBTQ and HIV Asylum, Withholding and CAT Claims Manual (Asylum Manual)*.
- If your client was granted asylum, check out this information regarding benefits for asylees: USCIS webpage [Benefits and Responsibilities of Asylees](#) and [Family of Refugees and Asylees](#).
- If your client was subject to the Migrant Protection Protocols (MPP), NIPNLG and CGRS have a practice advisory on [Motions to Reopen Migrant Protection Protocols \("MPP"\) Removal Orders](#) (Aug. 8, 2023).
- If you are working with a client from Afghanistan, check out AILA's [resources list](#); the ABA COI's webinars on *Asylum 101 for Representing Afghan Parolees*, *Cultural Humility and Working with Afghan Clients*, *Bars to Asylum and Common Concerns*, and the *Anatomy of the Asylum Interview*; or the *Practice Advisory: Common Obstacles when Representing Afghans in Immigration Proceedings* developed by the COI, CLINIC, Conklin Immigration, and Clinical Programs of Trinity Law School.



## C. Withholding of Removal and Protection Under the Convention Against Torture

Withholding of removal and protection under the CAT<sup>144</sup> are similar to asylum since they are fear-based claims, and the applicant also uses the [Form I-589, Application for Asylum and for Withholding of Removal](#) to apply for the relief. Additionally, some of the prior proposed changes to asylum law also impacted withholding of removal claims making them more difficult.<sup>145</sup> While many of these changes have been halted as a result of litigation, it is important to check the current status of the law. With any increase in the bars to asylum, it becomes more important to pursue withholding of removal and protection under the CAT. However, the claims have significant differences in eligibility requirements and potential benefits.

First and foremost, these are defensive claims so only an immigration judge can adjudicate these claims, not the Asylum Office. That said, it is good practice to check the box on the front page of the Form I-589 to also “apply for withholding of removal under the Convention Against Torture” to protect your client’s options. If the Asylum Office denies your client’s asylum application, the case will be referred to immigration court.<sup>146</sup> If this box was not checked or, when you review the I-589, it does not properly address questions about torture, then you should consider submitting supplemental filings with the court to provide this information.

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

Overall, there are more benefits to winning asylum than withholding of removal or protection under the CAT because winning asylum can lead to lawful permanent residence and ultimately citizenship. There is no equivalent pathway to citizenship for withholding of removal or protection under the CAT. However, these forms of relief can be a critical protection for applicants who are otherwise barred from asylum. For instance, neither withholding of removal or protection under the CAT require the applicant to file within one year of entry.<sup>147</sup>

For children’s cases in particular, guidance used in asylum cases to look at the case from the perspective of a child can also be argued to apply to children’s withholding of removal and CAT cases. [Section III.B.](#) includes resources for children’s based asylum cases.

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

### Withholding of Removal Under the INA

#### APPLYING FOR RELIEF

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

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<sup>144</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

<sup>145</sup> See *supra* page 50, Box: “Asylum Law is a Dynamic Area of Law.”

<sup>146</sup> 8 C.F.R. § 208.14(c)(1); USCIS, *Affirmative Asylum Procedures Manual*, Pt. II.N.2.b. (May 2016), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf>. Additionally, if your client is in removal proceedings and the immigration judge redetermines your client’s unaccompanied child status (because they turned 18 or reunified with a parent before filing for asylum), then the judge may assert jurisdiction over the case. The judge may cite to *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018). Notably, that case does not address a scenario where a child reunified with a parent. Learn more in NIPNLG’s *Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings in Light of I.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 1, 2019).

<sup>147</sup> While the one-year filing deadline is not applicable to unaccompanied children, this becomes important if a youth’s unaccompanied child status is redetermined by an immigration judge. See *supra* page 53 for more information in the discussion of “Where Should I File the Asylum Application?”

## ELIGIBILITY REQUIREMENTS

Like with asylum, you must be able to show past persecution or a well-founded fear of future persecution with a connection/nexus to one of the five protected grounds: race, religion, political opinion, nationality, or PSG. Generally, the protected ground must be “one central reason” for the persecution—the same standard applied in asylum,<sup>148</sup> except in the Ninth and Sixth Circuits, where the standard lessens to “a reason.”<sup>149</sup> If you are able to prove past persecution, the burden shifts to the government to rebut that presumption. The burden of proof for the possibility of future persecution is higher for withholding of removal than asylum. In withholding of removal, there must be a clear probability, or that it is more likely than not, that your client will suffer future persecution.

### Withholding of Removal under the INA Key Sources of Law

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

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

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

BAR	ASYLUM	WITHHOLD- ING OF REMOVAL UNDER INA	WITHHOLD- ING OF REMOVAL UNDER CAT	DEFERRAL OF REMOVAL UNDER CAT
One Year filing deadline	X			
Firm resettlement	X			
Prior denial of an asylum application by EOIR	X			
Safe Third Country	X			
Persecutor of others	X	X	X	
Terrorism	X	X	X	
Nazi persecution or genocide	X	X	X	
Convicted of a particularly serious crime <sup>150*</sup>	X	X	X	

<sup>148</sup> *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

<sup>149</sup> *Barajas-Romero v. Lynch*, 846 F.3d 351, 358 (9th Cir. 2017); *Turcios-Flores v. Garland*, 67 F.4th 347, 358 (6th Cir. 2023).

<sup>150</sup> “Particularly serious crime” is more stringently defined in the asylum context (*see* INA § 208(b)(2)(B)(i); 8 U.S.C. § 1158(b)(2)(B)(i)) than in the context of withholding of removal (*see* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3)(B)).

BAR	ASYLUM	WITHHOLD- ING OF REMOVAL UNDER INA	WITHHOLD- ING OF REMOVAL UNDER CAT	DEFERRAL OF REMOVAL UNDER CAT
Commission of serious non-political crime outside the United States	X	X	X	
Danger to the security of the United States	X	X	X	

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

If granted, a removal order will simultaneously be issued and withheld, meaning that your client will not be deported. This approval will not lead to permanent residence and citizenship, but the individual will be able to apply for an EAD. This claim is country-specific so if there is more than one potential country of removal, then you must prove withholding for each country. There is no option to have derivatives, so each individual must have their own application for withholding. Unlike asylum, there is no option to bring family to the United States after a grant on this basis.<sup>151</sup> There is no right to travel and reenter the United States. This claim has limited benefits, but it does provide your client with protection and ability to stay in the United States, which can be very important when your client is facing severe injury and/or death upon return to their country of origin.

## Protection Under the Convention Against Torture

The United States is a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT or Convention). The United States signed the Convention in 1988 under President Ronald Reagan, ratified it in 1994, and it was codified into United States law in 1998. Article 3 of the CAT includes a non-refoulement provision, “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>152</sup>

There are two related claims for relief: withholding of removal under the CAT and deferral of removal under the CAT. Withholding of removal under the CAT is a more secure form of relief than deferral of removal, but deferral of removal has no bars. Depending on the circumstances, it is sometimes a necessary option for clients. The requirements are the same for both claims, but the bars and benefits differ.<sup>153</sup>

### Protection under the Convention Against Torture Key Sources of Law

Withholding of Removal under the CAT:

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

Deferral of Removal under the CAT:

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

<sup>151</sup> However, learn more about the Central American Minors (CAM) refugee and parole program in [Section III.A](#).

<sup>152</sup> See CAT *supra* note 144 at art. 3.

<sup>153</sup> See chart above on pages 69–70.

## APPLYING FOR RELIEF

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

## ELIGIBILITY REQUIREMENTS

An important distinction between CAT cases and asylum is that in CAT cases, there is no requirement to connect the harm to one of the five protected grounds (nexus). In a successful CAT claim, you must prove it is more likely than not<sup>154</sup> that your client will face torture. This standard will not be met if the circumstances giving rise to torture are speculative or generalized. Rather, you must address each link in the chain of events that would lead to torture with facts and evidence that each link is more likely than not. Torture is defined as severe pain or suffering that is either physical or mental.<sup>155</sup> The BIA has defined torture as “an extreme form of cruel and inhuman treatment” and not lesser forms.<sup>156</sup> Harm should be considered in the aggregate so all forms of harm your client fears should be raised and argued.

According to 8 C.F.R. § 208.18(a)(1):

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

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

- **What?** An act—severe pain or suffering—that is either physical or mental
  - **NOT** Arising out of a lawful sanction<sup>157</sup>
- **Intent?** That is intentionally inflicted
- **Why/Purpose?** For such purposes as listed above (i.e., “obtaining from him or her or a third person information or a confession,” etc.) or something similar
- **By Whom?** The act was done by OR at the instigation of OR with the consent or acquiescence of a public official or other person acting in an official capacity
  - **ALSO** Some jurisdictions require a finding that the act was against a person in the offender’s custody or physical control<sup>158</sup>

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

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<sup>154</sup> In the Seventh Circuit, they consider more likely than not in terms of “a substantial risk” rather than in the quantitative sense reflecting the language of the Convention itself rather than the regulations. See *Arrazabal v. Lynch*, 822 F.3d 961 (7th Cir. 2016).

<sup>155</sup> See CAT *supra* note 144 at art. 1. See also 8 C.F.R. § 208.18(a).

<sup>156</sup> *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002).

<sup>157</sup> For instance, the death penalty is a lawful sanction; therefore, this is not considered torture. However, under 8 C.F.R. § 208.18(a)(3), “a government cannot exempt itself from obligations under the CAT by defining acts that would constitute torture as lawful forms of punishment.” Case law research will be important in cases with this issue.

<sup>158</sup> Having custody or control is a requirement included in the regulations but not in the CAT itself. See 8 C.F.R. § 208.18(a)(6). The Ninth Circuit has reversed denials of CAT on this basis and recognized that “[t]orture is not limited to acts that occur ‘under public officials’ custody or physical control.” *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004) (citing *Azanor v. Ashcroft*, 364 F.3d 1013, 1019–20 (9th Cir. 2004)).

Generally, “acquiescence of a public official” is more difficult to prove than the standard seen in asylum—unable or unwilling to protect. The regulations require: the official “must prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”<sup>159</sup> Awareness includes actual knowledge and willful blindness.<sup>160</sup> It depends on case law and which Circuit Court of Appeals you are in to see how this is assessed.

The case *Matter of O-F-A-S-* looked at the issue of when a person is “acting in an official capacity” and found that cases should be analyzed by whether the person was acting “under the color of law” as seen in cases under the Civil Rights Act.<sup>161</sup> This is a fact-intensive inquiry and both direct and circumstantial evidence should be considered when determining if the individual was “acting in an official capacity.”

## BUILDING THE CASE

According to the regulations,<sup>162</sup> the burden of proof is on the applicant and all evidence relevant to the possibility of future torture shall be considered. “The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”<sup>163</sup>

The regulations under 8 C.F.R. § 208.16(c) also provide a non-exhaustive list of evidence to consider, none of which are individually determinative, including evidence of:

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

Therefore, it is important to consider all potential evidence that could show your client will more likely than not be tortured in the potential country of removal. Usually, generalized country conditions evidence alone is insufficient to meet an applicant’s burden of demonstrating the individualized risk of torture necessary to win a CAT claim.<sup>164</sup> Expert testimony can be instrumental in establishing the future risk an individual faces based on the case facts and context within their country of origin.

## CONSIDER WHEN PREPARING A CASE

- Does the I-589 application include the necessary information regarding the torture your client fears?
- Are you asking your client the pertinent questions when drafting the declaration to support a CAT case?
- Does your documentary evidence help prove each element of a CAT case?
  - Evidence of any past harm, torture, threats done to your client and/or family members
  - Statements from community members, neighbors, family, etc.
  - Documentary support showing related human rights abuses by the government of their country?

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<sup>159</sup> 8 C.F.R. § 208.18(a)(7).

<sup>160</sup> The BIA case *Matter of S-V-* required “willful acceptance” to meet acquiescence but this has been largely rejected by Circuit Courts of Appeals, which instead condone the “willful blindness” standard. 22 I&N Dec. 1306 (BIA 2000).

<sup>161</sup> *Matter of O-F-A-S-* states “[t]he ‘under color of law’ standard draws no categorical distinction between the acts of low- and high-level officials. A public official, regardless of rank, acts ‘under color of law’ when he ‘exercise[s] power ‘possessed by virtue of . . . law and made possible only because [he was] clothed with the authority of . . . law.’” *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020). The BIA elaborated on this in *Matter of J-G-R-* stating that, “[t]he key consideration in determining if an official’s torturous conduct was undertaken ‘in an official capacity’ for purposes of CAT eligibility is whether the official was able to engage in the conduct because of his or her government position, or whether the official could have done so without connection to the government.” 28 I&N Dec. 733 (BIA 2023).

<sup>162</sup> 8 C.F.R. § 208.16(c).

<sup>163</sup> *Id.*

<sup>164</sup> See *Pieschacon-Villegas v. Att’y Gen.*, 671 F.3d 303, 312–13 (3d Cir. 2011), *abrogated on other grounds by Nasrallah v. Barr*, 140 S. Ct. 1683 (2020); *Lin v. U.S. Dep’t of Justice*, 432 F.3d 156, 160 (2d Cir. 2005).



Torture committed by government officials? Evidence of corruption? Impunity? Inadequate response by the government in relation to the harm that is feared?

- Country conditions expert statement to help make a connection between the general country conditions evidence to your client

- Are you asking your client and/or witness(es) the pertinent questions in testimony that relate to a CAT claim?

## MAKING THE ARGUMENT THAT AGE MATTERS IN CAT CASES

- You can look to international guidance to make the argument that age matters in CAT cases. The U.N. Committee Against Torture interprets and monitors the CAT. General Comments Nos. 2<sup>165</sup> and 4<sup>166</sup> have helpful language to make the argument that age matters. If gender is an important factor in your case, the General Comments also provide helpful language regarding this issue.
- For example, you could make the argument that similar to asylum, where a lesser harm experienced by a child could be considered persecution comparatively to an adult, argue that a lesser act should be considered torture for a child, even if it would not for an adult.
- Keep in mind that torture can be either physical or mental severe pain or suffering. Under 8 C.F.R. § 208.18(a)(4), torture for mental pain or suffering includes, among other things, a threat of imminent death or a threat that another person will be subject to death, severe physical pain or suffering. Again, you may want to make an analogous argument using guidance from asylum cases. In asylum cases, there is support that a child, because of age, will react differently than an adult when a caregiver or close family member suffers harm.<sup>167</sup> Also, remember to argue and show by any available documentary evidence any ongoing or lasting psychological impact.

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

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

The requirements for withholding of removal under the CAT and deferral of removal under the CAT are the same.<sup>168</sup> As the chart on pages 69 to 70 regarding bars illustrates, the difference between withholding of removal under the CAT and deferral of removal under the CAT is that there are no bars to relief for deferral of removal; whereas, there are bars for withholding of removal under the CAT.<sup>169</sup>

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<sup>165</sup> General Comment No. 2 states:

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status . . .

U.N. Committee against Torture, *General Comment No. 2 on implementation of article 2 by States parties*, CAT/C/GC/2 (Jan. 24, 2008), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=11).

<sup>166</sup> General Comment No. 4 states:

Severe pain or suffering cannot always be assessed objectively. It depends on the negative physical and/or mental repercussions that the infliction of violent or abusive acts has on each individual, taking into account all relevant circumstances of each case, including the nature of the treatment, the sex, age, and state of health and vulnerability of the victim and any other status or factors.

U.N. Committee against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, CAT/C/GC/4 (Sept. 4, 2018), [https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf).

<sup>167</sup> See *supra* page 54 for further discussion of *Experiencing Harm as Child*.

<sup>168</sup> 8 C.F.R. § 208.17(a).

<sup>169</sup> *Id.*; 8 C.F.R. § 208.16(d).

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

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

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

Similar to withholding of removal under the INA and withholding of removal under the CAT, if deferral of removal is granted, a removal order will be issued.<sup>170</sup> Simultaneous with the grant, the removal order will be deferred. This approval will not lead to permanent residence and citizenship. The individual can apply for an EAD, but it will not be automatically granted. Discretionary factors such as good moral character, positive contributions, ties to the United States, economic necessity, dependent family members, etc. are considered when making a decision on the EAD. Deferral of removal can be terminated by a motion from the government or if the Secretary of State receives diplomatic assurances.<sup>171</sup> Additionally, an individual is not exempt from detention despite an approval on this basis.

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

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

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

- Check out CILA's [webinar](#): *Overview of Withholding of Removal and Protection under the Convention Against Torture for Unaccompanied Children* (60 minutes).
- Check out Immigration Equality and Midwest Immigrant and Human Rights Center's *Preparing LGBTQ and HIV Asylum, Withholding and CAT Claims Manual* ([Asylum Manual](#)).
- Take a look at ILRC's practice advisory [Qualifying for Protection Under the Convention Against Torture](#), Aruna Sury, April 2020.

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<sup>170</sup> 8 C.F.R. § 208.17.

<sup>171</sup> 8 C.F.R. § 208.17(d).

## D. Special Immigrant Juvenile Status and Adjustment of Status

Special Immigrant Juvenile Status (SIJS) is a form of humanitarian protection available for youth up to age 21 who need intervention from a state court because of abuse, neglect, or abandonment by a parent. The question of whether the youth has been abused, neglected, or abandoned (or a similar basis under state law) must be determined by a **state** court with jurisdiction over the care and custody of children.

There are three key phases of a SIJS case: (1) obtaining a custody or dependency order from a state court, (2) submitting the Special Immigrant Juvenile petition for a decision from USCIS, and (3) applying for lawful permanent residence (either with USCIS or the immigration judge).

**TIP:** Keep in mind that you will likely need to be barred in the state where the state court order is obtained, although you can be barred in any state to petition with USCIS or appear in immigration court.

### THREE PHASES OF A SIJS CASE



**SIJS Eligibility Requirements:** The applicant must:<sup>172</sup>

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

**TIP:** If you want to learn more about the eligibility requirements, CILA's [website](#) has an *Overview of New Special Immigrant Juvenile Status Regulations* (May 2022) that discusses the regulation changes in 2022 and provides historical context for the SIJS statutes and regulations.

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<sup>172</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

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

- INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J)
- 8 C.F.R. § 204.11
- USCIS Policy Manual Volume 6 Immigrants - [Part J Special Immigrant Juveniles](#)
- Administrative Appeals Office (AAO) Adopted Decisions:
  - [Matter of D-Y-S-C-](#), Adopted Decision 2019-02 (AAO Oct. 11, 2019)
  - [Matter of A-O-C-](#), Adopted Decision 2019-03 (AAO Oct. 11, 2019)
  - [Matter of E-A-L-O-](#), Adopted Decision 2019-04 (AAO Oct. 11, 2019)
- INA § 245(h); 8 U.S.C. § 1255(h) (adjustment of status)
- 8 C.F.R. § 245.1(e)(3) (adjustment of status)
- USCIS Policy Manual [Volume 7](#) Adjustment of Status - Part A - Adjustment of Status Policies and Procedures and Part F Special Immigrant-Based (EB-4) Adjustment - [Chapter 7 Special Immigrant Juveniles](#) (adjustment of status)
- William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008; 8 U.S.C. § 1232

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

### Phase 1: State Law Portion: Obtain State Court Order

For USCIS to grant SIJS, there are five requirements for the state court order. The order must:<sup>173</sup>

1. Be valid;
2. Contain a judicial determination about custody or dependency;
3. Include a determination about parental reunification;
4. Contain a best interest determination; and
5. Warrant DHS consent by providing the factual basis for the determinations made under state law, either in the court order or other documents submitted to the court. DHS when making this assessment will consider if the order contains a “bona fide” request, meaning whether a primary reason for seeking the determinations in state court was to obtain relief from parental abuse, abandonment, neglect, or a similar basis under state law.

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<sup>173</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

## VALID COURT ORDER

In order for a court order to be valid, it must be issued under state law.<sup>174</sup> Determinations in the state court order should be based on state law.<sup>175</sup>

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

Additionally, the state court must have continuing jurisdiction during the filing of the petition through adjudication of the petition.<sup>176</sup> There are exceptions to this rule, for instance, if a petitioner is adopted or placed in permanent guardianship or if a petitioner was subject to a valid order that was later terminated based on age before or after filing the SIJS petition.<sup>177</sup> If a petitioner relocates, USCIS may not require a new state court order unless the petitioner is no longer living with the placement from the court order. In that case, a new court order may be necessary or additional evidence must be provided to show continuing jurisdiction.<sup>178</sup>

### STOP!

Before filing anything in state court be sure to read the **USCIS Policy Manual** on SIJS and identify the state laws upon which your state court order will be based.

## JUDICIAL DETERMINATION ABOUT CUSTODY OR DEPENDENCY

The state court order must include a determination about either custody or dependency.<sup>179</sup> There must be a state law basis for the custody or dependency determination.<sup>180</sup> The state court order should generally not be temporary or expire before the child reaches the age of majority.<sup>181</sup>

Every state's laws regarding custody and dependency are different. Be sure to identify the laws that apply in the state where you are obtaining a state court order. Some states have statutes that are specific to SIJS.

### Keep in mind:

- **Custody:**
  - The state court order must include both legal and physical custody.
  - If custody is granted to an individual, the name of that individual should be included.
- **Dependency:**
  - The state court order must declare dependency OR legal commitment/placement under the custody of a state agency, department, entity, or individual.
  - *Matter of E-A-L-O-* requires intervention by the state court through determination on care/custody and/or child welfare services.<sup>182</sup> Child welfare services could include psychiatric, educational, occupation, medical or social services, protection against domestic violence or human trafficking, or other supervision by a court or a court-appointed entity.

<sup>174</sup> USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.

<sup>175</sup> Keep in mind that state laws differ, and some states will consider youth under 18 for a state court order while other states will consider youth under age 21. See page 80 for more information about seeking SIJS when your client is over 18 years old.

<sup>176</sup> USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.1.

<sup>180</sup> When you submit the I-360 packet to USCIS, the state law basis for the custody or dependency determination can be shown by either the order or in the evidence submitted to obtain the state court order. See USCIS Policy Manual Vol. 6, Pt. J, Ch. 3.A.1.

<sup>181</sup> USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.C.

<sup>182</sup> *Matter of E-A-L-O-*, Adopted Decision 2019-04 (AAO Oct. 11, 2019).



## JUDICIAL DETERMINATION ABOUT PARENTAL REUNIFICATION

The judge must also determine that reunification with a parent is not possible.<sup>183</sup> This should be based on a determination of abuse, neglect, or abandonment (or a similar basis under state law) by that parent. Reunification cannot be possible until the child ages out of the court's jurisdiction. Termination of the parent's rights is not required.<sup>184</sup>

The USCIS Policy Manual provides information regarding determining parentage and states that the record must establish that the court made a determination regarding the petitioner's parentage and that USCIS may request additional evidence if this determination is missing. This requirement can be met through naming the parents or explaining that they are unknown in the order, or through other supporting evidence in the record such as a birth certificate.<sup>185</sup>

## JUDICIAL DETERMINATION ABOUT BEST INTEREST

The best interest of a child is regularly considered in custody or dependency proceedings, but the best interest finding here is a little different. Here, the emphasis is on best interest of the child regarding placement specifically. There must be a judicial determination that it is not in the best interest of the child to be returned to the country of nationality or last habitual residence of the petitioner or their parents.<sup>186</sup> This typically fits within the traditional best interest analysis done by the judge in child welfare and custody proceedings. According to the USCIS Policy Manual, "USCIS generally defers to the court on matters of state law and does not go behind the state court to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, abandonment, or a similar basis under state law."<sup>187</sup>

## WARRANT DHS CONSENT

The Secretary of DHS must consent to the grant of SIJS.<sup>188</sup> This involves a question of whether the state court order was bona fide and sought to protect the child from abuse, abandonment, or neglect and was not solely for an immigration benefit.<sup>189</sup> To meet this requirement, the order should state the factual basis for the legal determinations made under state law. If the order does not provide a factual basis, when you submit the petition packet to USCIS, this can be evidenced by other state court documents such as the petition, evidence submitted, court transcript or if not available, an affidavit by the attorney or client summarizing what was submitted to the court.<sup>190</sup>

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

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

185 *Id.*

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

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

188 INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J). In March 2021, USCIS updated the USCIS Policy Manual based on a settlement agreement from *Saravia v. Barr*, 3:17-cv-03615 (N.D. Cal. January 14, 2021), that impacts "the application of the USCIS consent function as well as the grounds upon which the agency may revoke an SIJ petition." USCIS, *Policy Alert: Special Immigrant Juvenile Classification and Saravia v. Barr Settlement*, PA-2021-03 (Mar. 18, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210318-SIJ.pdf>. Accordingly, USCIS "will not refuse its consent to a request for SIJ classification based in whole or in part on the fact that the state court did not consider or sufficiently consider evidence of the petitioner's gang affiliation when deciding whether to issue a predicate order or in making its determination that it was not in the best interest of the child to return to his or her home country." *Id.* See also USCIS Policy Manual Vol. 6, Pt. J, Ch. 2.D.

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

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

## TIPS TO OBTAIN THE STATE COURT ORDER

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

Include references to state law, not immigration law.

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

Learn about/initiate service of process. You will need to serve the respondents in the case, typically the parents of the child, and possibly other individuals. Oftentimes, one or both of the parents will be living abroad. This may present unique challenges that should be navigated using the rules of service in your state and any applicable international treaties.<sup>191</sup>

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

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

Prepare yourself and your client for a hearing in state court to obtain a final order. Your client may need an interpreter during the hearing. Consult the court's practice and rules for how to request a court-provided interpreter or to see if you need to bring your own.

Request a court reporter so you can obtain a court transcript of the hearing. After the hearing, obtain a certified copy of the final order to submit to USCIS.

### State Practice Manuals

CILA is partnering with organizations across the nation to develop practice manuals with detailed state-specific information on how to obtain a SIJS order in your state court. The Texas and Florida manuals are currently available on CILA's [website](#). More states are in development, so check to see if your state has been added. ILRC also has resources for seeking SIJS orders in [California](#).

<sup>191</sup> For example, you may need to consider the Hague Service Convention or Inter-American Convention on Letters Rogatory. A helpful starting point for research is the DOJ website. See *Service Requests*, DOJ, <https://www.justice.gov/civil/service-requests> (last updated Apr. 12, 2021). If you are practicing in Texas, you may want to consult Burta Rhoads Raborn Inns of Court Team 4's decision tree on *How to Serve the Respondent Successfully* posted on CILA's [website](#).

## Common Issues

### DEATH AS ABANDONMENT OR NEGLECT

It is sometimes viable to argue that the death of a parent results in constructive abandonment or neglect because the parent failed to plan for that scenario and the child was left without provision or care, if the parent did not have a will or sufficient resources. It is important to tie this to neglect and/or abandonment as defined in your state's law. The USCIS's Policy Manual states: "The fact that one or both parents is deceased is not itself a similar basis to abuse, abandonment or neglect under state law. A legal conclusion from the state court is required that parental death constitutes abuse, neglect, abandonment, or is legally equivalent to a similar basis under state law."<sup>192</sup> These Administrative Appeals Office (AAO) non-precedential decisions provide examples of analysis under various state laws:

- [Matter of Y-A-M-O](#) (AAO Feb. 28, 2019) (Texas law) (failure to make reasonable and necessary arrangements for the child after death met the definition of abandonment under Texas Family Code § 152.102)
- [In Re: 18431575](#) (AAO Sept. 14, 2022) (New York law) (death of a parent prevented reunification under *Matter of Luis R. v. Maria Elena G.* 120 A.D.3.d 581 (N.Y. App. Div. 214) and New York statutes)
- [In Re: 17813928](#) (AAO Aug. 26, 2022) (Michigan law) ("While we acknowledge that the death certificates provided a reasonable factual basis for the court's findings that reunification with the Petitioner's parents was not viable, the evidence in the record does not establish that the court determined the death of a parent is a similar basis under Michigan State law to that of abuse, neglect, or abandonment.")
- [In re: 14451884](#) (AAO May 11, 2022) (Colorado law) (state court order did not make sufficient reunification findings because it did not cite a specific statute to support the statement that "parental death constitutes abandonment or the equivalent thereof")

### PARENTAGE

The establishment of parentage can be complex, especially when you are looking to the laws of the country where a child was born. Oftentimes, parents in your case may not be married or otherwise subject to presumptions of parentage under the laws of your state. Additionally, some clients may have other relatives on their birth certificate in the absence of a father. Be sure to review the child's birth certificate for both a mother and father. USCIS notes that if the parent who has mistreated the child is not on the child's birth certificate, they will look to the order for a determination of parentage of that person. If the identity of the father is unknown, you may be able to make findings against an unknown father.<sup>193</sup>

### YOUTH OVER 18 YEARS OLD

Youth have until their 21st birthday to file the I-360 application with USCIS.<sup>194</sup> But there may be limited options to obtain a state court order once youth reach the age of majority, which in most states is 18 years old. Some states like California, Illinois, New Mexico, and Washington have enacted legislation to address this issue of post-18 relief and provide a pathway for youth to obtain SIJS determinations in state court after they turn 18. If your client is at risk of aging out of the state court system, you should research applicable state laws and be aware that you may need to try and expedite proceedings in state court.

For clients who are nearing their 21st birthday, the [USCIS website](#) has information for how to file Form I-360 in person at a USCIS field office if seeking to file within 2 weeks of the client turning 21.

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<sup>192</sup> USCIS Policy Manual, Vol. 6, Pt. J, Ch. 3.A.1.

<sup>193</sup> See AAO non-precedential decisions: [Matter of A-S-F-D-](#), ID #2118258 (AAO Dec. 27, 2018); [Matter of A-V-F-D-](#), ID# 2118279 (AAO Dec. 27, 2018); [Matter of E-R-F-D-](#), ID# 2118354 (AAO Dec. 27, 2018); [Matter of N-A-F-D-](#), ID# 2118313 (AAO Dec. 27, 2018); [Matter of B-E-G-P-](#), ID# 1523093 (AAO Apr. 15, 2019).

<sup>194</sup> See 8 C.F.R. § 204.11(b).

## EXAMPLE SIJS CASE STUDY: COMPARING APPROACHES IN TEXAS AND WASHINGTON

### Hypothetical Case Facts:

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

### Approach in Texas

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

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

### Approach in Washington

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

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

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

Once the state court order is obtained, the child can file a petition for an immigrant visa under the SIJS classification. The child can apply for SIJS by filing Form I-360 with USCIS.<sup>195</sup>

### FILING THE PETITION

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

To also show eligibility for SIJS, in addition to the form, it is important to also include the following information:<sup>196</sup>

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

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

The USCIS [website](#) and [instructions](#) for Form I-360 contain information about where to file the form. It is important to check for any updates before filing. Currently, USCIS directs SIJ petitioners to file the Form I-360 and supporting documents at the lockbox associated with where they live. USCIS's [website](#) provides a list of filing locations. After the application is filed, you should receive a "Notice of Action" from USCIS with a receipt number and filing date.<sup>197</sup> Once you have the receipt number, you can use USCIS's online [case status](#) tool to check the status of your case. You can also contact the [USCIS Contact Center](#) if you have questions about the filing process or case status.

During the adjudication process, it is possible for USCIS to schedule an interview regarding the petition at a local field office, but currently this rarely occurs. The law requires USCIS to adjudicate the petition within 180 days.<sup>198</sup> But USCIS currently reports that the average processing times range from 15-18 months.<sup>199</sup> After reviewing the petition and supporting evidence, USCIS may issue: an approval, denial, Request for Evidence (RFE), or Notice of Intent to Deny (NOID).

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

- If your client receives a RFE → The notice will give a time frame to respond to provide additional information and/or documentation. The time frame will not exceed twelve weeks.<sup>200</sup>
- If your client receives a NOID → The deadline to respond cannot exceed 30 days.<sup>201</sup>

#### Resources Regarding the Administrative Appeals Office (AAO)

[CLINIC](#) *Index of Unpublished Administrative Appeals Office Decisions on Special Immigrant Juvenile Status*

[CILA Webinar](#) *Immigration Legal Research and AAO Appeals*

<sup>195</sup> 8 C.F.R. § 204.11(b).

<sup>196</sup> 8 C.F.R. § 204.11(d).

<sup>197</sup> See USCIS, *Special Immigrant Juveniles: After You File* (last reviewed/updated Mar. 31, 2023), <https://www.uscis.gov/working-in-US/eb4/SIJ>.

<sup>198</sup> See Section 235(d)(2) of the TVPRA 2008; 8 U.S.C. § 1232(d)(2).

<sup>199</sup> See USCIS, *Check Case Processing Times* (last visited June 21, 2023), <https://egov.uscis.gov/processing-times/>.

<sup>200</sup> 8 C.F.R. § 103.2(b)(8)(iv). During the COVID-19 pandemic, USCIS provided some flexibility regarding timelines to respond to certain USCIS actions such as requests for evidence and notices of intent to deny. However, USCIS ended most of these COVID-related flexibilities in March 2023. See USCIS, *USCIS Announces End of COVID-Related Flexibilities* (Mar. 23, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-announces-end-of-covid-related-flexibilities>.

<sup>201</sup> 8 C.F.R. § 103.2(b)(8)(iv).

- If your client receives a denial<sup>202</sup> → There are options to appeal. Your client can appeal to a federal court or the AAO.<sup>203</sup> Additionally, there is the option to file a motion to reopen or motion to reconsider with USCIS.

## IMPACT OF AN APPROVED SIJS PETITION

### Benefits:

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

### Limitations:

- SIJS provides a lawful status for the child, but the child is still in “limbo” until the child obtains residency. SIJS alone, without adjustment of status, does not constitute relief from removal. See more information below regarding how an approved SIJS petition impacts children in removal proceedings.
- SIJS does not grant work authorization, but it may make your client eligible for work authorization through the deferred action process described below.
- SIJS does not grant re-entry to the United States if the child leaves. There is no option for travel.
- Neither parent of the SIJS petitioner can obtain immigration status through their child.<sup>204</sup>

## DEFERRED ACTION

SIJS petitioners are now eligible for deferred action if they have an approved SIJS petition (meaning an approved Form I-360) and are waiting to adjust solely because a visa number is unavailable. Deferred action and its related regulations were announced by USCIS on March 7, 2022.<sup>205</sup> The new policies provide a welcome option for youth who were otherwise unable to obtain a work permit while they waited years for a visa to become available.

USCIS should automatically consider deferred action for anyone with an approved I-360. A separate request or application should not be required.<sup>206</sup> If granted, the deferred action lasts for 4 years, and the petitioner is eligible to apply for employment authorization during that time.<sup>207</sup> [Section IV.D.](#) provides more information about how to apply for employment authorization if your client receives deferred action.

For more information about the deferred action process, review the [Frequently Asked Questions](#) from the Coalition to End SIJS Backlog. ILRC also has resources on deferred action in [English](#) and [Spanish](#) that may be useful for you or your client.

## CLIENT IN REMOVAL PROCEEDINGS AND HAS PENDING SIJS PETITION

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

<sup>202</sup> USCIS Policy Manual, Vol. 6, Pt. J, Ch. 5.

<sup>203</sup> 8 C.F.R. § 103.3. Consult the USCIS AAO Practice Manual if you plan to appeal to the AAO. See AAO Practice Manual, USCIS (Apr. 2018), <https://www.uscis.gov/aao-practice-manual>.

<sup>204</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>205</sup> See USCIS, *Policy Alert: Special Immigrant Juvenile Classification and Deferred Action* (Mar. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>; 87 Fed. Reg. 13,066 (Mar. 8, 2022).

<sup>206</sup> See USCIS, *Special Immigrant Juveniles: Consideration of Deferred Action* (last reviewed/updated Mar. 31, 2023), <https://www.uscis.gov/working-in-US/eb4/SIJ>.

<sup>207</sup> See USCIS, *Policy Alert: Special Immigrant Juvenile Classification and Deferred Action*, at 2 (Mar. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf>.



continue, or to place the case on the status docket until the SIJS petition is adjudicated by USCIS or a visa becomes available to adjust status.

**TIP:** When pursuing any of these options, emphasize to the immigration judge that SIJS is a humanitarian form of relief and that a state court judge determined that it is not in the child's best interest to return to their home country.

Additionally, [Section IV.C.](#) has more information about these immigration court procedural strategy options.

Also, know that ICE issued a [directive](#), *Using a Victim-Centered Approach with Noncitizen Crime Victims* (1005.3) in August 2021, which affects civil enforcement of petitioners and beneficiaries of several victim-based immigration benefits including U visas, T visas, VAWA, and SIJS.<sup>208</sup> The directive includes a non-exhaustive list of the types of civil enforcement action this directive affects, and some actions on the list include decisions whether to issue or cancel a Notice to Appear, detain or release from custody, grant deferred action or parole, and execute a final order of removal.

## ADMINISTRATIVE CLOSURE

Administrative closure is a docket management tool that allows adjudicators to pause removal proceedings. A July 2018 decision by the Attorney General in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) limited the use of administrative closures. But that decision was overruled by a July 2021 certified decision by Attorney General Garland in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). Currently, administrative closure remains a viable option for practitioners. Since *Matter of Cruz-Valdez*, the director of EOIR has issued a [memorandum](#) with guidance for when adjudicators should consider using this tool, including when someone is seeking relief with another agency.

Check out this [Practice Advisory](#) from the American Immigration Council and ACLU for more information about how to seek administrative closure. If you are practicing in the Sixth Circuit, it is especially recommended to review this Practice Advisory as there is additional caselaw to be aware of from that circuit.

## STATUS DOCKETS

Status dockets are another case management tool that allow IJs to pause removal proceedings by holding certain cases in abeyance. Keep in mind that not all immigration courts use status dockets, so this may not be an option for all cases. If your court has a status docket, you should research whether there are any local requirements to be placed on the docket. General guidance for how to use these dockets has varied over time, but the EOIR director most recently issued a [memorandum](#) in October 2022 that states SIJS cases can qualify when the IJ has granted a motion to continue to await a state court's adjudication or to wait for a visa after the respondent's petition for SIJ status was approved by USCIS.

## SIJS Policy Change Efforts

Advocacy efforts, including [efforts by the ABA](#) and CILA, led to the USCIS announcement of offering deferred action in March 2022. Learn more about ongoing policy efforts by visiting the website for the [Coalition to End SIJS Backlog](#).

<sup>208</sup> See Kate Goettel, *ICE Announces New Victim-Centered Policy, Showing a Favorable Shift Toward Vulnerable Immigrants*, Immigration Impact (Aug. 13, 2021), <https://immigrationimpact.com/2021/08/13/ice-abuse-victim-policy/#.YR2HrXySk2w>; Rebecca Beitsch, *ICE directed to avoid deportation of victims of crime*, The Hill (Aug. 12, 2021), <https://thehill.com/policy/national-security/567670-ice-directed-to-avoid-deportation-of-victims-of-crime>.

## PROSECUTORIAL DISCRETION

Prosecutorial discretion gives government attorneys the ability to no longer pursue charges against someone in removal proceedings. Receiving prosecutorial discretion typically leads to the IJ closing the case and the respondent no longer being in removal proceedings. In September 2021, DHS issued [guidance](#) for using prosecutorial discretion in a manner that would focus resources on certain types of cases deemed to be priorities because of the threat they posed to national security, public safety, or border security.<sup>209</sup> Those civil enforcement policies were challenged in litigation that resulted in a [final judgment](#) vacating the September 2021 guidance. The U.S. Supreme Court in June 2023, however, reversed that decision in *United States v. Texas*, 143 S.Ct. 1964 (2023). On September 28, 2023, EOIR issued [DM 23-04](#) with updated guidance on prosecutorial discretion.<sup>210</sup>

Keep in mind that even when the guidance was being challenged, prosecutorial discretion remained available. OPLA attorneys always have the authority to review cases and exercise prosecutorial discretion on a case-by-case basis.<sup>211</sup> ICE's [website](#) includes information about how to request prosecutorial discretion and provides emails for where to send requests depending on your location. You should at least consider prosecutorial discretion in most cases. Before making a request, research local practice by asking local practitioners or reviewing the local immigration court and OPLA websites to see if they have additional information about how to make requests. Review [Section IV.C.](#) for more information about how to seek prosecutorial discretion in immigration court.

## CONTINUANCES

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

## Phase 3: File for Adjustment of Status

Once a child has an approved I-360 petition, the child is eligible to apply for lawful permanent residence. However, the child may apply for adjustment of status only once a visa number is available. The child should apply using USCIS [Form I-485, Application to Register Permanent Residence or Adjust Status](#). There is a filing fee<sup>212</sup> associated with Form I-485, but a fee waiver<sup>213</sup> using [Form I-912, Request for Fee Waiver](#) can be filed with USCIS. Additionally, there are some inadmissibility grounds that do not apply to Special Immigrant Juveniles or that may be waived.<sup>214</sup>

## WHERE SHOULD MY CLIENT FILE THE APPLICATION?

The child should file this application with USCIS if they are not in removal proceedings, or if they are in removal proceedings but are considered an “arriving alien” (entered through a port of entry).<sup>215</sup> If the child is not considered an “arriving alien” and is in removal proceedings which have not been dismissed, then the child should file the application with the immigration court. Also check out CILA's [blog post](#) on the topic *Adjusting Without Jurisdiction: A Cautionary Tale*.

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<sup>209</sup> In May 2021, there was also [interim guidance](#) for OPLA attorneys on the use of prosecutorial discretion. That interim guidance included language specifically addressing the use of discretion in SIJS cases.

<sup>210</sup> See also DHS, *Statement from Secretary Mayorkas Regarding the Supreme Court Decision on Immigration Enforcement* (June 23, 2023), <https://www.dhs.gov/news/2023/06/23/statement-secretary-mayorkas-regarding-supreme-court-decision-immigration>.

<sup>211</sup> See ICE, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor* (Updated Sept. 12, 2022).

<sup>212</sup> G-1055, *Fee Schedule*, USCIS, <https://www.uscis.gov/g-1055> (last reviewed/updated May 17, 2021).

<sup>213</sup> *Additional Information on Filing a Fee Waiver*, USCIS, <https://www.uscis.gov/feewaiver> (last reviewed/updated Feb. 1, 2021).

<sup>214</sup> See INA § 245(h); 8 U.S.C. § 1255(h); 8 C.F.R. § 245.1(e)(3).

<sup>215</sup> See 8 C.F.R. § 1.2.

## HOW DO I KNOW IF A VISA NUMBER IS AVAILABLE?

The government issues a limited number of visas each year for people seeking to adjust their status. They post different categories of visa availability depending on the relief sought. Visa availability is also based in part on the petitioner's country of origin. In addition, you will need to check your client's I-360 Receipt Notice from USCIS to find your client's priority date, the date USCIS received the petition. This is the date you use when checking the Visa Bulletin for visa availability. Special Immigrant Juveniles fit into the 4<sup>th</sup> preference employment-based (EB-4) category. The Department of State (DOS) issues a [Visa Bulletin](#) monthly to show available visas. You should check the Visa Bulletin regularly to see if there has been any movement in visa availability and whether a visa number is available for your client. For more information on visa availability, review CILA's *Quick Reference Guide - Special Immigrant Juvenile Status and EB-4 Immigrant Visa Availability*, available on CILA's [website](#).

## WHEN SHOULD MY CLIENT FILE THE APPLICATION?

If a visa number is available, and the child is not in removal proceedings or is an arriving alien, then the child theoretically could file the I-485 at the same time as the I-360 with USCIS for concurrent processing. However, at this time all countries of origin are experiencing a backlog and it is unlikely that a visa number will be available at the time of filing the I-360.

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

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

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

According to the USCIS Policy Manual, “[t]here is no age limit for SIJ-based applicants for adjustment of status. In cases where an SIJ petitioner is under 21 years of age on the date of proper filing of the SIJ petition, USCIS does not deny an SIJ-based adjustment application solely because the applicant is older than 21 years of age at the time of filing or adjudication of the Form I-485.”<sup>216</sup>

## SIJS-BASED ADJUSTMENT OF STATUS ELIGIBILITY REQUIREMENTS

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

- Have an approved I-360 petition;
- Have no bars to adjustment;
- Be admissible or qualify for a waiver; and
- Merit a favorable exercise of discretion.<sup>217</sup>

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<sup>216</sup> USCIS Policy Manual, Vol. 7, Pt. E, Ch. 7.

<sup>217</sup> USCIS issued a policy alert in July 2020 regarding updating the USCIS Policy Manual on “application of discretion in applications.” USCIS, *Policy Alert: Applying Discretion in USCIS Adjudications*, PA-2020-10 (July 15, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf>. The update includes a non-exhaustive list of factors for officers to consider. See USCIS Policy Manual Vol. 1, Pt. E, Ch. 8. Then, in November 2020, USCIS issued another policy alert with additional information regarding discretion for adjustment of status cases. USCIS, *Policy Alert: Use of Discretion for Adjustment of Status*, PA-2020-22 (Nov. 17, 2020), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201117-AOSDiscretion.pdf>. See USCIS Policy Manual Vol. 7, Pt. A, Ch. 1 and 10. For more information, review ILRC's practice advisory. Peggy Gleason, *USCIS Policy Manual Makes Sweeping Changes to Discretion*, ILRC (Mar. 2021), <https://www.ilrc.org/uscis-policy-manual-makes-sweeping-changes-discretion>.

## APPROVED I-360 PETITION

At this stage, if the adjustment of status application is sent to USCIS, they will verify continued eligibility for SIJS, which means it is possible that an I-360 could be revoked. There are some grounds for automatic revocations, including: marriage of the petitioner, reunification by court order, or reversal of best interest determination by the court.<sup>218</sup> If the revocation is not automatic but USCIS finds that the applicant is no longer eligible for SIJS, USCIS will send a Notice of Intent to Revoke (NOIR).

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

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

The only applicable bar for adjustment of status for Special Immigrant Juveniles is the terrorist-related bar.<sup>219</sup>

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

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

There are certain grounds of inadmissibility that are inapplicable to Special Immigrant Juveniles and so will not affect their admissibility for their application for adjustment of status.<sup>220</sup> No waiver is necessary.

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

INA § 212(a)(4) Public charge

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

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

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

INA § 212(a)(6)(D) Stowaways

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

INA § 212(a)(9)(B) Unlawfully present

Many grounds of inadmissibility which do apply to Special Immigrant Juveniles can be waived with the submission of [Form I-601, Application for Waiver of Grounds of Inadmissibility](#) and accompanying evidence.<sup>221</sup> There are more generous waivers for Special Immigrant Juveniles seeking adjustment of status

<sup>218</sup> 8 C.F.R. § 205.1(a)(3)(iv).

<sup>219</sup> INA § 245(c)(6); 8 U.S.C. § 1255(c)(6).

<sup>220</sup> INA § 245(h)(2)(B); 8 U.S.C. § 1255(h)(2)(B); 8 C.F.R. § 245.1; USCIS Policy Manual, Vol. 7, Pt. F, Ch. 7.

<sup>221</sup> *Id.*

than the regular waivers of inadmissibility grounds. The standard for the SIJS-specific waiver is whether it should be granted “for humanitarian purposes, family unity, or when it is otherwise in the public interest.”<sup>222</sup>

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

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

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

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

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

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

INA § 212(a)(2)(I) Money laundering

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

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

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

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

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

INA § 212(a)(6)(E) Smugglers

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

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

INA § 212(a)(7)(B) Nonimmigrants

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

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

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

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

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<sup>222</sup> USCIS Policy Manual, Vol. 7, Pt. F, Ch. 7 (citing INA § 245(h)(2)(B); 8 CFR § 245.1(e)(3)(v)).

There are also some inadmissibility grounds that apply to Special Immigrant Juveniles that cannot be waived under the SIJS-specific waiver, but they may be waivable under a different statutory authority.<sup>223</sup> The [USCIS Policy Manual](#), Vol. 9 provides additional information on waivers.

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

INA § 212(a)(2)(A) Conviction of certain crimes<sup>224</sup>

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

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

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

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

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

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

## Juvenile Records

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

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

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

<sup>223</sup> See [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7, note 28.

<sup>224</sup> The [USCIS Policy Manual](#) states that “[f]indings of juvenile delinquency are not considered criminal convictions for purposes of immigration law.” [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7. The Manual goes on to state, “However, certain grounds of inadmissibility do not require a conviction. In some cases, certain conduct may be sufficient to trigger an inadmissibility ground. Furthermore, findings of juvenile delinquency may also be part of a discretionary analysis” *Id.* It is important to read the Manual further if your client has any criminal history or arrests and explore the issue. Based on INA § 245(h)(2)(B); 8 U.S.C. § 1255(h)(2)(B) and INA § 212(h); 8 U.S.C. § 1182(h), non-waivable bars do not include the portion “related to a single offense of simple possession of 30 grams or less of marijuana.” See *Matter of Moradel*, 28 I&N Dec. 310 (BIA 2021). See also Kathy Brady, Zachary Nightingale, Matt Adams, *Immigrants and Marijuana*, ILRC (May 2021), <https://www.ilrc.org/immigrants-and-marijuana>.



## MERITS EXERCISE OF FAVORABLE DISCRETION

In addition to ensuring the applicant meets all requirements to file, the USCIS officer will also determine if the individual merits favorable discretion in approving the application or not.<sup>225</sup>

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

## FILING THE ADJUSTMENT OF STATUS APPLICATION

### CHECKLIST FOR SEEKING TO ADJUST STATUS

The application packet should include:<sup>226</sup>

- Form I-485, *Application to Register Permanent Residence or Adjust Status*
- Appropriate fee OR [Form I-912](#), *Request for Fee Waiver*
- Copy of the receipt or approval notice (Form I-797) for the applicant's SIJS petition (unless the applicant is filing the petition together with Form I-485)
- Two passport style photos
- Copy of government issued identity document with photograph (if available)
- Copy of birth certificate (or proof of unavailability/non-existence and other acceptable evidence of birth)
- [Form I-693](#), *Report of Medical Examination and Vaccination Record* completed by a civil surgeon—Check USCIS's website to [find a doctor](#).
  - **TIP:** Do not get the medical examination done immediately. Check out [USCIS's Special Instructions](#) regarding Form I-693 and the [USCIS Policy Manual](#) Volume 8, Part B, Chapter 4 regarding this issue to ensure results are valid and timely.
- Certified police and court records of juvenile delinquency findings, criminal charges, arrests, or convictions (if applicable)
- Form I-601, *Application for Waiver of Grounds of Inadmissibility* (if applicable). This form also has a fee so you should include it in the request for a fee waiver, if necessary.

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

<sup>225</sup> See [USCIS Policy Manual](#), Vol. 7, Pt. F, Ch. 7.

<sup>226</sup> *Id.* See *Checklist of Required Initial Evidence for Form I-485 (for informational purposes only)*, USCIS, <https://www.uscis.gov/i-485Checklist> (last reviewed/updated Oct. 27, 2022).

## FILING THE APPLICATION WITH USCIS

At the time of publication, adjustment of status applications filed with USCIS should be sent to a USCIS lockbox, and the exact location will depend on where the petitioner lives. Check the [USCIS website](#) for more information and any updates on where to submit the I-485 for special employment based categories.. If necessary, an interview will be scheduled for the applicant at a local field office. The application could either be approved or denied by USCIS.

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

## FILING THE APPLICATION IN IMMIGRATION COURT

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

- Provide an appropriate fee OR request to waive the I-485 filing fee and biometrics fee. *See* Chapter 3.4 of the [Immigration Court Practice Manual](#) for instructions.
- Submit the immigration judge's order waiving fees along with a copy of the I-485 and [pre-hearing instructions](#) to the USCIS Texas Service Center.
- Once the USCIS Texas Service Center issues a Receipt Notice, file a copy of that along with the adjustment of status packet with the immigration court and serve the filed documents on the appropriate government attorney in the case.
  - The Receipt Notice can be used to file for an EAD with USCIS. This is important if there is a lengthy time period before the individual hearing.

The adjudication process before the immigration court typically involves:

- The USCIS Service Center will issue a biometrics appointment notice and the applicant must attend the appointment.
- The immigration judge will schedule an individual hearing in the case. Before the individual hearing, it is recommended to follow up with the Office of the Principal Legal Advisor (OPLA) to ensure that the background check has been completed.
- At the individual hearing, the immigration judge will adjudicate the I-485 application packet.
- Following the hearing, if the application is approved, follow the [post-order instructions](#) to assist your client in obtaining a green card which is processed by USCIS.
- If the application is denied, your client can appeal to the BIA, but that is the last level of appeal. There is no option to appeal to federal court.

## IMPACT OF AN APPROVED APPLICATION<sup>227</sup>

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

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

- Check out CILA's 101 [webinar: Introduction to Special Immigrant Juvenile Status](#) (49 minutes). CILA also has a [Special Immigrant Juvenile Status \(SIJS\) Overview](#).
- View CILA's [webinar: Introduction to Unaccompanied Children and Special Immigrant Juvenile Status](#) (58 minutes).
- Review CILA's [Overview of New Special Immigrant Juvenile Status Regulations](#) to get more information about the 2022 regulation updates. CILA's blog post [Analysis of SIJS updates to the USCIS Policy Manual](#), December 11, 2019 provides an overview of changes made to the USCIS Policy Manual.
- Use CILA's [SIJS Case Theory and Evidence Matrix](#) chart posted on CILA's [website](#) to help you stay organized and create a case strategy.
- In some instances, state court judges seek proof of international law, CILA and Justice in Motion in collaboration, released affidavit packets regarding paternity law in El Salvador, Guatemala, and Honduras. Check out the resource on CILA's [website](#).
- There are state-specific resources to help you obtain SIJS orders in state court. Check out the [CILA Special Immigrant Juvenile Status \(SIJS\) Manual for Texas Practitioners](#) and the [CILA Special Immigrant Juvenile Status \(SIJS\) Manual for Florida Practitioners](#). If you are in California, ILRC's Practice Advisory [Guidance for SIJS State Court Predicate Orders in California: What You Need to Know in 2021](#) by Katie Annand (KIND), Ashley Melwani (Legal Services for Children), & Rachel Prandini (ILRC), June 2021, may be of help to you.
- Watch CILA's [webinar Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on SIJS](#) to learn more about filing for adjustment of status. Also, review CILA's resource [Frequently Asked Questions – Overcoming Analysis Paralysis: Practical Considerations for Adjusting Status Based on Special Immigrant Juvenile Status \(SIJS\)](#) posted on CILA's [website](#).
- Review CILA's [SIJS Adjustment of Status Inadmissibility Chart](#) posted on CILA's [website](#).

<sup>227</sup> Rights and Responsibilities of a Green Card Holder (Permanent Resident), USCIS, <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-a-green-card-holder-permanent-resident> (last reviewed/updated July 15, 2015).

- Learn more about SIJS and filing for adjustment of status with ILRC's [Humanitarian Forms of Relief Part II: Asylum & SIJS](#), Veronica Garcia, August 2019 and [Changes to the Form I-485, Application for Adjustment of Status](#), January 2018.
- View CILA's flowchart [Petition for Special Immigrant Juvenile Status Across Systems](#) to see a visual of the course of a SIJS case through the different stages which can be helpful in explaining the process.
- Check out CILA's youth-facing resource on the [Pathway to Special Immigrant Juvenile Status \(SIJS\) and a Green Card](#), available in [English](#) and [Spanish](#). Read ILRC's Practice Advisory [Special Immigrant Juvenile Status & Visa Availability](#), Rachel Prandini, March 2023.
- Learn more about visa availability with CILA's resource [Quick Reference Guide – SIJ Status and EB-4 Immigrant Visa Availability](#), October 2022.
- Read ILRC's Practice Advisory [What are the Immigration Consequences of Delinquency?](#), Rachel Prandini, March 2020 if delinquency is an issue in your case.
- View the CILA-NILA [webinar: Litigating SIJS Delay Cases: Mandamus and APA](#) (53 min.) & review the accompanying [Mandamus and APA Actions for Special Immigrant Juvenile Petitions Practice Advisory](#) and [Example Template Complaint](#) for SIJS Delay Cases.
- Watch the CILA-NILA [webinar: Challenging USCIS' Denial of A Petition For SIJS Under The APA](#) (60 minutes) & review the accompanying [Practice Advisory](#).

## E. U and T Visas

### U Visas

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

#### U Visa Key Sources of Law

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

## ELIGIBILITY REQUIREMENTS

To be eligible for a U visa, an individual must meet the following criteria:<sup>228</sup>

- Be a victim of a designated crime (qualifying crime) that occurred in the United States or violated U.S. law
- Cooperate with law enforcement or other government authorities investigating or prosecuting the criminal activity, which occurs if the applicant
  - Possesses information about the crime and
  - Has been, is being, or is likely to be helpful in investigation or prosecution
- Suffered “substantial physical or mental abuse” as result of the crime
- Is admissible or eligible for a waiver

**Who is considered a victim?** A victim can be the direct victim, or at times an indirect victim.<sup>229</sup>

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

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting . . . or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes . . . .<sup>230</sup>

The criminal activity can include “one or more of the following or any similar activity in violation of Federal, State, or local criminal law.”<sup>231</sup> The advocate must identify the designated criminal activity and law that was violated.

**Does a child need to cooperate with law enforcement?** If the victim is under age 16, then “the parent, guardian, or next friend” of the child may meet the requirements for cooperation.<sup>232</sup>

**Does it matter when the crime occurred?** No. There is not a temporal requirement between when the crime occurred and when the petitioner files for a U visa. The crime could have occurred many years ago.

**Does the outcome of the investigation or prosecution matter?** There is no requirement that criminal charges were pursued or that there was a conviction. However, some law enforcement agencies may resist certifying a more remote crime, so be prepared to make as many persuasive arguments that you can.

**TIP:** USCIS’s website has information for crime victims about U visa eligibility and applications.

### Petitioner’s Location

While the crime must occur in the United States or have violated U.S. law, the applicant does not need to be located in the United States when the petition is filed and can seek a U visa while abroad. If the U visa petition is approved, they would have to consular process to enter the United States.

<sup>228</sup> INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U).

<sup>229</sup> See 8 C.F.R. 214.14(a)(14); Federal Register, Vol. 72, No. 179, 53016-53017 (Sept. 17, 2007) regarding indirect and bystander victims.

<sup>230</sup> INA § 101(a)(15)(U)(iii); 8 U.S.C. § 1101(a)(15)(U)(iii).

<sup>231</sup> *Id.*

<sup>232</sup> 8 C.F.R. § 214.14(c)(2)(ii).

## FILING THE U VISA PETITION

- **Certification of Helpfulness:** After assessing eligibility for your client, one of the first steps is to get a signature from a certifying agency on the required [Form I-918](#), Supplement B, *U Nonimmigrant Status Certification*. This form certifies your client's possession of information relating to the criminal activity, as well as helpfulness and cooperation with authorities. The certifying agency can be a local, state, or federal judge, law enforcement agency, or prosecutor for instance.<sup>233</sup>

- **TIP:** This can sometimes be a difficult process. It may be best to talk with local advocates for any feedback regarding where to start when asking for a signature. Of course, you will be limited by the facts of the case. Ensure that you have relevant documents regarding your client's situation so you can effectively advocate for a signature.

It is important to remember that if you get the I-918 Supplement B signed, the certification only lasts **6 months** after the signature, meaning you will need to file the U visa petition before the certification expires.<sup>234</sup> Otherwise, you will have to get the form signed again by the certifying agency, which can prove to be difficult.

- **Necessary Forms:** In addition to the I-918, Supplement B, you will need to file the primary form for the petition, [Form I-918](#), *Petition for U Nonimmigrant Status*. If your client has any derivatives, you need to file [Form I-918](#), Supplement A, *Petition for Qualifying Family Member of U-1 Recipient* for each qualifying family member. The [USCIS website](#) provides a checklist of suggested evidence of what to send with your petition. If your client has inadmissibility grounds at issue, you should also file [Form I-192](#), *Application for Advance Permission to Enter as a Nonimmigrant* to apply to waive those grounds of inadmissibility.
- **TIP:** Know that one benefit to U visas is that many grounds of inadmissibility can potentially be waived. ASISTA's practice advisory on [Representing Criminalized Survivors: Impact of Criminal Inadmissibility on Survivor-Based Immigration Remedies](#) (Jan. 18, 2023) has additional information about the inadmissibility grounds and waiver process.
- **TIP:** Previously, in 2019 through late 2020, USCIS rejected I-918 U visa petitions as incomplete if they had any blank areas.<sup>235</sup> As a result of [litigation](#), in early 2021, [USCIS](#) stopped this practice, but also stated, "we may reject your form or your case might take more time if you leave required spaces blank, if you do not respond to questions related to filing requirement, or if you omit any

### Resources for Working with Agencies

Agencies can have different levels of experience with U visa certifications. Some may be familiar with these types of requests and have information available online about how to make a request for certification. Others may know nothing about the process. If an agency needs guidance, refer to them to USCIS's [U Visa Law Enforcement Resource Guide](#) and webpage with [Information for Certifying Officials: Law Enforcement, Judges and Other Agencies](#).

Check out CLINIC's [U Visa Certification Advocacy Toolkit](#) (last updated April 2022) for additional guidance on working with agencies.

<sup>233</sup> 8 C.F.R. § 214.14(a)(2)-(3).

<sup>234</sup> 8 C.F.R. § 214.14(c)(2)(i).

<sup>235</sup> See *Practice Advisory: USCIS Form Alert - Blank Spaces on Form I-918, Petition for U Nonimmigrant Status*, ASISTA, <https://asistahelp.org/wp-content/uploads/2020/02/I-918-Practice-Alert-3.pdf> (Feb. 2020); *Practice Advisory: Insight into USCIS's Application of the "No-Blanks" Policy to U-Visa Petitions*, ASISTA, <https://asistahelp.org/new-practice-advisory-insight-into-uscis-application-of-the-no-blanks-policy-to-u-visa-petitions/> (Nov. 23, 2020).



required initial evidence, as indicated in the form instructions or regulations.”<sup>236</sup> Keep this in mind when filling out Form I-918.

- **Derivatives:** A principal petitioner who is under age 21 may petition for a spouse,<sup>237</sup> children, parents, and unmarried siblings under age 18.<sup>238</sup> A principal petitioner who is age 21 or older may petition for a spouse and children.<sup>239</sup>
- **Wait Times:** There is a cap on the number of principal petitioners (not derivatives) that can be granted a U visa each year.<sup>240</sup> The cap is 10,000, and far more individuals than that apply annually.<sup>241</sup> The USCIS website shows processing times average from 60-61 months for U visa petitions.<sup>242</sup> They also show that the number of pending U visas continues to grow, with over 286,000 pending at the end of 2022.<sup>243</sup> Petitions that are found to be approvable by USCIS are placed on the waiting list for the visas. Principal petitioners and qualifying family members on the waiting list may be eligible for deferred action, employment authorization, or parole.<sup>244</sup>
- **Bona Fide Determination (BFD):** On June 14, 2021, USCIS modified their procedures for evaluating U visas and provided a pathway for petitioners waiting for a visa to more easily obtain interim benefits, including work authorization.<sup>245</sup> The new guidance for the BFD process pertains to all Form I-918 petitions currently pending and those filed on or after June 14, 2021.

The [USCIS Policy Manual](#) explains the BFD process in Vol. 3, Pt. C, Ch. 5. Under this process, USCIS should do an initial review of the petition to determine if they should be granted a BFD. If granted, the petitioner and their qualifying family members may receive a BFD EAD and deferred action for four years.<sup>246</sup> A BFD is sufficient to show to ICE and EOIR that the “petitioner is also considered to have established a prima facie case for approval within the meaning of INA 237(d)(1).”<sup>247</sup> Those that do not receive a BFD proceed to the full waiting list adjudication. The [USCIS Policy Manual](#) includes a helpful [flowchart](#) with the adjudication processes and various outcomes in an appendix to Vol. 3, Pt. C, Ch. 4.

Learn more from USCIS’s [Frequently Asked Questions](#) about the BFD process (last reviewed/updated Sept. 2021), CLINIC’s [Bona Fide U Status Petitioners to be Given Deferred Action and EADs](#) (June 2021), and ASISTA’s [Policy Alert: Bona Fide Employment Authorization for U Visa Petitioners](#) (June 2021).

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<sup>236</sup> See *USCIS Confirms Elimination of “Blank Space” Criteria*, USCIS, <https://www.uscis.gov/news/alerts/uscis-confirms-elimination-of-blank-space-criteria> (last reviewed/updated April 1, 2021).

<sup>237</sup> In *Medina Tovar v. Zuchowski*, the Ninth Circuit Court of Appeals, found that it was an arbitrary and capricious requirement for the spousal relationship to have to exist at the time of filing the U visa petition. Now, USCIS is applying the decision nationwide, and the decision will apply to both U and T visas. In a June 2021 USCIS Policy Alert regarding U visas, USCIS stated, “[t]herefore, when confirming a relationship between the principal petitioner and the qualifying family member which is based on marriage, USCIS will evaluate whether the relationship existed at the time the principal petition was favorably adjudicated, rather than when the principal petition was filed.” See also ILRC, ASISTA, and CLINIC, *Updated Practice Alert: U Visa and T Visa “After-Acquired Spouse” Cases* (June 11, 2021), <https://cliniclegal.org/resources/humanitarian-relief/u-visas/updated-practice-alert-u-visa-and-t-visa-after-acquired>.

<sup>238</sup> INA § 101(a)(15)(U)(ii)(I); 8 U.S.C. § 1101(a)(15)(U)(ii)(I).

<sup>239</sup> INA § 101(a)(15)(U)(ii)(II); 8 U.S.C. § 1101(a)(15)(U)(ii)(II).

<sup>240</sup> INA § 214(p)(2); 8 U.S.C. § 1184(p)(2).

<sup>241</sup> *Id.*

<sup>242</sup> See USCIS, *Check Case Processing Times*, <https://egov.uscis.gov/processing-times/> (last visited June 20, 2023).

<sup>243</sup> *Number of Form I-918, Petitions for U Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2009-2022*, USCIS, [https://www.uscis.gov/sites/default/files/document/reports/I918u\\_visastatistics\\_fy2022\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/reports/I918u_visastatistics_fy2022_qtr1.pdf).

<sup>244</sup> [USCIS Policy Manual](#) Vol. 3, Pt. C, Ch. 4. App.

<sup>245</sup> See USCIS, *Policy Alert: Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners*, PA-2021-13 (June 14, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>. Before the BFD procedure, petitioners could have to wait for years to simply to be placed on the waiting list for receiving deferred action or parole.

<sup>246</sup> On August 11, 2023, USCIS issued additional guidance regarding the BFD process for qualifying family members. See USCIS, *Policy Alert: Bona Fide Determination Process Qualifying Family Members of U Nonimmigrant Victims of Qualifying Crimes*, PA-2023-22 (Aug. 11, 2023), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230811-VictimsOfCrimes.pdf>.

<sup>247</sup> [USCIS Policy Manual](#) Vol. 3, Pt. C, Ch. 5.

## BENEFITS OF AN APPROVED U VISA PETITION

If your client is successful, then they are eligible for employment authorization and lawful non-immigrant status for four years.<sup>248</sup> After three of the four years in U visa status, they can apply for lawful permanent residence.<sup>249</sup> Derivatives are also eligible for the same benefits.<sup>250</sup>

**TIP:** Applying for lawful permanent residence after obtaining the U visa will likely be similar to the process described above in the SIJS section for seeking an adjustment of status using Form I-485. But keep in mind that things like the inadmissibility bars and where to send the application can vary if you are seeking to adjust based on a U visa instead of SIJS. You will need to conduct additional research once you reach this stage.

## CLIENT IN REMOVAL PROCEEDINGS AND HAS PENDING U VISA

If your client is in removal proceedings and has a pending U visa application, consider seeking to delay or close the proceedings while USCIS adjudicates the application. The best course of conduct may depend on the specific immigration judge (IJ) or government attorney in your case. The following are some procedural tools to consider.

- File a **motion for a continuance** with the IJ. If drafting a motion for continuance, review the BIA cases *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), *Matter of L-N-Y-*, 27 I&N Dec. 755 (BIA 2020), and *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), along with [ASIS-TA's Practice Advisory](#) on *Matter of L-N-Y-*.
- Seek **prosecutorial discretion** asking OPLA to dismiss the claim. Review the discussions in [Section IV.C.](#) and on page 85 for more information about this process. Note too that U visas are specifically included in the [guidance](#) on prosecutorial discretion issued by ICE in May 2021.<sup>251</sup>
- Seek **administrative closure** from the IJ. In November 2021, EOIR issued [guidance](#) for adjudicators on how they can use administrative closure as a docket management tool, which included to allow a respondent to file an application or petition with another agency. Review pages 84 and 129 for more information about administrative closure.

### Can Filing a U Visa Petition Lead to Removal Proceedings?

While this section addresses clients that are already in removal proceedings when filing the petition, your client may ask if filing the petition could cause the government to start removal proceedings. As discussed in [Section III.A.](#), one of the factors to consider when assessing types of relief is whether applying can increase the risk of the client being placed in removal proceedings. In 2018, there was a [USCIS Policy Memorandum](#) allowing for the issuance of an NTA based on a denial for certain petitions, including U visas and T visas. However, that policy was rescinded in a January 2021 DHS memorandum on the [Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities](#). While this means that the risk is relatively low under the current guidance, be sure to check for any future policy updates, especially if this is an area of particular concern for your client.

<sup>248</sup> 8 C.F.R. § 214.14(c)(6)-(7), (g)(1).

<sup>249</sup> INA § 245(m); 8 U.S.C. § 1255(m); 8 C.F.R. § 245.24.

<sup>250</sup> 8 C.F.R. §§ 214.14(f), 245.24(g). See information *supra* note 236.

<sup>251</sup> Specifically, the [interim guidance](#) states that “[w]hen a noncitizen has a viable avenue available to regularize their immigration status outside of removal proceedings, whether through temporary or permanent relief, it generally will be appropriate to move to dismiss such proceedings without prejudice so that the noncitizen can pursue that relief before the appropriate adjudicatory body.” Then in footnote 18, the guidance points out that “DHS regulations expressly contemplate joint motions to terminate removal proceedings in appropriate cases in which the noncitizen is seeking to apply for U nonimmigrant status. See 8 C.F.R. § 214.14(c)(1)(i).”

- Request that the IJ place the case on the **status docket**. The EOIR memorandum issued on October 4, 2022, to [Provide guidance to adjudicators on the use of status dockets](#) addresses how U visa petitioners can qualify for status dockets. Review pages 84 and 128 for more information.

[Section IV.C.](#) has more information about these procedural options and court filings.

Keep in mind too that ICE issued a directive in August 2021 on [Using a Victim-Centered Approach with Noncitizen Crime Victims \(11005.3\)](#) that affects civil enforcement of petitioners and beneficiaries of certain victim-based immigration benefits, including U visas, and addresses grants of deferred action or parole. Check out ILRC's [Overview of ICE's Victim-Centered Directive](#) for more information.

## T Visas

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

### ELIGIBILITY REQUIREMENTS

To be eligible for a T visa, an individual must:<sup>252</sup>

- Be a victim of a severe form of trafficking in persons
- Be physically present in the United States on account of trafficking
  - **TIP:** Any exit from the United States after trafficking may affect eligibility.
- Have complied with any reasonable request for assistance in the investigation of trafficking or be less than 18 years of age
  - **TIP:** Victims may not have reported the trafficking. You should decide on a case-by-case whether to help them do so. Places to consider making a report include a Human Trafficking Task Force, Regional FBI, ICE Homeland Security Investigations, Department of Labor, or local law enforcement. Reporting is generally not required for a child under 18 years of age. Considerations can include the possibility of having more derivatives, as explained below. Also having law enforcement complete [Supplement B](#) to Form I-914 could help you assess the strength of the case.
- Demonstrate that they would suffer extreme hardship involving unusual and severe harm upon removal
- Be admissible or eligible for a waiver

### Child Labor

Unaccompanied children can be especially vulnerable to child labor exploitation in the United States. A [New York Times article](#) from February 2023 highlighted these issues. Practitioners should be aware of these problems and check in with your client regularly. More resources may become available to help address these issues. The HHS Office on Trafficking in Persons has been developing [standards of care](#) for clients impacted by human trafficking, and the Department of Labor and HHS responded to the February 2023 article by [announcing](#) efforts to combat exploitative child labor. Kids In Need of Defense (KIND) also issued a report in March 2023 with [Five Recommendations for Protecting Unaccompanied Children from Labor Exploitation](#).

<sup>252</sup> INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T); 8 C.F.R. § 214.11(b).

## T Visa Key Sources of Law

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

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

**Sex Trafficking:** “[S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”<sup>253</sup> When working with children under age 18 who have been sex trafficked, you do not have to show force, fraud, or coercion, just that the sex act occurred. Furthermore, “[t]he term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”<sup>254</sup>

**Labor Trafficking:** Can be “recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”<sup>255</sup>

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

**TIP:** USCIS issued [T visa policy guidance](#) in October 2021 that included some updates to the USCIS Policy Manual. [ASISTA’s Practice Advisory](#) provides a helpful overview of the updates and changes.

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<sup>253</sup> 22 U.S.C. § 7102(11)(A).

<sup>254</sup> 22 U.S.C. § 7102(12).

<sup>255</sup> 22 U.S.C. § 7102(11)(B).

## FILING THE T VISA APPLICATION

- **Necessary Forms:** You must provide evidence that your client meets all of the eligibility requirements for a T visa.<sup>256</sup> [Form I-914, Application for T Nonimmigrant Status](#) is the primary form used for this application. If your client has any derivatives, you need to file [Form I-914, Supplement A, Application for Family Member of T-1 Recipient](#) for each qualifying family member. If applicable, you may also file [Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons](#) or other evidence can also suffice to support that you have complied with any reasonable request to assist law enforcement.<sup>257</sup> The [USCIS website](#) provides alternative example evidence that can be used, and USCIS has a [T Visa Law Enforcement Resource Guide](#). If your client has inadmissibility grounds at issue, you should also file [Form I-192, Application for Advance Permission to Enter as a Nonimmigrant](#) to apply to waive those grounds of inadmissibility.
- **Derivatives:** A principal petitioner who is under age 21 may petition for a spouse,<sup>258</sup> children, parents, and unmarried siblings under age 18.<sup>259</sup> A principal petitioner who is age 21 or older may petition for a spouse and children.<sup>260</sup> Additionally, there are more categories for derivatives of a T visa if there is a present danger of retaliation because of the principal's "escape from the severe form of trafficking or cooperation with law enforcement."<sup>261</sup>
- **Wait Times:** The amount of T visas that can be issued each year for principal applicants is capped at 5,000.<sup>262</sup> To date, this cap has not been met so there is no waiting period other than USCIS's processing time.<sup>263</sup>
- **OTIP letter:** If you see evidence that the youth has an Office on Trafficking in Persons (OTIP) Eligibility Letter, this does not mean the child has a T visa or is necessarily eligible for a T visa. A child can receive an OTIP letter even if the child was trafficked outside the United States; whereas, a T visa requires trafficking that occurred in the United States, or that the applicant is present in the United States on account of the trafficking. Having an OTIP letter can prove beneficial for a child because it can be used as evidence of T visa eligibility and it qualifies the child for certain benefits. Check out CILA's blog post on [What is an OTIP Letter and How Can Advocates Utilize It to Help Unaccompanied Children?](#) for additional information.<sup>264</sup>

## BENEFITS OF AN APPROVED T VISA APPLICATION

Individuals who have received a T visa approval are eligible for lawful status and employment authorization for four years.<sup>265</sup> For principals, the EAD is automatically given without the need to file [Form I-765, Application for Employment Authorization](#), but derivatives must file Form I-765 to get work authorization.<sup>266</sup> After three years, the principal and any derivatives can apply for adjustment of status to get a

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<sup>256</sup> You might want to check out the USCIS informational checklist of required initial evidence found on USCIS's webpage. See *I-914, Application for T Nonimmigrant Status*, USCIS, <https://www.uscis.gov/i-914> (last reviewed/updated June 14, 2021).

<sup>257</sup> Unlike the certification required in U visa cases, this form is not required in order to secure a T visa, though it can be very helpful. For example, if your client reports to a law enforcement agency, but the agency declines to investigate, you can include evidence of the report (email, etc.) without the Form I-914B declaration.

<sup>258</sup> See information *supra* note 236.

<sup>259</sup> INA § 101(a)(15)(T)(ii)(I); 8 U.S.C. § 1101(a)(15)(T)(ii)(I).

<sup>260</sup> INA § 101(a)(15)(T)(ii)(II); 8 U.S.C. § 1101(a)(15)(T)(ii)(II).

<sup>261</sup> INA § 101(a)(15)(T)(ii)(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(III); 8 C.F.R. § 214.11(a)(3), (k)(1)(iii).

<sup>262</sup> INA § 214(o)(2); 8 U.S.C. § 1184(o).

<sup>263</sup> *Number of Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status Fiscal Years 2008-2022*, USCIS (last visited June 20, 2023), [https://www.uscis.gov/sites/default/files/document/reports/I914t\\_visastatistics\\_fy2022\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2022_qtr1.pdf).

<sup>264</sup> Learn more about Office on Trafficking in Persons (OTIP) eligibility letters. See *Child Eligibility Letters*, HHS OTIP, <https://www.acf.hhs.gov/otip/victim-assistance/child-eligibility-letters> (last visited Sept. 29, 2021). Additionally, you can view a HHS webinar on the topic once a month online. See *Monthly Webinars: Responding to Child Victims of Trafficking*, HHS OTIP, <https://www.acf.hhs.gov/otip/resource/monthlywebinars> (last reviewed June 2, 2021.)

<sup>265</sup> 8 C.F.R. §§ 214.11(c)(1)-(2), (d)(9), (d)(11), 245.23.

<sup>266</sup> 8 C.F.R. § 214.11(d)(11), (k)(10). See Section IV.D. for more information on how to file the I-765.



green card.<sup>267</sup> T visa recipients are also eligible for some public benefits.<sup>268</sup>

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

- Check out CILA's 101 [webinar](#): *Options for Child Survivors of Crimes, Including Trafficking* (43 minutes).
- View CILA's webinar, *Immigrant Survivor Relief for Unaccompanied Children*, August 2023.
- Watch *Identifying and Filing T Visa Claims for Youth Clients: The Flags You May Be Missing* [training](#) presented at CILA's Third Annual Texas Champions for Immigrant Youth Symposium, May 2021.
- Review webinar and handouts from the *T Visa Practice Updates & Best Practices for Children and Youth* [training](#) presented at CILA's Fifth Annual Symposium, May 2023.
- Check out ILRC's Practice Advisory *Humanitarian Forms of Relief Part I: U, T, VAWA*, Veronica Garcia, June 2019.
- Review NIJC's *Representing Immigrant Survivors of Human Trafficking: T Non Immigrant Status (T Visa) Training Manual* (March 2023).
- Read ILRC's Practice Advisory *Special Considerations When Screening Youth for T Visa Eligibility*, Andrew Craycroft and Nithya Nathan-Pineau, July 2021.
- Review ILRC's Practice Advisories *Identifying Humanitarian Forms of Relief For Derivatives – U Non-immigrant Status*, Veronica Garcia, December 2019 and *A Guide to State Laws on U Visa and T Visa Certifications*, Alison Kamhi and Sarah Lakhani, April 2020.
- The Coalition to Abolish Slavery and Trafficking (CAST) provides a host of resources on their [website](#) regarding T visas including online courses and practice advisories including the practice advisory *"Physical Presence on Account of Trafficking" Eligibility Requirement for T Visa Applicants*, November 2020. CAST also provides a [table](#) of AAO opinions relating to T visas.
- ASISTA has a [resource library](#) with information regarding U visas and T visas amongst other topics and offers [technical assistance](#) to members with case-specific questions. Review ASISTA's Practice Pointer: *What If You Do Not Receive an RFE or Denial Notice?*, 2020.
- Consult ILRC's Practice Advisory *U Visa Derivatives Age-Out*, Angel Graf and Alison Kamhi, June 25, 2021.
- Check out the DOJ [webpage](#) regarding Human Trafficking Key Legislation and DOS's [webpage](#) *International and Domestic Law* from the Office to Monitor and Combat Trafficking in Persons.
- Check out CILA's ongoing blog series on *Supporting Our Clients in the Interim by Rescreening for Relief* for more information about U visas and T visas as well as advice for how to evaluate changed circumstances and assess eligibility, June and August 2023.
- Watch Project TRUST's recorded webinar on *Enhancing Trauma-Informed Approaches: Building Trauma-Conscious and Person-Centered Practices in Anti-Trafficking Work*.
- Review on CILA's [website](#) the *Toolkit for Navigating Difficult Conversations with Child Clients: Guidance & Examples* (August 2023), especially the section on how to approach having conversations related to sex and labor trafficking.

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<sup>267</sup> 8 C.F.R. § 245.23.

<sup>268</sup> See *Victims of Human Trafficking: T Nonimmigrant Status*, USCIS, <https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-human-trafficking-t-nonimmigrant-status/victims-human-trafficking-t-nonimmigrant-status> (last reviewed/updated Oct. 20, 2021).



## F. Family-Based Cases and VAWA Self-Petitions

### Family-Based Cases

Family-based immigration is the primary form of immigration in the United States.<sup>269</sup> United States citizens<sup>270</sup> and lawful permanent residents<sup>271</sup> can petition for certain family members to gain legal status in the United States and become lawful permanent residents. When reviewing family-based immigration options, they can be broken down into immediate relatives and family preference categories, which are reviewed further below. It is important to screen your client to see if they have a family-based option to get a green card. This Guide provides a general overview of this potential option to get you started.

#### Family-Based Cases Key Sources of Law

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

### WHO QUALIFIES FOR A FAMILY-BASED VISA?

**Immediate Relatives:** There are an unlimited number of visas available for immediate relatives, so immediate relatives typically do not have to wait for a visa (except for processing times).<sup>272</sup>

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

- A spouse<sup>273</sup>
- Unmarried children under age 21 of U.S. citizen
- Parents of U.S. citizen, if the U.S. citizen petitioner is at least 21 years old

**Family Preference Categories:** The United States gives preference to certain family relationship categories<sup>274</sup> over others, ranking them F1-F4, with F1 being the top priority.

- F1: Unmarried sons and daughters (over age 21) of U.S. citizens

<sup>269</sup> See *How the United States Immigration System Works*, American Immigration Council (Sept. 2021), <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>.

<sup>270</sup> To learn more about family-based immigration options for United States citizens, view USCIS's webpage on the topic. See *Family of U.S. Citizens*, USCIS, <https://www.uscis.gov/family/family-us-citizens> (last reviewed/updated Mar. 23, 2018).

<sup>271</sup> To learn more about family-based immigration options for lawful permanent residents, view USCIS's webpage on the issue. See *Family of Green Card Holders (Permanent Residents)*, USCIS, <https://www.uscis.gov/family/family-green-card-holders-permanent-residents> (last reviewed/updated July 14, 2015).

<sup>272</sup> INA § 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i).

<sup>273</sup> 8 C.F.R. § 204.2(a)(1).

<sup>274</sup> INA § 203(a); 8 U.S.C. § 1153(a).

- F2: A) Spouses<sup>275</sup> and minor children of lawful permanent residents  
B) Unmarried sons and daughters over age 21 of lawful permanent residents
- F3: Married sons and daughters of U.S. citizens and their spouses and minor children
- F4: Brothers and sisters of U.S. citizens and their spouses and minor children, if the U.S. citizen petitioner is at least 21 years old

As you may be able to tell from the lists above, neither U.S. citizens nor lawful permanent residents can petition for grandparents/grandchildren, aunts/uncles, in-laws, or cousins. Lawful permanent residents cannot petition for their married children, parents, or siblings.

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

- Has a mother or father who became a lawful permanent resident or U.S. citizen
- Has a step-parent<sup>276</sup> who is a lawful permanent resident or U.S. citizen
- Married a U.S. citizen<sup>277</sup> or lawful permanent resident
- Has a U.S. citizen sibling (F4)

## FILING A FAMILY-BASED PETITION FOR A VISA

- **Wait Times:** The total number of family-based preference visas is capped at 480,000 each fiscal year.<sup>278</sup> Additionally, there are some limits per preference category,<sup>279</sup> and each country can have roughly 7% of the number of visas each year.<sup>280</sup> This creates a longer waitlist for those in the least preferred categories, as well as longer waitlists for individuals from certain countries like Mexico. The number of family-based visa petitions filed per year far exceeds the cap, causing long waitlists for a visa.<sup>281</sup>
- **Snapshot of the Process:**
  - Step 1: Submit [Form I-130, Petition for Alien Relative](#) to USCIS<sup>282</sup> to petition for a visa for a family member. The form can be submitted through online filing with USCIS. Submitting the form places the beneficiary into their eligibility group of either immediate relative or family preference category. Once approved, those placed in a family preference category are placed on a waitlist and given a priority date, the date the petition was received by USCIS. If they are an immediate relative, the applicant can go to step 2 immediately after receiving an approval of the I-130. If they are not an immediate relative, there will be a waiting period. The DOS issues a Visa Bulletin<sup>283</sup> each month, which is an updated waitlist based on priority date per country.

<sup>275</sup> 8 C.F.R. § 204.2(a)(1).

<sup>276</sup> According to INA § 101(b)(1)(B); 8 U.S.C. § 1101(b)(1)(B) a child can be a stepchild “whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.”

<sup>277</sup> Note that, for SIJS eligibility, the petitioner must be unmarried at the time that the SIJS petition is filed and at the time that USCIS makes a decision on the SIJS petition.

<sup>278</sup> INA § 201(c)(1)(A)(i); 8 U.S.C. § 1151(c)(1)(A)(i).

<sup>279</sup> INA § 203(a); 8 U.S.C. § 1153(a).

<sup>280</sup> INA § 202(a)(2); 8 U.S.C. § 1152(a)(2).

<sup>281</sup> Read more about the numbers and wait times in CLINIC’s article. Charles Wheeler, *Backlogs in Family-Based Immigration: Shedding Light on the Numbers*, CLINIC (Mar. 1, 2019), <https://cliniclegal.org/resources/family-based-immigrant-law/backlogs-family-based-immigration-shedding-light-numbers>.

Learn about the recent numbers for family-sponsored immigration and the increasing backlog from the CATO Institute. David J. Bier, *8.3 Million Relatives of U.S. Citizens & Legal Residents Awaited Green Cards in 2022*, CATO Institute (May 17, 2023), <https://www.cato.org/blog/83-million-relatives-us-citizens-legal-residents-await-green-cards>.

<sup>282</sup> To find out more information regarding the process of filing a Form I-130 with USCIS, you may want to read USCIS’s webpage on the topic. See *I-130, Petition for Alien Relative*, USCIS, <https://www.uscis.gov/i-130> (last reviewed/updated Sept. 26, 2023). The Department of State (DOS) also provides information on their webpage regarding this part of the process. See *Immigrant Visa Process*, DOS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html> (last visited Oct. 13, 2023).

<sup>283</sup> The DOS Visa Bulletin is issued each month on DOS’s website. See *The Visa Bulletin*, DOS, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> (last visited Oct. 13, 2023).

- Step 2: To get a visa, the individual can file [Form I-485, Application to Register Permanent Residence or Adjust Status](#) to USCIS<sup>284</sup> or consular process by going to the United States Consulate's office in their home country to apply for a visa using [Form DS-260, Immigrant Visa Electronic Application](#).<sup>285</sup> When determining whether an individual can adjust status by applying with USCIS or if they will need to consular process, the answer often stems on where the individual is located, when they filed their I-130 petition, whether the individual entered with inspection or not, their eligibility group, and whether they have any other inadmissibility issues or not.

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

- Grounds of Inadmissibility: There are many grounds of inadmissibility including unlawful presence, criminal issues, public health issues, misrepresentation/fraud, smuggling, prior removal orders, etc. which must be explored when your client is applying for lawful permanent residence. Drug offenses, for instance, are generally not waivable except if the offense was for marijuana, and there was only a single offense for simple possession of 30 grams or less.<sup>286</sup>
- Unlawful Presence: It is important to know how your client entered the United States (via a port of entry or between ports of entry) and the number of entries your client has had. Unlawful presence is not accrued until after reaching the age of 18.

- \* If a child unlawfully entered the country one time, then the child may be able to consular process. A waiver is required if the youth accrued unlawful presence.
- \* In June 2022, USCIS issued policy guidance regarding inadmissibility under INA § 212(a)(9)(B) and what happens if a noncitizen returns to the United States during the statutory 3-year or 10-year period after the noncitizen left or was removed from the United States. Under this [Policy Alert \(PA-2022-15\)](#), a noncitizen seeking admission to the United States more than 3 or 10 years after the departure or removal is not inadmissible under INA § 212(a)(9)(B). Even if the noncitizen came back to the United States, with or without authorization, during the statutory 3-year or 10-year period, they are still not inadmissible under INA § 212(a)(9)(B). In *Matter of Duarte-Gonzalez*, 28 I&N Dec. 688 (BIA 2023), the BIA held that the 3-year and 10-year bars for unlawful presence continue to run while a non-citizen is in the United States. Since there are nuances involved with this issue, consult the policy alert and the USCIS Policy Manual for all details when doing your analysis.
- \* If a child entered the United States more than one time, you must then know how long the child stayed in the United States after entering. If the child entered the country without documentation, stayed longer than one year, and then left the country and re-entered, the child will be subject to the “permanent bar.”<sup>287</sup> It is commonly referred to as the “permanent bar” because it cannot be waived with a waiver, but the bar can be overcome by staying outside of the United States for ten years and then applying for permission to re-enter the United States.

- **Waivers:** Sometimes an individual can file a waiver to waive a ground of inadmissibility. Some of the forms used to file for a waiver include [Form I-601A, Application for Provisional Unlawful Presence Waiver](#); [Form I-601, Application for Waiver of Grounds of Inadmissibility](#); and [Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal](#) depending on the circumstance. The chart on page 105 gives a quick break-down of instances when you would

284 To find out more information regarding the process before USCIS, you may want to read USCIS's webpage on the issue. See *Green Card for Family Preference Immigrants*, USCIS, <https://www.uscis.gov/greencard/family-preference> (last reviewed/updated Jan. 10, 2022).

285 To find out more information regarding consular processing, visit the DOS's webpage on the issue. See *Immigrant Visa Process*, DOS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition/step-2-begin-nvc-processing.html> (last visited Oct. 13, 2023).

286 See also Kathy Brady, Zachary Nightingale, Matt Adams, *Immigrants and Marijuana*, ILRC (May 2021), <https://www.ilrc.org/immigrants-and-marijuana>.

287 INA § 212(a)(9)(c); 8 U.S.C. § 1182(a).

use each of these particular forms. You would need to consult instructions and guidance for how to file each of them and for a full list of instances when you can use Form I-601.

FORM I-601A, APPLICATION FOR PROVISIONAL UNLAWFUL PRESENCE WAIVER	FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY (EXAMPLE LIST) <sup>288</sup>	FORM I-212, APPLICATION FOR PERMISSION TO REAP- PLY FOR ADMISSION INTO THE UNITED STATES AFTER DEPORTATION OR REMOVAL
Previous unlawful presence INA § 212(a)(9)(B) <sup>289</sup> <u>ONLY</u>	Previous unlawful presence INA § 212(a)(9)(B)	Previously removed INA § 212(a)(9)(A)
	Immigration Fraud and misrepresentation INA § 212(a) (6)(c)	Unlawfully present after previous immigration violations INA § 212(a)(9)(C)
	Certain criminal grounds INA § 212(a)(2)	
	Health-related grounds INA § 212(a)(1)	
	Immigrant membership in totalitarian party INA § 212(a)(3)	
	Smuggling INA § 212(a)(6)(E)	
	Subject to civil penalty INA § 212(a)(6)(F)	

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

If your client is in removal proceedings and has a pending family-based visa petition, you may want to file a motion for a continuance, seek prosecutorial discretion<sup>290</sup> to dismiss the claim, seek administrative closure,<sup>291</sup> or request that the case be placed on the status docket while your client is waiting for a decision on their petition. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) and *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) are important cases to consult when drafting your motion for a continuance when your client's case is in this procedural situation. Additionally, see [Section IV.C](#). Introduction to Immigration Court for more information regarding motions for a continuance in immigration court and seeking prosecutorial discretion.

<sup>288</sup> See the Form I-601 instructions for further guidance on use of the I-601 to waive inadmissibility grounds. *I-601 Application for Waiver of Grounds of Inadmissibility*, USCIS, <https://www.uscis.gov/i-601> (last reviewed/edited June 29, 2023).

<sup>289</sup> USCIS issued [Policy Guidance](#) on June 24, 2022, regarding inadmissibility under INA § 212(a)(9)(B). The policy alert on this issue states, “Under this Policy Guidance, a noncitizen who again seeks admission to the United States more than 3 or 10 years after the relevant departure or removal is not inadmissible under INA 212(a)(9)(B), even if the noncitizen returned to the United States, with or without authorization, during the statutory 3-year or 10-year period.

<sup>290</sup> See discussion *supra* note 210. Learn more about seeking prosecutorial discretion on page 130 in [Section IV.C](#).

<sup>291</sup> Learn more about administrative closure on pages 84 and 129.

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

**TIP:** If your client will need to consular process, but is currently in removal proceedings and has no other legal claim for relief, your client may want to consider the option of voluntary departure. It is important for your client to resolve their removal proceedings before leaving the country to consular process. Voluntary departure<sup>292</sup> can be a tricky subject, so it is important to study this option and review it carefully with your client, but if your client follows the voluntary departure instructions, this can be a better option than getting a removal order. This will be up to your client.

Also, know that ICE issued a [directive](#), *Using a Victim-Centered Approach with Noncitizen Crime Victims* (11005.3) in August 2021, which affects civil enforcement of petitioners and beneficiaries of several victim-based immigration benefits including U visas, T visas, VAWA, and SIJS.<sup>293</sup> The directive includes a non-exhaustive list of the types of civil enforcement action this directive affects, and some actions on the list include decisions whether to issue or cancel a Notice to Appear, detain or release from custody, grant deferred action or parole, or execute a final order of removal.

## Violence Against Women Act Self-Petitions

The Violence Against Women Act (VAWA)<sup>294</sup> provides a way for an abused spouse, child, or parent to self-petition for legal status when they have suffered abuse by a U.S. citizen or lawful permanent resident family member. Despite the name, protection is available to both females and males and to adults and children. A child can self-petition directly or be a derivative on an abused parent's petition.

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

### VAWA Self-Petitions Key Sources of Law

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

292 See Immigration Equality, *Asylum Manual*, <https://immigrationequality.org/asylum/asylum-manual/immigration-basics-voluntary-departure/> (last visited Oct. 13, 2023). See also *Practice Advisory Voluntary Departure: When the Consequences of Failing to Depart Should and Should Not Apply*, American Immigration Council (Dec. 21, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/voluntary\\_departure\\_when\\_the\\_consequences\\_of\\_failing\\_to\\_depart\\_should\\_and\\_should\\_not\\_apply.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/voluntary_departure_when_the_consequences_of_failing_to_depart_should_and_should_not_apply.pdf).

293 See articles *supra* note 207.

294 To learn more about the relevant legislation and regulations relating to VAWA, review the DOJ Office on Violence Against Women's *Legislation and Regulations webpage* (last updated Oct. 20, 2022).



## VAWA ELIGIBILITY REQUIREMENTS

An individual can self-petition if they are the victim of battery or extreme cruelty committed by:<sup>295</sup>

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

Therefore, a child (unmarried and under age 21)<sup>296</sup> can be a direct self-petitioner or a derivative on a parent's VAWA petition.

In addition to a qualifying familial relationship (as listed above), other eligibility requirements for self-petitioners include:<sup>297</sup>

- Suffered battery or extreme cruelty by U.S. citizen or lawful permanent resident family member (one of the qualifying familial relationships listed above)
  - Additionally, parents can file if their U.S. citizen or lawful permanent resident spouse abused their child.
- Resides (or resided) with the abusive individual<sup>298</sup>
- If the child is petitioning based on abuse of a parent, the child must reside in the United States.
- If familial relationship is based on marriage, the marriage must have been entered in good faith and not solely for immigration purposes.
- Individual must be person of good moral character (if a child is self-petitioning, this requirement only applies to children over age 14 because younger children are presumed to be persons of good moral character).

VAWA self-petitioners may be able to seek waiver of certain inadmissibility grounds. There are also specific inadmissibility exceptions for VAWA self-petitioners, including being present without admission or parole (INA § 212(a)(6)(A)(i)),<sup>299</sup> and public charge (INA § 212(a)(4)(E)(i)),<sup>300</sup> where a waiver is not necessary.

## FILING THE VAWA SELF-PETITION

- **Confidentiality:** Congress has created some important confidentiality protections for individuals with pending or approved U, T, and VAWA self-petitions to protect individuals.<sup>301</sup> This is important for safety reasons. See [Section II.B](#).
- **Necessary Forms:** [Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant](#) is used to file for VAWA.<sup>302</sup> If the abuser is a U.S. citizen, then the applicant can concurrently file [Form I-485, Application to Register Permanent Residence or Adjust Status](#) for adjustment of status. If the abuser is a lawful permanent resident, then the individual will have to wait for their priority date to become current prior to filing for adjustment of status. It will be important to check the DOS Visa Bulletin to

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295 INA § 204(a); 8 U.S.C. § 1154(a). See also *Questions and Answers: Battered Spouses, Children and Parents under the Violence Against Women Act (VAWA)*, USCIS, <https://www.uscis.gov/humanitarian/battered-spouse-children-parents/questions-and-answers-battered-spouses-children-and-parents-under-violence-against-women-act-vaawa> (last reviewed/updated Feb. 10, 2022).

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

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

298 In 2022, USCIS updated the Policy Manual to change the interpretation of the requirement for shared residence with the abusive individual. USCIS updated its interpretation of the statute to require self-petitioners to demonstrate, when filing the self-petition, that they currently reside or have resided with the abuser at any time in the past. Read this [USCIS Policy Alert \[PA-2022-09\]](#) to learn more about the VAWA update to the USCIS Policy Manual.

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

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

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

302 8 C.F.R. § 204.2.



see if their priority date is current. See [Section III.D](#).

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

## BENEFITS OF AN APPROVED VAWA SELF-PETITION

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

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

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

## CLIENT IN REMOVAL PROCEEDINGS

If your client is in removal proceedings, then your client would want to consider VAWA cancellation of removal as a form of relief in immigration court. When determining whether to file a VAWA case before USCIS or VAWA cancellation of removal in immigration court, it is going to depend on the facts of the case. There are certain instances when a youth can qualify for VAWA cancellation of removal but not VAWA. The eligibility requirements for VAWA cancellation of removal include:<sup>303</sup>

- Has been battered or subject to extreme cruelty by a U.S. citizen or lawful permanent resident spouse<sup>304</sup> or parent (or a parent of a child who either currently or previously was battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse);
- Has been physically present in the United States for a continuous period of at least three years;
- Has been a person of good moral character;
- Is not admissible or deportable based on certain grounds; and
- Can show that removal would result in extreme hardship to the applicant, their child, or their parent.

It is also important to know that there is a 4,000 cap per year for those who can be approved for VAWA cancellation of removal.<sup>305</sup> Your client can file for VAWA cancellation of removal by filing [Form EO-IR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents](#) and other necessary documents with the immigration court.

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

- Check out CILA's 101 [webinar: Family-Based Immigration and VAWA for Unaccompanied Children](#) (29 minutes).
- View CILA's webinar, [Immigrant Survivor Relief](#), August 2023.
- [Family-Based Cases](#): If you are representing a LGBTQ client who is seeking a petition on marriage,

<sup>303</sup> INA § 240A(b); 8 U.S.C. § 1229b(b).

<sup>304</sup> See *Matter of L-L-P-*, 28 I&N Dec. 241 (BIA 2021). See also Joanna Mexicano Furmanska, *BIA Provides Guidance on Special Rule Cancellation Eligibility*, CLINIC (Mar. 22, 2021), <https://cliniclegal.org/resources/humanitarian-relief/bia-provides-guidance-special-rule-cancellation-eligibility>.

<sup>305</sup> INA § 240A(e)(1); 8 U.S.C. § 1229b(e)(1).

you may want to review ILRC's Practice Advisory *Family-Based Petitions for LGBTQ Couples: Considerations When Documenting a Bona Fide Marriage*, Em Puhl, January 2020. Also, review ILRC's Chapter 1: *Qualifying Family Relationships and Eligibility for Visas*, September 2017. Review CLINIC's resources *Beware the Dangers of Naturalization for Child Beneficiaries*, Charles Wheeler, May 27, 2021 and *Five Things to Know about Fraud and Marriage-Based Petitions*, Elizabeth Carlson, April 26, 2021. Check out the ABA Commission on Immigration webinar about immigration for family groups: "*Common Forms of Immigration Relief for Family Groups and How to Screen for Them*" (February 3, 2023). CLINIC provides several resources relating to family-based immigration law, including *Practice Advisory: Sham Marriages and Marriage Fraud: A Summary of Recent Case Law and Tips for Practitioners*, December 15, 2021, and *Age-Out Rules for Afghan SIV Derivative Children*, Elizabeth Carlson and Charles Wheeler, August 4, 2022.

- **Waivers:** CLINIC provides several resources pertaining to preparing an extreme hardship waiver, December 9, 2018.
- **Inadmissibility Grounds:** Review ILRC's Practice Advisories: *Immigrants and Marijuana*, Kathy Brady, Zachary Nightingale, and Matt Adams, May 21, 2021. *Community Handout on Public Charge*, available in English and Spanish, April 2021, and *Public Charge Safe to Use List*, available in English and Spanish, May 24, 2021. *Understanding Unlawful Presence Under INA § 212(A)(9)(B) and Waivers of Unlawful Presence, I-601 and I-601A*, March 2019. Learn more about public charge issues from CLINIC. Learn more about unlawful presence bars with CLINIC's resource *Board Affirms That Unlawful Presence Bars Continue To Run While Noncitizen Is in the United States*, Elizabeth Carlson and Charles Wheeler, February 24, 2023.
- **VAWA:** Check out ILRC's Practice Advisory *Humanitarian Forms of Relief Part I: U, T, VAWA*, Veronica Garcia, June 2019. Review ILRC's Practice Advisory *Document Gathering Guide for VAWA Self-Petitioners*, Veronica Garcia, January 2021. Learn more in ILRC's Practice Advisory *Applying for Adjustment of Status Through VAWA*, June 2021. Read through the practice advisory produced by ASISTA, ILRC, and CLINIC about VAWA and VAWA Self-Petition Policy Updates: *VAWA Practice Advisory: VAWA Self-Petition Policy Updates*, June 2022. Learn more about VAWA with NIJC's recorded *Pro Bono Training: Representing Immigrant Survivors Of Domestic Violence (VAWA)*, March 2023.
- **VAWA Cancellation of Removal:** Learn more about VAWA cancellation of removal by reading American University Washington College of Law, NIWAP, and Legal Momentum's *VAWA Cancellation of Removal*, Rebecca Story, Cecilia Olavarria, and Moira Fisher Preda, 2015. Read NIPNLG's practice advisory *VAWA Cancellation of Removal*, Ann Block, Michelle Méndez, Rebecca Scholtz, March 2023. Check out more resources from ASISTA about VAWA Cancellation of Removal.



# SECTION IV.

## IV. PRACTICAL POINTERS

### A. Research Tips

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

#### SOURCES OF LAW

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

[Title 8 of the Code of Federal Regulations \(C.F.R.\)](#), as well as other titles, contain provisions relating to immigration. [Title 45](#) contains the functions of the Office of Refugee Resettlement (ORR).

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

**Administrative decisions are decided in immigration courts and at USCIS/the Asylum Office.**

**When immigration court cases are appealed, they go to the Board of Immigration Appeals (BIA). The Attorney General can also certify cases to himself.**

Precedent BIA Case [List & Chart](#)

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

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

[Precedent AAO Decisions](#)

[Non-Precedent AAO Decisions](#)

#### **International Law – Treaties**

[United Nations \(UN\) Convention & 1967 UN Protocol Relating to the Status of Refugees](#)

[Universal Declaration of Human Rights](#) (right to seek asylum)

#### **UNHCR Handbook and Guidelines**

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

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

8 C.F.R. §§ [1292.3](#), [292.3](#), [1003.101](#), and [1003.102](#). See also [ICPM Ch. 10.4](#).

## SOURCES OF LAW (continued)

### Field Manuals and Agency Guidelines

USCIS Policy Manual

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

Affirmative Asylum Procedures Manual

Asylum Officer Basic Training Course Lesson Modules<sup>306</sup>

Immigration Court Practice Manual (ICPM)

Immigration Judge Benchbook (Archived)

DHS and DOJ Memoranda<sup>307</sup>

CBP Inspector's Field Manual

### Links to Help GET YOU STARTED IN YOUR RESEARCH

- Check out CILA's [101 webinar: Research and CILA Resources](#) (22 minutes). View the CILA-NILA [webinar: Advanced Immigration Legal Research](#) (1 hour). For more information about the CILA-NILA partnership and how this partnership can assist you in your practice, take a look at this CILA blog post, "[The CILA-NILA Partnership Offers Helpful Resources & Trainings for Representing Immigrant Youth in Federal Court](#)."
- As mentioned above, CILA has an [extensive chart](#) on our website listing helpful resources to help get you started in your research.
- In February 2023, the ABA Commission on Immigration (COI) & CILA created a [handout](#) for pro bono attorneys that compiles resources, all available for free, that pro bono attorneys can utilize in their practice.
- Check out Georgetown Law Library's [Immigration Law \(U.S.\) Research Guide](#).
- Review the [Ninth Circuit Immigration Outline](#) prepared by the Office of Staff Attorneys of the United States Courts for the Ninth Circuit, updated September 2023.
- View the webpage from the Houston Immigration Legal Services Collaborative on [Legal Resources, by Subject Matter](#).
- Check out the ILRC's compilation of resources: [Unaccompanied Immigrant Children Resources](#), September 2014.
- Be aware of EOIR's [Virtual Law Library](#) and though now archived, the [Immigration Judge Benchbook](#).
- Access the USCIS site for links to [Laws and Policy](#), including handbooks and guides used by immigration officers in performing their job.
- Check out ABA COI's [Resource Guide for New-to-Immigration Attorneys](#), October 2022.
- Peruse EOIR's Electronic [Reading Room](#), where unpublished BIA cases are posted.

<sup>306</sup> See American Immigration Lawyers Association (AILA), *Asylum Lesson Plans* (last visited Oct. 13, 2023), <https://www.aila.org/infonet/asylum-lesson-plans>.

<sup>307</sup> DHS memoranda and directives are available online at <https://www.dhs.gov/publication/memoranda-and-directives>. DOJ policy memos and guidance are available online at <https://www.justice.gov/jmd/orders-policy-memos-and-guidance>.

## B. Drafting Tips

Legal writing is a central part of most children's immigration cases. Pro bono attorneys working on cases from beginning to end will likely need to use their legal writing skills on various types of documents and often for different immigration agencies. In other instances, pro bono attorneys may be working on a discrete project that focuses on using legal writing skills, such as writing a brief to support an appeal or to file a certain action in court.

This section provides some general drafting tips and resources for immigration cases. This information is not exhaustive. While this information may serve as a starting point, please exercise due diligence and engage in independent research in developing a case strategy and drafting and preparing legal documents.

The form and style of writing can vary depending on the type of document and agency for submission and filing. When determining how best to approach writing and preparing a document in a child's case, **consider the following:**

- What *type* of document are you preparing?
- Do you have access to any templates or samples to serve as an example from the organization that referred you the immigration case or from another reputable source?<sup>308</sup>
- What is the *purpose* of the document?
- Is the document for an *affirmative* or a *defensive* case?<sup>309</sup>
- Who is the intended *audience* for the document?
- *Where* will the document be filed (e.g., USCIS, immigration court, OPLA office, etc.)?
- What is the best *tone* for the document (formal, informal, etc.)?
- What are the relevant sources of law?
- Are there filing instructions or other local rules or guidelines to consult?

### LEGAL WRITING IN AFFIRMATIVE CASES

Affirmative cases typically involve relief applications being adjudicated by USCIS.

USCIS's website generally has webpages for each form of relief that link to the filing instructions and include information about what needs to be included in the filing. See more information in [Section IV.D.](#) of this Guide. Additionally, the [USCIS Policy Manual](#) provides guidance for applications being filed with USCIS.

Include a **cover letter** when sending any applications or other documents to USCIS. This letter should be written in a formal tone and generally includes identifying case information, biographic information about the applicant, and an overview of what is being sent. It may also summarize eligibility for the legal form of relief, although the level of detail and style can vary and may depend on what is being filed with USCIS.

<sup>308</sup> While templates can provide a useful starting point, exercise due diligence when using them. You should always conduct additional research to verify and assess whether the template is accurate. This step is especially important in an area of law like immigration that can have rapid legal and policy changes. Filing and formatting requirements can also vary by jurisdiction. Be sure to modify the template as needed to fit the needs of your case.

<sup>309</sup> [Section III.](#) of the Guide provides more information about the differences between an affirmative application filed with USCIS and a defensive application filed with the immigration court.



## LEGAL WRITING IN AFFIRMATIVE CASES (continued)

For example, the cover letter for a Form I-589, Application for Asylum should state up front the applicant's country of origin and is usually treated like a **legal brief**—laying out the applicant's claim for asylum with a concise statement of facts at the heart of the claim and analysis of the protected grounds, legal authorities, and country conditions evidence in support of the claim.

As another example, responses to any **Request for Evidence (RFE)** or **Notice of Intent to Deny (NOID)** from USCIS should include a formal cover letter along with any other documents or information required by the RFE or NOID. The cover letter should include the applicant's name and A number, the receipt number (if applicable), and a substantive response to the issue(s) raised in the RFE or NOID.

## LEGAL WRITING IN DEFENSIVE CASES

Cases that are in removal proceedings and must comply with the requirements of EOIR and the immigration court are defensive cases. It is important to follow the rules outlined in the [Immigration Court Practice Manual \(ICPM\)](#) regarding filings to EOIR.

Try to learn about your judge's filing preferences. You can consult with the organization that referred the case to you or local immigration practitioners.

EOIR filings generally require a **cover page**. For more information, consult [ICPM Chapter 3.3\(c\)\(6\)](#) and check out EOIR's sample cover page in [Shared Practice Manual Appendix E](#).

Written **pleadings** should conform to EOIR filing style guidelines and include a caption and formal tone. Check out EOIR's sample pleading in [Shared Practice Manual Appendix K](#).

**Motions** are used to make requests to the court. Motions should be written in a formal tone and must include a cover page. Consult [ICPM Chapter 5](#) for additional requirements, including that the motion states with particularity the grounds for making the request and identifies the relief or remedy sought.

File an **application packet** with proposed exhibits when seeking a form of legal relief before the immigration court. These filings should comply with the document requirements in [ICPM Chapter 3.3](#).

You will likely also want to file a **legal brief** to make your arguments in writing. These are written in a formal tone with the judge as the audience and are common in cases seeking more complicated forms of legal relief, like asylum. Consult EOIR's [ICPM Chapter 4.19](#) for pre-hearing brief formatting requirements and general rules. For example, a statement of facts should be concise, and excessive use of footnotes is discouraged. A pre-hearing brief in an asylum matter typically contains the key facts and legal argument with cites to the legal authorities and country conditions reports and sources that support the claim.

## Links to Help You with LEGAL WRITING IN CHILDREN'S IMMIGRATION CASES

- Improve your writing skills by watching the CILA-NILA recorded webinar, *Legal Writing Workshop* (1 hour), December 29, 2020.
- Learn more about the BIA appeal process and tips for preparing and filing a successful BIA appeal with the CILA-NILA recorded webinar, *Winning At The BIA* (1 hour and 29 minutes), June 22, 2021.
- If you are practicing in Texas, CILA has a template bank with Texas state court templates. To gain access to these templates, you must watch CILA's webinar, *SIJS in Texas 101* (1 hour and 40 minutes) and then provide confirmation [here](#) to request a login.
- Review the resources from NILA and CILA on CILA's *Appellate & Litigation Strategy webpage*, including the [Civil Cover Sheet Guide](#) (Intro to Federal Court Practice), February 2021; [Template Habeas Petition](#) (Habeas Petitions 101), August 2021; [Administrative FTCA Claim Packet Checklist](#) (Filing Administrative Claims For Wrongful Conduct), November 2021; [Example Petition for Review \(PFR\) Template](#) (Petitions for Review and Judicial Stays of Removal to the Fifth Circuit Court of Appeals 101), October 2021; [Template Motion for EAJA Fees](#) (Seeking Attorneys' Fees), June 2021; and [Example Template Complaint for SIJS delay case](#) (Mandamus Actions 101), January 2021.

## C. Introduction to Immigration Court

Immigration court is part of the Executive Office for Immigration Review (EOIR). EOIR is an agency within the Department of Justice (DOJ). EOIR states its mission "is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws."<sup>310</sup>

Immigration courts are Article II courts under the Executive Branch. Immigration judges (IJs) are hired by the DOJ. Their judicial authority is delegated by the Attorney General. This means that IJs are subject to certain decisions issued by the Attorney General and that they have less judicial independence than Article III judges in the federal judiciary.<sup>311</sup>

## Removal Proceedings

Removal proceedings are conducted to determine whether a person is subject to removal from

### Key Tools & Contacts

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

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

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

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

310 *About the Office*, DOJ Executive Office for Immigration Review, <https://www.justice.gov/eoir/about-office> (last updated Apr. 25, 2023).

311 See 8 C.F.R. § 1003.10. Notably, the ABA, American Immigration Lawyers Association (AILA), Federal Bar Association, and the National Association of Immigration Judges (NAIJ) have all jointly advocated for change so that the immigration court is not under the Executive Branch. See *ABA urges Congress to create separate immigration courts*, ABA (July 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-urges-congress-to-create/>. See also *Achieving America's Immigration Promise: ABA Recommendations to Advance Justice, Fairness, and Efficiency*, ABA (2021), [https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving\\_americas\\_immigration\\_promise.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf).

the United States.<sup>312</sup> Except for bond hearings, jurisdiction vests with the immigration court when the charging document is filed.<sup>313</sup>

## CHARGING DOCUMENT AND THE START OF PROCEEDINGS

**Notice to Appear (NTA):** The most common charging document in an immigration case is the Notice to Appear (NTA). Read ILRC’s Practice Advisory *The Notice To Appear (NTA)* issued in June 2020 to learn more. For jurisdiction to properly vest, the NTA must be filed with the immigration court by DHS ICE after service on the individual respondent.<sup>314</sup> The section in this Guide entitled “Reviewing and Explaining the NTA and I-213” has more information about the charging documents and your client’s rights and potential challenges based on them.

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

## HEARINGS: SCHEDULING AND WHAT TO EXPECT IN GENERAL

The immigration court will typically send you or your client a Notice of Hearing informing you that a hearing has been set in the case. Hearings are held in person, by video conference, or by telephone conference.<sup>315</sup> The immigration court’s website includes information regarding each court’s [operational status](#) and the availability of the video teleconference platform [Webex](#).<sup>316</sup>

Hearings by video conference or telephone conference raise many concerns including due process issues, particularly when working with children.<sup>317</sup> In addition to due process issues, hearings by video conference or telephone conference may raise issues with venue and precedent—especially if the parties are appearing from two different locations. To learn more about this issue, check out NIPNLG’s *Practice Advisory: Video Hearings in Immigration Court: “Knotty” Issues of Venue and Choice of Law*, (Dec. 21, 2022).

**TIP:** Consider advocacy efforts and strategies to request in-person hearings. You can submit a technical assistance request to CILA if this is an issue

### EOIR Reference Materials

In 2022, EOIR created its [Reference Materials](#) webpage, with links to the manuals to practice before EOIR, agency memoranda, and other materials for practitioners and the public. With the Reference Materials webpage, practitioners can search through documents and download PDFs.

Attorneys representing clients in removal proceedings should familiarize themselves with the [Immigration Court Practice Manual](#) (ICPM), which contains material about appearing before the immigration court, hearings before the IJs, forms used in immigration court, and other information relevant to filing and removal proceedings.

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

313 8 C.F.R. § 1003.14.

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

315 INA § 240(b)(2); 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c). Telephonic and video hearings became more prevalent during the COVID-19 pandemic.

316 See also *DM 22-07, Internet-Based Hearings*, Aug. 11, 2022; *PM 21-03, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing*, Nov. 6, 2020; *ICPM, Ch. 4.7*.

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

in your case, or review CILA's resources on rejecting hearings by video teleconference, CILA Template Motion to Object to VTC and Reset to In-Person Docket and Research on Objections to VTC for Children, posted on CILA's [website](#).

Hearings are generally open to the public, except:<sup>318</sup>

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

The IJ electronically records hearings.<sup>319</sup> The official file created by the immigration court containing the documents relating to respondent's case is called the record of proceedings (ROP).<sup>320</sup>

## PRO BONO REPRESENTATION IN IMMIGRATION COURT

Many immigrants in removal proceedings go to court unrepresented.<sup>321</sup> Pro bono legal representatives can change people's lives and meaningfully assist with filling the gaps in legal representation for those in removal proceedings. Learn more about the need for pro bono representation in CILA's blog post *The Time is Right for Pro Bono in Children's Cases*.

EOIR also recognizes the need for pro bono representation and issued [Director's Memorandum \(DM\) 22-01](#) in November 2021 to encourage and facilitate pro bono legal services. This memorandum directs IJs and EOIR staff to accommodate and facilitate pro bono representation as much as practicable, including priority scheduling at master calendar hearings when requested or creating a docket focused on cases with pro bono representatives. IJs are especially encouraged to facilitate pro bono representation when children are involved.

To learn more about pro bono advocacy for children in removal proceedings, watch CILA's webinar *Immigration Judge Perspectives on Pro Bono Representation and Best Practices* (February 2023).

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

This part of the Guide provides more details about the different types of hearings you may encounter during your case. Keep in mind that the overall flow of the case may depend on the type of case. There can also be dedicated dockets for detained or family cases. EOIR made some changes to the flow of cases in 2021, including directing IJs to issue more scheduling orders and to have more tasks conducted in writing rather than during a hearing.<sup>322</sup> These directives may apply differently in children's cases. Read CILA's blog post *EOIR Revises Case Flow Processing in April 2021 PM* to learn more.

**Bond Hearings:** Bond hearings can be part of the process of seeking release from immigration detention. They are very common in adults' cases. In children's cases, these are less common. Children are typically detained in different facilities managed by ORR and subject to a release process that often does not involve any hearing. If a hearing is needed, it will usually take place as *Flores* bond hearings or *Saravia* hearings.<sup>323</sup>

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318 8 C.F.R. §§ 1003.27, 1003.31(d), 1003.46, 1208.6, 1240.10(b), 1240.11(c)(3)(i).

319 8 C.F.R. § 1240.9; ICPM Ch. 4.10.

320 See *infra* page 122 for more information about ROPs and how to request a copy of the ROP in your case.

321 See *supra* pages 8–11.

322 See *PM 21-18, Revised Case Flow Processing Before the Immigration Courts* (Apr. 2, 2021); *PM 21-23, Dedicated Docket* (May 28, 2021).

323 See Rachel Prandini and Alison Kamhi, *Practice Alert on Flores v. Sessions*, ILRC (July 2017), [https://www.ilrc.org/sites/default/files/resources/flores\\_v\\_sessions\\_practice\\_alert\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/flores_v_sessions_practice_alert_final.pdf).

**Master Calendar Hearings (MCH):** These hearings cover more procedural matters, such as taking pleadings and scheduling. MCHs are important because this is often your client's first appearance before an IJ, and the path of the case is set. Even though MCHs are typically short and procedural in nature, it is important to be prepared because an IJ can still issue a removal order at a MCH. This may occur, for example, if your client does not appear, abandons an application by not being prepared, or does not have any viable relief.

Generally, MCHs run on a docket. You may be at court for a couple of hours waiting for your case to be called, but your hearing will likely be pretty short (approximately 5–15 minutes). Immigration court hearings do not typically run in the order of the names listed on the docket. It depends on the judge, but frequently cases with attorneys will go first. This sometimes occurs in a first-come first-served order.

A client may have more than one MCH. If you need more time to prepare the case or to reschedule the MCH, you may file a written motion in advance or orally seek a continuance at the time of your MCH. Generally, it is best practice to file a written motion so you receive a written order.

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

- The IJ will provide advisals to the respondent<sup>324</sup>
- The IJ will likely ask your client some basic questions: name, birthdate, current address, best language, if they would like you to represent them, etc.
- Respondent will plead to the NTA
- The IJ will designate a country of removal (where your client will be removed to if ultimately denied relief). The IJ will typically ask you or the respondent to designate a country of removal. The common response by the representative is “respondent declines to designate.” This is for two reasons: first DHS has the burden to prove alienage and second, if your client is seeking asylum, you do not want to admit on the record that your client is willing to return to their home country.
- Respondent will indicate what relief will be sought and applications (or proof of filing applications with USCIS) should be submitted, if not already done so in advance
- The IJ will schedule the next court date, either another MCH or an Individual Calendar Hearing (ICH)

The ICPM has helpful information regarding how to do pleadings in immigration court.<sup>325</sup> Review this section in advance of your MCH.<sup>326</sup>

The IJ may expect any application(s) for requested relief to be filed at a MCH, or in advance of the next MCH. As noted above, the use of scheduling orders has increased in immigration courts, so it is important to see what deadlines, if any, the judge has set in a case either at a hearing or in a scheduling order. It is also important to review the ROP if your client has attended one or more hearings *pro se* in order to understand what deadlines the IJ has set, and what you should be prepared to file when you first appear as counsel.<sup>327</sup>

If the IJ has set a deadline you cannot meet as new counsel on a case, this raises challenges. You can file a written motion for a continuance and/or an extension of a deadline explaining the need for more time, but it is also important to know the judge could deny the motion and find that your client abandoned the option for relief for not meeting their deadlines (even if you recently came onto the case) so generally,

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<sup>324</sup> EOIR has used video advisals in some immigration courts and posted the advisory videos online. See *Proactive Disclosures*, DOJ, <https://www.justice.gov/eoir/proactive-disclosures> (last updated Mar. 31, 2023).

<sup>325</sup> See Ch. 4.15, *Apps. K* (Ex. Pleading), *L*. (Ex. Oral Pleading).

<sup>326</sup> See also *The Master Calendar Hearing*, ABA COI (Feb. 2022), [https://www.youtube.com/watch?v=gDEd\\_vkDsU0&t=141s](https://www.youtube.com/watch?v=gDEd_vkDsU0&t=141s).

<sup>327</sup> See *infra* page 122 for more information about ROPs and how to obtain a copy.



deadlines are very important to meet. The IJ could also either continue the matter to another MCH so an application (or proof of filing applications with USCIS) can be submitted or the IJ may schedule an ICH and provide a due date (aka call up date) for any applications to be filed with the court in advance of the ICH.

**Individual Calendar Hearings (ICH):** Generally, an ICH is your client's merits hearing. This is a hearing set specifically for your client to appear at that specific date and time; it is not run on a docket. This is the time designated for the judge to hear your client's testimony, consider evidence (submitted in advance), and for the judge to make a ruling on your client's case.<sup>328</sup> Usually, your client will only have one ICH. The length of an ICH varies per case, judge, and jurisdiction, but commonly an ICH will last 2–4 hours (sometimes longer). If the judge's schedule does not allow for the case to keep going or if the judge is interested in seeing more evidence on a particular issue, it is possible for the case to get continued to another date. Sometimes you may also need to advocate for more time for additional testimony from your client or a witness if the judge is pressuring you to stop without fully providing an opportunity to present the case.

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

- **Stipulations:** Some judges will begin by asking the parties whether they have narrowed the issues in the case by stipulating to anything.
- **Pre-hearing submissions:** You will likely be required to file certain documents before the ICH, and the IJ will go over the parties' submissions at the start of the hearing. The IJ will make any decisions about any pending motions and enter evidence into the record.
  - Any applications, exhibits, motions, witness list, and criminal history chart (if applicable) should be filed in advance.
  - Be prepared to raise any objections to the government's evidentiary submissions or motions, if applicable.
- **Opening statements:** Be prepared to give an opening statement in case the IJ gives you this opportunity.
- **Testimony:** You and the government will have the opportunity to present witnesses. You should make requests in advance or at the start of the hearing if your witnesses will need an interpreter.
  - Your client will likely testify. The IJ will have the opportunity to ask your client questions.
  - The government attorney will cross examine your client.
  - You will have the opportunity for re-direct.
  - Any other witnesses you may have can testify, including experts.<sup>329</sup> The judge may allow for telephonic testimony in some cases. This requires a motion for telephonic testimony to be filed in advance of the hearing. The government attorney can cross examine each of your witnesses, and you can ask questions on re-direct.

### Resources on Merits Hearings

An ICH can be like a mini-trial in your case. For more information, review the ABA Commission on Immigration's (COI) webinar, *The Individual Calendar/Merits Hearing*, ABA COI (Mar. 2022). Preparation is very important. Check out CILAs *How to Prepare for an Individual Hearing: Different Practitioner's Perspectives* for some tips and to learn more.

328 As stated previously, there are many challenges with video teleconference and telephonic hearings for children including the great potential for due process concerns and confusion. It is particularly important for individual calendar hearings to be held in person. See discussion *supra* note 316.

329 Having an expert witness testify in your immigration case can make a difference. To learn more about working with experts in immigration court or throughout the course of an immigration case, see Kelcey Baker, Katherine Freeman, Gigi Warner, and Professor Deborah M. Weissman, *Expert Witnesses in U.S. Asylum Cases: A HANDBOOK* (2018), <https://law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf>. See also Jeffrey S. Chase, "The Importance of Expert Witnesses" (Aug. 24, 2017), <https://www.jeffreyschase.com/blog/2017/8/24/theimportance-of-expert-witnesses>. See also *Corroboration, Witnesses, and Working with Experts*, ABA COI (Feb. 2022), [https://www.youtube.com/watch?v=gDEd\\_vkDsU0&t=141s](https://www.youtube.com/watch?v=gDEd_vkDsU0&t=141s).



- The government attorney has the opportunity to present witnesses, but this often does not happen. If a witness is presented, you will have the opportunity to conduct cross examination.
- **Closing Statements:** Be prepared to give a closing statement in case the IJ gives you this opportunity.
- **Decision:** The IJ may make an oral decision. Sometimes the judge will continue the case if the judge wants to see something specific or may set the case to another hearing to make a decision. Sometimes the judge will issue a written decision.
- **Appeal:** The IJ will ask if you wish to reserve your client's right to appeal. This only preserves your client's option to appeal. This does not mean your client has filed an appeal in the case. There is a separate process for seeking an appeal with the BIA.

## LIFE OF A CASE

If the IJ denies your application for relief and your client chooses to appeal the case, the graphic below shows the trajectory the case may take. Timing of the appeal is important, as you must file a Notice to Appeal with the BIA within 30 days of the IJ's decision. Learn more about the appellate process in the CILA-NILA webinar *Winning at the BIA* posted on the *Appellate & Litigation Strategy* page of CILA's website.



## PLAYERS PRESENT IN IMMIGRATION COURT

**Immigration judge (IJ):** An IJ shall administer oaths, receive evidence, and interrogate, examine, cross examine the respondent, and any witnesses.<sup>330</sup>

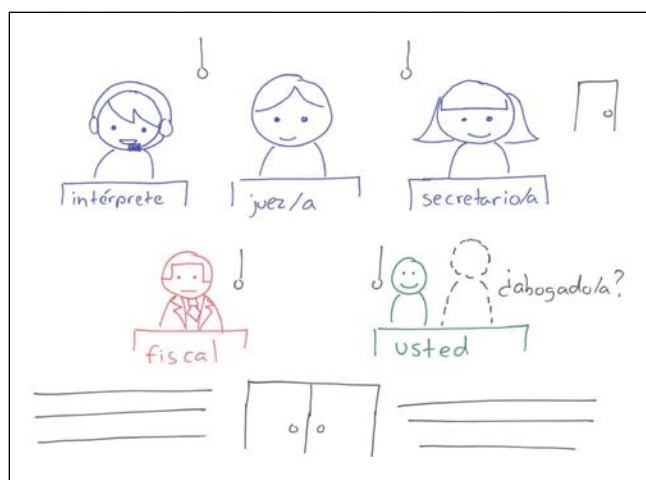
**Government attorney:** The government's interests are represented by OPLA attorneys in cases before the EOIR.<sup>331</sup> They will be your opposing counsel in immigration court. OPLA is part of ICE, an agency of the DHS.<sup>332</sup>

**Respondent:** The respondent is your client and the person in removal proceedings.

**Interpreter:** Currently, government-paid interpreters are available in immigration court.<sup>333</sup>

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

**TIP:** The visual to the right provided by ProBAR is a great example of how to explain immigration court proceedings to a child through a drawing, so that the child can better understand what to expect. From left to right and top to bottom, the



<sup>330</sup> INA § 240(b); 8 U.S.C. § 1229a(b).

<sup>331</sup> *Office of the Principal Legal Advisor Field Locations*, DHS U.S. Immigration and Customs Enforcement (ICE), <https://www.ice.gov/contact/legal>, (last reviewed/updated Oct. 2, 2023).

<sup>332</sup> Immigration and Customs Enforcement is also in charge of enforcement of immigration law including identification, arrest, detention, bond management, and removal through Enforcement and Removal Operations (ERO), as well as investigations through Homeland Security Investigations.

<sup>333</sup> Providing interpreters in immigration court was previously in dispute. See *The U.S. Commission on Civil Rights Denounces Replacement of Interpreters with a Video at Immigrants' First Immigration Hearing*, U.S. Commission on Civil Rights (July 19, 2019), <https://www.usccr.gov/press/2019/Immigration-Interpreter-Statement.pdf>.

drawing shows the interpreter (intérprete), judge (juez/a), court secretary/clerk (secretario/a), government attorney (fiscal), the child respondent (usted) and outline to show possibly an attorney will be by their side (¿abogado/a?). You can use this drawing or a similar one to explain the process to your client, but reassure your client you will be by their side at any court proceedings.

## A WORD ABOUT INTERPRETATION IN IMMIGRATION COURT

While interpreters are provided in immigration court, practically speaking, in many courts, only Spanish interpreters are available at MCHs unless the respondent seeks a continuance to have an interpreter or files a motion for an interpreter for a language other than Spanish in advance. At the first MCH, the IJ should ask the respondent for their best language. If the court does not ask, you should inform them of your client's best language. You want the court to be on notice regarding interpreter needs for the ICH.

- [EOIR Director's Memorandum \(DM\) 23-02](#)

- If you are having language access issues, refer to the guidance recently issued in [EOIR DM 23-02](#) (June 6, 2023). This memo acknowledges that many noncitizens with limited English proficiency appear before EOIR, that EOIR must ensure every noncitizen appearing before EOIR is entitled to a full and fair removal hearing, and that EOIR must provide in-court interpretation in their preferred language.
- It specifically directs the IJ to ask about language preferences on the record and acknowledges that out-of-court translation services may be needed. The memo further states that deadlines set by IJs should be reasonable and take into account that more time for translation may be necessary.

## SPECIAL COURT GUIDANCE FOR CASES INVOLVING CHILDREN

There are some special considerations for the immigration court when the respondent is a child. Under the federal regulations, "the Immigration Judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which respondent is an inmate or patient."<sup>334</sup> An IJ should not accept an admission of removability from a child who appears alone and doing so could be the basis of an appeal, objection, and/or motion to terminate proceedings.

Immigration court policies contain additional protections and/or accommodations for youth. Some of these are highlighted below and you are encouraged to further review the following sources to see how you can best advocate for your client.

- [ICPM Ch. 4.22 Juveniles](#)

- "(c) Courtroom orientation. — Juveniles are encouraged, under the supervision of court personnel, to explore an empty courtroom, sit in all locations, and practice answering simple questions before the hearing. The Department of Health and Human Services, Office of Refugee Resettlement, provides orientation for most juveniles in their native languages, explaining Immigration Court proceedings."
- "(d) Courtroom modifications. — Immigration Judges make reasonable modifications for juveniles. These may include allowing juveniles to bring pillows, or toys, permitting juveniles to sit with an adult companion, and permitting juveniles to testify outside the witness stand next to a trusted adult or friend."

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<sup>334</sup> 8 C.F.R. § 1240.10(c).

- [EOIR Operating Policies and Procedures Memorandum \(OPPM\) 17-03](#)

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

## CHECKING THE RECORD

When working with your client, you will of course gather information through client interviews. It is also a good idea to do your due diligence and gather more information by reviewing all available documents in the case.

### EOIR Record of Proceedings (ROP)

You will likely want to request a copy of the ROP if your client is considering an appeal, if there was prior counsel, or if your client represented themselves pro se in a hearing before you began representation.

**TIP:** Keep in mind that requesting an ROP is a separate process from filing a FOIA request. You should consider making both types of requests when seeking information about the case.

EOIR’s [Request a ROP webpage](#) provides an overview of who may request a copy of the ROP. A practitioner can make the request on behalf of their client if they submit a Form EOIR-28 (E-28) or have one already on file.<sup>335</sup> While they may use [Form EOIR-59 \(E-59\)](#) to request a copy, practitioners typically take the simpler approach of emailing the request to the local EOIR office. In general, the requesting email should (1) include the respondent’s information and attorney’s full name and EOIR ID; (1) identify the portions of the ROP being requested; and (3) state the method of delivery (in-person, email, or mail) for the ROP copy.<sup>336</sup> Review this [website](#) for more detailed information about how to make a request by email.

### Freedom of Information Act (FOIA) Requests

You can use FOIA requests to get any documents related to your case from the federal agencies.<sup>337</sup> This section discusses what documents may be available and how to request copies. For unaccompanied children, USCIS, CBP, ICE, EOIR, and ORR, are all likely to have been involved in the case and may have records. Your client will likely have a centralized “Alien File (A File)” with USCIS that is shared by the agencies. But you will want to consider requesting documents from each of the agencies involved.

It is best practice to send a FOIA request to **USCIS** for a copy of the A File and any other records they may have related to your client. Use [Form G-639](#) to make the request. You will also need to file a [Form G-28](#). Check out [USCIS’s website](#) for more information about making a FOIA request and where to send the request.<sup>338</sup>

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<sup>335</sup> See *infra* page 124 for more information about Form EOIR-28.

<sup>336</sup> For more information about delivery methods, review ICPM Ch. 1.5(c), Ch. 4.10.

<sup>337</sup> See *The Freedom of Information Act and Its Applications in Immigration Practice*, American Immigration Council (last updated Apr. 26, 2023), [https://www.americanimmigrationcouncil.org/practice\\_advisory/foia-immigration-lawyers-0](https://www.americanimmigrationcouncil.org/practice_advisory/foia-immigration-lawyers-0).

<sup>338</sup> See also *Steps to File a FOIA Request*, DHS, <https://www.dhs.gov/steps-file-foia> (last updated Sept. 27, 2023); *FOIA Contact Information*, DHS, <https://www.dhs.gov/foia-contact-information> (last updated Oct. 11, 2023); *Nightingale v. USCIS and FOIA Requests for Immigration Case Files (A-Files)*, NILA, AIC, NWIRP, and Law Offices of Stacy Tolchin, [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/23.04.17\\_nightingale\\_foia\\_4th\\_update\\_-\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/23.04.17_nightingale_foia_4th_update_-_final.pdf) (last updated Apr. 17, 2023).

EOIR is likely to have records if your client is in removal proceedings. Check out [EOIR's website](#) to learn about how to make a FOIA request with EOIR's FOIA Service Center.

CBP and ICE may have records related to your client's entry into the country or initial detention. To learn about requesting these records, review this [Guide to Obtaining Detention Records](#) by the AIC and Black Alliance for Just Immigration (BAJI). Guidance for how to make requests is also available on [CBP's website](#) and [ICE's website](#).

ORR should have a case file if your client has been designated as an unaccompanied child. Review ILRC's [Practice Advisory](#) and [ORR's website](#) for more information on how to obtain a copy of your client's ORR file.

## EVIDENTIARY RULES IN IMMIGRATION COURT

The Federal Rules of Evidence do not apply in immigration court. This generally means that the strict rules of evidence are not applicable in removal proceedings.<sup>339</sup> Instead, evidentiary procedures are governed by the INA, ICPM, and any local immigration court rules or rules in the IJ's scheduling order. The BIA has recognized that sole test for admission of evidence in immigration court proceedings is relevance and fundamental fairness.<sup>340</sup> The IJ has discretion as to what weight to give evidence and may consider hearsay if the evidence is probative and not fundamentally unfair.<sup>341</sup> The Immigration Judge Benchbook (Tools → Evidence → Guide) has more information about how judges have been advised to consider evidentiary issues.<sup>342</sup>

## A WORD ABOUT DUE PROCESS IN IMMIGRATION COURT

Your client has Constitutional due process rights in immigration proceedings. Your client has the right to an opportunity for a full and fair hearing.<sup>343</sup> Evidence can be excluded or suppressed on due process grounds in removal proceedings if its use is not fundamentally fair.<sup>344</sup> You may make an objection based on Fourth and Fifth Amendment violations. To prevail in a due process challenge to the exclusion of evidence, the respondent must show both (1) that they were denied a reasonable opportunity to be heard on his evidence and (2) that there was resulting prejudice. You should always make a proffer of evidence<sup>345</sup> that includes an explanation of the probative value of that evidence. You want this information on the record so that if you appeal there will be a basis for arguing prejudice to the client.

## Before Your First Case in Immigration Court

Attorneys must **register with EOIR** before their first appearance in immigration court. Currently, EOIR advises practitioners to go to their local immigration court with a valid form of identification to complete the [eRegistration validation process](#). If going in-person is not an option, contact your local immigration court to see if a virtual identity verification process is available. Once your identity is verified, EOIR staff will activate your EOIR account, notify you via email, and give you an EOIR Identification Number, which should be used when filing Form E-28.

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

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

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

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

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

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

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

For more information about registration, review [EOIR's eRegistration Validation Process](#) (last updated September 15, 2023) and EOIR's [Attorneys and Fully Accredited Representatives Registration Process](#) (effective as of March 2022).

It is important to familiarize yourself with the [Immigration Court Practice Manual \(ICPM\)](#) prior to representing your client so you are acquainted with the rules of the court. The ICPM has important information such as court deadlines, sample documents, and pleadings. Each IJ has their own style, rhythm, and particularities, so it is best practice to [observe court](#), and hopefully the IJ assigned to your case, in advance of your first appearance.

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

## COMMON IMPORTANT FORMS IN IMMIGRATION COURT

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

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

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

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

Form EOIR-61, *Notice of Entry of Limited Appearance for Document Assistance Before the Immigration Court*

To represent your client in immigration court, you will need a signed [Form EOIR-28 \(E-28\)](#), *Notice of Entry of Appearance as an Attorney or Representative before the Immigration Court* for your client to enter appearance. This may be submitted online through the ECAS portal or in court. If there has been a prior representative, you will need to file a motion to substitute counsel. As noted in the ICPM, while not required, it is highly encouraged that the E-28 be printed on light green paper.<sup>346</sup>

Practitioners can enter a "limited appearance" for the sole purpose of assisting **pro se** petitioners with **document** preparation. A Form E-28 should not be filed when entering a limited appearance. Instead, the practitioner must complete a Form EOIR-60 or [Form EOIR-61](#) that is filed with the document(s) they helped prepare for EOIR or the BIA. Remember that the petitioner remains pro se and that failure to complete a Form EOIR-60 or Form EOIR-61 when required may lead to discipline. Learn more about entering a limited appearance in CILA's blog post, "[Demystifying the "Limited Appearance" in Removal Proceedings: An overview of EOIR-60 and EOIR-61](#)."<sup>347</sup>

<sup>346</sup> ICPM Ch. 11.2(f).

<sup>347</sup> You can also check out these resources: EOIR's final rule [Professional Conduct for Practitioners-Rules and Procedures](#), and [Representation and Appearances](#) (published Sept. 14, 2022), EOIR's "[Frequently Asked Questions](#)" (last updated August 2023), Northwest Immigrant Rights Project's (NWIRP) [Limited Legal Assistance in Removal Proceedings: A Primer on EOIR Forms 60 & 61](#) (last updated Jan. 6, 2023), and CLINIC's [DOJ Issues Final Rule Allowing EOIR Practitioners to Enter Limited Scope Appearances for Document Assistance](#) (last updated Sept. 6, 2022).



## PREPARING YOUR CLIENT FOR IMMIGRATION COURT

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

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

## YOUR CLIENT'S RIGHTS IN REMOVAL PROCEEDINGS

- Representation at no expense to the government<sup>348</sup>
- List of pro bono legal services should be provided to respondent<sup>349</sup>
- Reasonable opportunity to examine the evidence against the respondent<sup>350</sup>
- Opportunity to present evidence<sup>351</sup>
- Opportunity to cross-examine witnesses presented by the government<sup>352</sup>
- To a complete record of the testimony and evidence<sup>353</sup>
- To accurate interpretation<sup>354</sup>
- To appeal if case is denied<sup>355</sup>
- Detained respondent should be notified that they may communicate with the consul or diplomatic officer of their country<sup>356</sup>
- Constitutional due process rights

While immigrants have the right to counsel in removal proceedings, counsel will not be provided by the government. This also applies to children, and as a result many children and adult respondents go forward in immigration removal proceedings without an attorney by their side. To learn more about representation rates in immigration courts, you can read Congressional Research Services's [U.S. Immigration Courts: Access to Counsel in Removal Proceedings and Legal Access Programs](#), July 6, 2022.

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

349 8 C.F.R. §§ 1003.61, 1240.10(a).

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

351 *Id.*

352 *Id.*

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

354 ICPM Ch. 4.11. Also, note there is no right to translation of documents at the government's expense. See 8 C.F.R. § 1240.5.

355 8 C.F.R. § 1240.10(a).

356 8 C.F.R. § 1236.1, Article 36 of the Vienna Convention on Consular Relations.



## YOUR CLIENT'S OBLIGATIONS IN REMOVAL PROCEEDINGS

- A respondent must tell the truth. These are formal proceedings, and your client will be sworn under oath and will be subject to the penalty of perjury if they lie. Additionally, there are immigration consequences for not disclosing or misrepresenting information.<sup>357</sup>
- A respondent must be present in court. If your client is not present, unless their presence has been previously waived, an *in absentia* removal order will likely be issued against your client.<sup>358</sup>
- A respondent must notify the court of any changes in their address or phone number within 5 days using [Form EOIR-33/IC, Alien's Change of Address Form/Immigration Court](#).<sup>359</sup> The form must be printed on light blue paper.<sup>360</sup>

Child respondents are required to be present in court.<sup>361</sup> Otherwise, an *in absentia* removal order could be issued, which presents grave consequences. An IJ may waive the presence of a child respondent at a hearing.<sup>362</sup> If providing a waiver, this must be clearly stated on the record or in a written order.

## REVIEWING AND EXPLAINING THE NTA AND I-213

You should always check the NTA to determine if service was properly conducted. Talk with your client regarding the NTA, assess for errors, and determine if you will concede service or not and how you will plead.<sup>363</sup>

**Form I-770, Notice of Rights and Disposition:** Must be provided to each child upon apprehension and informs the child of their rights during the initial processing interview typically conducted by CBP or ICE.<sup>364</sup> Failure to comply with the regulation may be grounds for terminating proceedings.<sup>365</sup>

**Form I-213, Record of Deportable/Inadmissible Alien:** An important document in removal proceedings because it typically forms the basis for the government's allegations against your client. This is a record of the apprehending officer, commonly a CBP officer. It contains biographical information about your client and any statements made by your client. Check your client's documents for this form. If your client does not have a copy of it, you may be able to request a copy from the OPLA attorney in advance of your court

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<sup>357</sup> For example, if it is determined your client made a frivolous application for asylum, then your client could be permanently ineligible for any immigration benefits. INA § 208(d)(6); 8 U.S.C. § 1158(d)(6).

<sup>358</sup> The Immigration and Nationality Act permits an immigration judge to order a person removed *in absentia* if the government establishes by clear, un-equivocal and convincing evidence that proper written notice was provided and that the person is removable. INA § 240(a)(5)(A); 8 U.S.C. § 1229a(a)(5)(A). See also 8 C.F.R. § 1003.26(c).

<sup>359</sup> 8 C.F.R. § 1003.15(d)(2); ICPM Ch. 2.2(c).

<sup>360</sup> See ICPM Ch. 11.2(f).

<sup>361</sup> Children not in proceedings should not be brought to court. If a child disrupts a hearing, the hearing “may be postponed with the delay attributed to the party who brought the child.” ICPM Ch. 4.12(c)(3).

<sup>362</sup> Immigration judges should adhere to requirements of 8 C.F.R. § 1003.25 to determine whether to waive a child's appearance at a hearing.

<sup>363</sup> To learn more about defective NTAs and how you can raise issues surrounding errors on NTAs, check out DMRS's presentation [Putting Up a Fight with NTAs](#) (46 minutes) at CILA's 5th Annual Symposium on May 18, 2023.

<sup>364</sup> The regulation 8 C.F.R. § 236.3(h) says, “**Notice and request for disposition.** When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.” Also, know that DHS and HHS issued regulations intended to replace the *Flores* Settlement Agreement in 2019, but some of the regulations were [enjoined](#) from taking effect including the portion of the regulation related to this section of law. Therefore, the link for the regulation included above links to a prior version of the regulations (before the new DHS and HHS regulations were issued). Read more about the DHS and HHS regulations in CILA's blog post, [The Flores Saga Continues: Update on DHS and HHS Flores Regulations after the 9th Circuit's Ruling](#).

<sup>365</sup> See Helen Lawrence, Kristen Jackson, Rex Chen, Kathleen Glynn, *Practice Advisory Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, produced for the Vera Institute of Justice's Unaccompanied Children Program (Mar. 2015), 4-5, <https://helenlawrencelaw.com/wp-content/uploads/2015/03/Suppression-Termination-PA-without-Appendices.pdf>, <https://helenlawrencelaw.com/wp-content/uploads/2015/03/Suppression-Termination-PA-Appendices.pdf>.

date or at the hearing.<sup>366</sup> If you make a USCIS FOIA request to obtain the A file, the I-213 will likely be in your FOIA results.<sup>367</sup> If you receive the I-213 the day of a court hearing, you may want to reserve any objections to the document for your next hearing to provide time for you to review it with your client. There are frequently errors and you will want to get them corrected, make appropriate objections, and/or possibly move to suppress the I-213 and terminate proceedings.<sup>368</sup>

## COURTROOM KNOW YOUR RIGHTS

### BEFORE ANY HEARING

<b>Who's going to be there:</b> <ul style="list-style-type: none"> <li>• Explain the roles of each person.</li> <li>• If your client needs an interpreter, advise them to pick up the headphones on the table to hear the interpreter. Emphasize the importance of letting you know right away if they cannot hear or understand the interpreter.</li> </ul>	<b>What's going on:</b> <ul style="list-style-type: none"> <li>• Stand when the IJ enters out of respect.</li> <li>• No gum, hats, etc. out of respect.</li> <li>• Go over the layout of the room and where everyone will sit for the hearing.</li> </ul>	<b>What's going to happen:</b> <ul style="list-style-type: none"> <li>• Prepare your client for what may happen, especially if the IJ may ask the client questions directly.</li> </ul>
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### BEFORE THE MCH

<b>Who's going to be there?</b> <ul style="list-style-type: none"> <li>• The IJ, government attorney, clerk, and interpreter will be in court. There will likely also be a gallery of people behind your client.</li> </ul>	<b>What's going on?</b> <ul style="list-style-type: none"> <li>• Explain that more than one case will be heard if the case is scheduled on a docket.</li> <li>• The IJ may speak to the child individually or as part of a group.</li> </ul>	<b>What's going to happen?</b> <ul style="list-style-type: none"> <li>• The IJ may ask your client some questions such as: Name? Birthdate? Address? Who is with you? Do you want them to represent you? Are you in school? Where do you go to school?</li> <li>• The IJ may take pleadings and accept application(s).</li> <li>• Go over the NTA with your client in advance.</li> </ul>
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<sup>366</sup> DHS often will present the I-213 in court to demonstrate that the respondent is removable. To learn more about this practice and what to do if the OPLA attorney presents the I-213 in court, see Aruna Sury, *What to Do When ICE Submits An I-213 in Immigration Court*, ILRC, <https://www.ilrc.org/resources/what-do-when-ice-submits-i-213-immigration-court> (last updated Sept. 28, 2022).

<sup>367</sup> See *supra* page 122 for more information about how to make a FOIA request.

<sup>368</sup> See *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988) ("Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability.") See also *Matter of Amaya*, 21 I&N Dec. 583 (BIA 1996) ("Although under 8 C.F.R. § 242.16(b) (1996), an Immigration Judge may not accept the admission to a charge of deportability by an unaccompanied and unrepresented minor under the age of 16, the regulation does not preclude an Immigration Judge from accepting such a minor's admissions to factual allegations, which may properly form the sole basis of a finding that such a minor is deportable.")

## COURTROOM KNOW YOUR RIGHTS (continued)

### BEFORE THE ICH

Who's going to be there?	What's going on?	What's going to happen?
<ul style="list-style-type: none"> <li>• IJ, government attorney, clerk (sometimes present and sometimes not), and interpreter will be in the courtroom.</li> <li>• Hearings are open to the public, but often there will not be other people present for an ICH.</li> </ul>	<ul style="list-style-type: none"> <li>• Explain how this hearing differs from the MCH. It is set for a specific date and time for your client's case to be heard.</li> </ul>	<ul style="list-style-type: none"> <li>• The IJ will likely decide pending motions and enter evidence into the record.</li> <li>• Your client may testify. If they do, the IJ can ask questions; the government attorney may cross-examine; and you may re-direct.</li> <li>• The government attorney could present witnesses and you may cross-examine.</li> <li>• The IJ may make a decision.</li> <li>• The IJ will ask if either party wishes to reserve the right to appeal.</li> </ul>

## Common Processes in Immigration Court

To learn about other motions commonly filed in immigration court, refer to [ICPM Chapter 5](#).

### • Continuance:

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

### • Status Docket:

- The status docket is a mechanism for holding cases in abeyance when the case is not ripe for adjudication. In October 2022, EOIR issued guidelines in [DM 23-01](#) for the use of status dockets and stated that a case may qualify for placement on the docket if the IJ granted a continuance to wait (1) for another agency (such as USCIS) or another court to adjudicate an application/petition or to take another action related to the respondent or (2) for visa availability. Cases may also qualify if placement is necessary for EOIR to comply with a federal court order.

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

- **Administrative Closure:**

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

- **Termination & Dismissal:**

- To terminate or dismiss removal proceedings ends the proceedings altogether. Many advocates and judges alike used the terms dismissal and termination interchangeably, but a 2018 case *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) highlighted the distinction between "a dismissal under 8 C.F.R. § 1239.2(c) and a termination under 8 C.F.R. §1239.2(f)." Significantly, *Matter of S-O-G- & F-D-B-* limited an IJ's ability to terminate and dismiss proceedings, with this decision holding that IJs lacked the authority to do so. However, in December 2022, *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022) overruled *Matter of S-O-G- & F-D-B-* and reinstated IJs' authority to terminate or dismiss removal proceedings. To learn more about the significance of *Matter of Coronado Acevedo*, check out CLINIC's *Attorney General Decision Restores Ability of Immigration Judges to Terminate Removal* (December 1, 2022). In children's cases, termination has been sought for a variety of reasons including DHS's failure to properly serve the NTA, meet its burden, or properly issue Form I-770. Additionally, according to *Matter of Coronado Acevedo*, IJs and the BIA should consider granting termination where "termination is necessary for the respondent to be eligible to seek immigration relief before USCIS."<sup>369</sup> This comes up frequently in SIJS cases where a youth has been approved for SIJS and is in removal proceedings; in that situation, the immigration court must terminate removal proceedings if the youth plans to seek adjustment of status before USCIS.<sup>370</sup>
- Advocates should consider seeking **prosecutorial discretion** to dismiss cases when developing a case strategy. Continue reading to learn more about requesting prosecutorial discretion.

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<sup>369</sup> 28 I&N Dec. 648 (A.G. 2022).

<sup>370</sup> Learn more about what happens after EOIR has terminated removal proceedings so that USCIS can adjudicate the adjustment of status application. See USCIS, *Immigration Benefits in EOIR Removal Proceedings*, <https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings> (last reviewed/updated: May 4, 2023).

- **Reopen**

- A representative can file a motion to reopen proceedings to ask the IJ to consider new facts or evidence after the IJ makes a decision. [ICPM Chapter 5.7](#) provides information about the filing requirements, what to include in the motion, and the limitations on when requests can be made.
- Check out ABA COI's practice advisory, [Quick Guide: Motions to Reopen in Immigration Court for Cases on the Dedicated Docket](#), last updated in September 2022, to find out more about using motions to reopen in your advocacy.

- **Prosecutorial Discretion**

- Requesting prosecutorial discretion with the informed consent of your client should be considered in most children's cases. According to ICE, government attorneys have "longstanding authority" to "preserve limited government resources necessary to achieve just and fair outcomes in individual cases."<sup>371</sup> In June 2023, the Supreme Court issued a decision in *United States v. Texas*, confirming OPLA attorney's authority. Check out the National Immigration Project (NIPNLG)'s practice alert [United States v. Texas: The Supreme Court's Decision on Biden's Enforcement Priorities](#) (June 2023) to learn more. You can seek prosecutorial discretion at different points in the case. The type of relief sought can range from joining in a motion to continue or seeking to administratively close or dismiss proceedings.
- Review ICE's [Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor](#) page, updated September 12, 2023, for official guidance and instructions for requesting prosecutorial discretion. If you do not have an attorney assigned to your case, requests can likely be sent to your [local OPLA Field Office \(OFL\)](#). Make sure to ask about office-specific procedures for seeking prosecutorial discretion.
- Read EOIR's guidelines on prosecutorial discretion, [DM 23-04](#). This DM gives guidance and information about prosecutorial discretion and the DHS enforcement priorities to EOIR adjudicators. Some of the guidance for IJs and appellate IJs included in this DM pertains to docket management, preserving government resources, and OPLA's authority to determine enforcement priorities.
- When making a request, highlight factors like qualifying for alternative forms of legal relief, being a victim of criminal activity, or seeking medical treatment in the United States, and be prepared to mitigate any negative factors, such as a criminal history. You may need supporting evidence, such as receipt notices for pending relief, community letters, school certificates, or medical records. Depending on your client's age, they may have to undergo a background check.
- Check out ABA COI's [Practice Advisory: Seeking Prosecutorial Discretion](#) (September 2023) and [Prosecutorial Discretion Quick Guide](#) (February 2023) for a comprehensive overview of prosecutorial discretion and detailed information about requesting prosecutorial discretion.

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<sup>371</sup> See *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> (last updated Sept. 12, 2023).

## Immigration Court Filings

As of February 11, 2022, **it is mandatory for representatives to use EOIR Courts & Appeals System (ECAS)**, an online filing system that is available at all immigration courts and the BIA. Attorneys and accredited representatives can use ECAS to enter appearance using Form EOIR-28 and view case details and upcoming hearings. Visit EOIR's [ECAS – Online Filing](#) to learn more about how to use ECAS as a practitioner, and read EOIR's final rule [Executive Office for Immigration Review Electronic Case Access and Filing](#), published December 13, 2021, to learn more about electronic filing and ECAS generally.

### TALKING WITH YOUR CLIENT ABOUT THEIR RIGHT TO APPEAL

At the end of an ICH, the IJ should ask both parties if they wish to reserve the right to appeal the decision made in the case. It is important to know that responding affirmatively does not mean you have appealed your client's case. There is a separate process for that. The appeal must be filed in writing with the BIA within **30 days** of the IJ's decision.<sup>372</sup> Answering affirmatively while in court simply means you have reserved your client's right to appeal so that your client has the option to file an appeal.

Because reserving the right to appeal is discussed at the ICH, it is important to talk with your client before the ICH about the option to appeal. You want to ensure that your client does not get confused at the end of the hearing and understands the process and their options for any next steps in their case. Generally, it is best practice to answer "yes" to reserve your client's right to appeal and preserve their option to appeal. Even if you talked with your client about this in advance and they do not want to appeal, they may change their mind and you do not want to foreclose their option to appeal. However, there may be times when the answer is "no," as is often the case for a client who is detained and no longer wishes to be.<sup>373</sup> In that case, you may want to have your client provide a written signed statement regarding their decision to not appeal for your own records.

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<sup>372</sup> 8 C.F.R. § 1003.38(b).

<sup>373</sup> For example, there are instances when a detained client does not wish to appeal because they do not want to be detained any longer. If they are denied, they wish to be removed as soon as possible. In that case, if you answer "yes" you wished to reserve their right to appeal, your client will have to remain detained for at least the 30-day appeal window, whereas, if you indicate "no," it is possible they could be removed much sooner.



## CILA-NILA Appellate and Litigation Strategy Resources

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

- Motions to Rescind *In Absentia* Removal Orders before the Immigration Judge and Appeals of Denials before the BIA and Circuit Courts
- As part of the CILA-NILA partnership, CILA-NILA hosted a webinar series, *Litigation for Unaccompanied Children: Updates and Foundational Cases*. Check out the six recorded webinars in this series.
- Filing Administrative Claims for Wrongful Conduct
- Petitions for Review and Judicial Stays of Removal to the Fifth Circuit Court of Appeals 101
- Challenging USCIS' Denial of a Petition for SIJS Under the APA (& AIC, CILA, NILA Practice Advisory Immigration Lawsuits and the APA: The Basics of a District Court Action)
- Nuts and Bolts of Habeas Corpus Petitions Challenging Immigration Detention (& Practice Advisory & Template Habeas Petition)
- *Niz-Chavez, Pereira*, and Notices to Appear
- Winning at the Board of Immigration Appeals (BIA)
- Seeking Attorneys' Fees Under the Equal to Access to Justice Act (& Template Motion for EAJA Fees)
- Intro to Federal Court Practice Part I and Part II
- Litigating SIJS Delay Cases: Mandamus and APA (& Practice Advisory: Mandamus & APA for SIJS Delay & Example Template Complaint for SIJS Delay Case)
- Advanced Immigration Legal Research
- Legal Writing
- Ready to Win – Moving Beyond Trying Cases at the Immigration Judge Level

### Links to Learn More About HOW TO PRACTICE IN IMMIGRATION COURT

- Take a look at CILA's [Bite-Sized Tips for New Practitioners & Pro Bono Attorneys](#), with an accompanying video (6 minutes).
- Watch ABA COI & CILA's recorded training [Representing Children and Families in Immigration Matters](#) (3 hours, 58 minutes), March 2022, to learn more about representing children and families in removal proceedings.
- Check out ABA COI's [Family Group Dedicated Docket Pro Bono Manual](#), October 2022, that is a comprehensive, guide designed to assist volunteers and practitioners who are representing families on the dedicated docket and to provide information about effective representation.
- Review ABA COI's [Practice Guide Statements as Evidence: Drafting and Editing Declarations, Affidavits, and Letters](#), June 2022, to learn about the types of statements, experts, and witnesses in immigration cases as well as practical tips and considerations for drafting declarations or affidavits.

- Check out CILA's 101 [webinar](#): *Introduction to Removal Proceedings for Unaccompanied Children* (1 hour).
- ABA COI's [Teachable](#), an online platform hosting a curriculum of courses, has courses about practicing in immigration court, including resources on prosecutorial discretion, Master Calendar Hearings, and motions to reopen. Also, check out COI's three-part series, *Mechanics of Immigration Court* (issued in February and March 2022 and available on COI's Teachable) to learn more about the nuts and bolts of immigration court.
- Read CILA's resource *How to Prepare for an Individual Hearing: Different Practitioners' Perspectives* posted on CILA's [website](#) to learn more about how to prepare for a merits hearing.
- Review CILA's resource *Trauma Informed Representation in Asylum Cases, Asylum Interview/Asylum Merits Hearing Checklists* on CILA's [website](#) to prepare for an asylum merits hearing in immigration court.
- Take a look at the Safe Passage Project's *Representing Noncitizen Youth in Removal Proceedings*, 2018-2019, NY.
- Review the U.S. DOJ, EOIR, Fact Sheet: *Executive Office for Immigration Review: An Agency Guide*, December 2017.
- View the NITA on demand webcast *Be a Better Conductor: Common Ways Immigration Individual Hearings Go Off the Rails*, presented by Michelle Mendez.
- View the NITA on demand webcast *Do's and Don'ts for Demonstrative Evidence in Immigration Court*, presented by Judge Denise Slavin.
- Read CLINIC's Practice Advisory on the *Rules of Evidence in Immigration Court Proceedings*, Rebecca Scholtz and Michelle Mendez, March 13, 2020.
- Review CLINIC's Practice Advisory on *Direct Examination*, Victoria Neilson and Michelle Mendez, July 6, 2020.
- Read CLINIC's Practice Pointer *Refreshing Recollection in Immigration Court Proceedings*, Amanda McShane, Michelle Mendez, and Rebecca Scholtz, March 13, 2020.
- Learn more about Notices to Appear in American Immigration Council and Penn State The Dickinson School of Law's Practice Advisory *Notice to Appear: Legal Challenges and Strategies*, February 27, 2019.
- Also, read ILRC's Practice Advisory *The Notice to Appear (NTA)*, July 2020.
- For motions guidance check out the Vera Institute of Justice's Unaccompanied Children Program's Practice Advisory *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, Helen Lawrence, Kristen Jackson, Rex Chen, and Kathleen Glynn, March 2015.
- Check out ILRC's Practice Advisory *Representing Clients at the Master Calendar Hearing*, December 2018.
- Read ILRC's Practice Advisory *Obtaining Office of Refugee Resettlement Records for Clients who were Detained as Children*, Andrew Craycroft, November 2019.
- Learn more about how to do FOIAs with ILRC's *A Step-By-Step Guide to Completing FOIA Requests with DHS*, December 2021 and American Immigration Council's *Freedom of Information Act and Immigration Agencies*, updated May 2021.
- Consider the *ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, August 2018.
- Review DSCS Deportation Defense's webpage *Mental Health & Competency Resources* provided for attorneys.
- Read CLINIC's Practice Advisories and materials on *Representing Noncitizens with Mental Illness*, May 2020.

## D. Representation before USCIS and the Asylum Office

### Introduction to USCIS

#### TIPS FOR PRACTICING BEFORE USCIS

- Familiarize yourself with the USCIS Policy Manual.
- You will need a signed [Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative](#) to represent a client before USCIS and/or the Asylum Office.
- Your client may be required to bring their own interpreter to an interview with USCIS.
  - For asylum cases, see [8 C.F.R. § 208.9\(g\)](#) regarding details about providing your own interpreter. Note that, starting September 13, 2023, affirmative asylum applicants unable to speak English or who wish to proceed with the asylum interview in a language other than English must bring their own interpreter. See [the USCIS alert](#) to learn more.
- As the attorney, you will not be permitted to speak on behalf of your client while the officer asks your client questions during the interview. You may be given the opportunity to ask follow up questions at the end, which can be useful to bring out additional information or to clarify something. You may also have the opportunity to make a closing statement.
  - You may take notes of the proceedings, and if you believe your client is being asked to respond to an inappropriate question or sign something inadvisable, you are allowed to indicate that you are advising your client not to answer or sign.
- Make sure you have your bar card, if applicable, and a form of government identification if the USCIS officer wishes to inspect it prior to beginning the interview.

#### Key Tools & Contacts

- Search all USCIS forms using this [link](#) to find the application your client needs.
- Find the USCIS [Fee Schedule](#), instructions on how to pay [USCIS Fees](#) and how to file for a [Fee Waiver](#), when available and applicable.
- Your client must keep USCIS up to date with their [current address](#). Check out USCIS's website to find out how to do this.
- USCIS provides [case processing times](#) for some applications it processes. Check the time frames to get a better idea of wait times.
- Use this link to find a [USCIS office](#).
- Find information to prepare for a [Biometric Services Appointment](#).
- Use this link to access [USCIS's online Self Service Tools](#) including making a [case inquiry](#).
- Explore [USCIS's Contact Center](#) options.
- Consider reaching out to the [Ombudsman's office](#) for case assistance, if needed.

## QUICK USCIS LINKS RELATING TO DIFFERENT FORMS OF RELIEF

- **Special Immigrant Juvenile Status (SIJS):**

- Review USCIS's webpage on [Special Immigrant Juveniles](#).
- If necessary, review [USCIS's Questions and Answers: Appeals and Motions](#).

- **Adjustment of Status before USCIS:**

- Read USCIS's website about getting a [Green Card based on Special Immigrant Juvenile Classification](#). Read more information about getting a [green card](#).
- Check out USCIS's Adjustment of Status [Filing Charts from the Visa Bulletin](#).
- Consult the Department of State [Visa Bulletin](#).
- If necessary, review [USCIS's Questions and Answers: Appeals and Motions](#).

- **Representation before the Asylum Office:**

- Read USCIS's information regarding the [Affirmative Asylum Process](#).
- If your client has applied for asylum before USCIS, you can find use the [USCIS Service and Office Locator](#) to find the closest asylum office and related information.
- Check out USCIS's guidance on [Preparing for Your Affirmative Asylum Interview](#).
- Review the potential [Types of Affirmative Asylum Decisions](#) including a grant or referral to immigration court.

- **U Visa:**

- Review USCIS's webpage regarding [Victims of Criminal Activity: U Nonimmigrant Status](#).
- Review USCIS's [Resources for Victims of Human Trafficking and Other Crimes](#).

- **T Visa:**

- Refer to USCIS's webpage regarding [Victims of Human Trafficking: T Nonimmigrant Status](#).
- Review USCIS's [Resources for Victims of Human Trafficking and Other Crimes](#).

- **VAWA Self-Petition:**

- Review USCIS's [Questions and Answers: Battered Spouses, Children and Parents Under the Violence Against Women Act \(VAWA\)](#).
- Explore USCIS's information [Green Card for VAWA Self-Petitioner](#).

- **Family-Based Claims:**

- Review USCIS's webpage regarding options for [Family of U.S. Citizens](#).
- Take a look at USCIS's webpage regarding options for [Family of Green Card Holders \(Permanent Residents\)](#).

## Applying for Employment Authorization before USCIS

According to USCIS, noncitizens must have employment authorization before they may lawfully work in the United States. Many immigrant clients in the United States will be eligible to apply for and obtain employment authorization as they wait for a decision on their pending legal relief or as they wait for visa availability—if they fall within one of USCIS’s eligibility categories for employment authorization. For example, certain unaccompanied children with pending asylum applications may be eligible for employment authorization under the (c)(8) category while they wait for adjudication of their asylum applications, while certain SIJ petitioners with deferred action may be eligible for employment authorization under the (c)(14) category while they wait for their priority dates to become current.

Even if your client does not plan on working or seeking employment, having an employment authorization document (EAD) may be a good idea for your client to have an additional form of identification. Talk to your client about the benefits of having an EAD and obtain their consent before applying.

To request an EAD, the legal representative should review the [Form I-765 Instructions](#) and see the categories listed beneath the *Who May File?* section, and if applicable, file a [Form I-765, Application for Employment Authorization](#) with USCIS.

### Tips for Applying for Employment Authorization

- Go to USCIS’s [I-765, Application for Employment Authorization](#) page for official information on filing the application for employment authorization. For more information about the filing process, check out ASAP’s comprehensive [Work Permits page](#), last visited September 26, 2023, to learn more about ASAP, its advocacy regarding work permits for immigrants, and resources pertaining to work permits. Some resources on ASAP’s website include ASAP’s [guide about the online work permit application](#), July 24, 2023 and a [sample work permit application](#) and supporting documents from an ASAP member, October 2022.
  - **TIP:** Before filing, check the edition date of the Form I-765 to make sure that you are using the acceptable edition of the form.
- Those under certain eligibility categories may file their applications for employment authorization online. To see if your client is eligible to file online, see USCIS’s [Forms Available to File Online](#) page. To file an application for employment authorization online, you must create or have a USCIS Online Account. Note that, as of January 2023, (c)(8) applicants may file online.
- Special filing instructions may apply to filing an application for employment authorization, depending on the eligibility category. Review the Form I-765 Instructions and check to see if any special filing instructions are required for your case.
  - For example, special instructions apply for asylum applicants seeking employment authorization. To learn more, check out CILA’s blog post “[Update on EADs for Asylum Seekers](#),” September 9, 2022. ABA COI uses [Teachable](#) to offer a curriculum of courses on a wide range of topics relating to immigration practice. You can register for an account on COI’s Teachable to access COI’s webinar and Q&A Written Responses for Employment Authorization for Asylum-Seekers in Removal Proceedings, May 2023.

## Tips for Applying for Employment Authorization (continued)

- If you are mailing the Form I-765, the filing address is not the same for all applications for employment authorization. Instead, the filing location depends on the eligibility category, as indicated in Question 27 of Form I-765. Check the [Direct Filing Address for Form I-765, Application for Employment Authorization](#) to find the address to file your employment authorization application.
- The employment authorization application has a filing fee, with exceptions. Review information on the filing fee on USCIS's [webpage](#) regarding Form I-765, Application for Employment Authorization. For example, certain applicants may be exempt from paying the filing fee if it is an initial request (rather than a renewal), and certain applicants may have to pay a fee for biometrics services. Use USCIS's [Fee Calculator](#) to estimate the filing fee for your case.
- Two identical passport-style photographs of the applicant must be submitted with Form I-765. The photos must be in color and measure 2 inches by 2 inches. Consult *Required Documentation* on page 20 of the Form I-765 Instructions to learn more.
  - **TIP:** If you are mailing your EAD application, it is best practice to write the client's name and A number clearly on the back of each photo.
- The application must be properly signed by the applicant to be granted.
- You can request a social security number in the application for employment authorization. This social security number can be used to file taxes and apply for other benefits. The social security card will arrive separately from the EAD since it is administered by the Social Security Administration and not USCIS.
- After the EAD application has been submitted, you should receive the receipt notice. Keep track of this receipt notice and its number. Additionally, if you mail your application, keep the tracking number of the package. You will need this if there are USCIS delays in processing the application.
- Remember that employment authorization expires and can be renewed. There may be different rules, deadlines, and filing fees between the initial application and the request for renewal. It is important to submit the renewal on time and before the expiration date and not after the EAD has expired. Additionally, depending on the eligibility category for employment authorization, validity periods may vary, and some EADs are subject to automatic extension of their expiration dates—though receiving the automatic extension requires that the EAD renewal is submitted timely. Review the instructions for renewal for the eligibility category to understand the renewal process and requirements.



## Representation before the Asylum Office

Unaccompanied children who are eligible for asylum will have the opportunity to present their asylum claim at the Asylum Office, which is considered a non-adversarial setting compared to EOIR. Check out the information below to learn more about representing a child in an interview with the Asylum Office.

### ASYLUM OFFICE—GENERALLY WHAT TO EXPECT FOR ASYLUM INTERVIEW

Asylum interviews are conducted by the U.S. Citizenship and Immigration Services (USCIS) asylum office in affirmative cases and in the cases of unaccompanied children. At an asylum interview, there is no opposing counsel. The asylum officer is the adjudicator.

When appearing for an asylum interview, you will arrive at the asylum office and check in, as will your client and any interpreter you have brought with you. You will wait in a waiting area before being called into an office for the interview.

Interviews are conducted by a single asylum officer and often last a couple of hours. The officer may or may not be an attorney. Other than the officer, there will be no one from USCIS in the room unless a newer officer is shadowing and observing.

Previously, it was necessary for all individuals to bring their own interpreter to asylum office interviews. During the COVID-19 pandemic, a temporary rule was issued, which was extended through September 12, 2023. The rule required the use of USCIS contract telephonic interpreters for the interview for 47 languages. However, effective as of September 13, 2023, USCIS requires applicants unable to proceed with an affirmative asylum interview in English to provide their own interpreters.<sup>374</sup>

Keep in mind that the interview is not recorded or transcribed, so you must be certain to take good notes. You may do this by hand or bring your laptop so long as you fill out a form.

The file will include the asylum application and any supporting documents you have submitted, such as your client's declaration, other declarations/reports (from witnesses, experts), case documents (medical records, death certificates, news articles) and country conditions reports.

The officer may ask you some preliminary questions about the file. Frequently, officers will go through each of the biographical questions in the I-589 application to confirm that all of the information is correct and ensure there are no updates that need to be made. If there are updates/edits to the application, the officer will make those changes in red pen and ask the applicant to sign confirming that the changes are correct. This can be helpful since it gives the child an opportunity to make edits if an amended form was not submitted. The officer then will get started asking your client other questions.

Once the officer is done, you can request some time to ask some questions of your client as well. This is an opportunity to elicit critical information from your client that may not have come out during the interview or to clarify/contextualize any inconsistencies. Officers typically allow attorneys to provide a closing statement if they request it. Either after you are done with your questions or after a brief closing statement, the interview will conclude. Some officers will ask for the submission of a written closing statement in lieu of an oral one.

<sup>374</sup> See USCIS, *Affirmative Asylum Applicants Must Provide Interpreters Starting Sept. 13*, <https://www.uscis.gov/newsroom/alerts/affirmative-asylum-applicants-must-provide-interpreters-starting-sept-13#:~:text=U.S.%20Citizenship%20and%20Immigration%20Services,a%20language%20other%20than%20English> (last updated Sept. 13, 2023).

## ASYLUM OFFICE—GENERALLY WHAT TO EXPECT FOR ASYLUM INTERVIEW (continued)

It is unlikely that you will receive a decision immediately. Instead, it will be available for you to pick up in the future, or it may be mailed to you. When the asylum office has made a decision on your case, the tracker function “Case Status Online” will update and state that the decision has been mailed.

If the asylum officer is unable to approve the asylum claim, they will generally refer the case to the immigration court for an IJ’s review. The IJ will evaluate the asylum claim independently.

## ASYLUM OFFICE—SAMPLE ASYLUM INTERVIEW CHECKLIST

### Working with an Interpreter:<sup>375</sup>

- If your client’s best language is not English, you may need to obtain the services of an interpreter for the interview. As of September 13, 2023, USCIS requires certain asylum applicants to bring interpreters to their asylum office interviews.
- If you are working with a nonprofit organization who referred you the case, check with them regarding finding an interpreter. It is likely best to try and secure pro bono interpretation whenever possible. It is also best to use the same interpreter throughout the life of the case.
- If you are having trouble finding an interpreter, you might also consider reaching out to law school immigration clinics to see if a student would be able to volunteer interpret for you.
- Be a bridge for your client to the interpreter. Explain confidentiality to both your client and the interpreter to help develop a trusting relationship.
- Explain the interpreter’s role to them so that they understand they must be impartial and not add new information to the case. They are not there to provide testimony.
- Make eye contact with your client even when speaking through an interpreter. Learn to rely more heavily on non-verbal communication.
- Remind a less-experienced interpreter to interpret verbatim and not in the third person.
- Practice with the interpreter prior to the interview, and make sure the applicant can communicate effectively with them.
- Let the interpreter know that the government may have someone on the phone listening for correct interpretation at the interview.
- Keep in mind that any notes the interpreter takes on their notepad during the interview will be collected by the asylum officer and added to the file. For this reason, they should be careful of what they memorialize.
- See [Section II.D.](#) for more guidance tips on how to work with an interpreter.

<sup>375</sup> Review CILA’s resource, *Practical and Ethical Considerations and Reminders when Working with Translators and Interpreters* (Apr. 2023).

## ASYLUM OFFICE—SAMPLE ASYLUM INTERVIEW CHECKLIST (continued)

### Supplementing Documents/Correction to Asylum Application:

- Take an original and two copies of any supplemental documents to the interview and provide them to the asylum officer. If you mailed any supplemental documents in advance of the interview, take an extra copy to the interview in case the mailed copy did not make it into the file. Also bring any proof of mailing.
- If there are numerous documents, make an index, tab the documents, and highlight relevant portions of documents for the asylum officer.
- Remember that all non-English documents must be translated into English, and you must include a certificate of translation.
- Review all case documents for consistency. This includes ensuring that all forms submitted to USCIS and/or the immigration court along with supporting documentation are consistent. For example, cross-check the information contained in the I-360 and I-589 to ensure consistency and to avoid a potentially negative credibility finding.
- If you need to make corrections to the application, take a letter documenting the changes and two copies for the asylum officer, and provide this before the interview begins. Be sure that your client has signed and dated any supplement to the application.

### Attorney Preparation/Conduct for Interview:

- Bring a couple of copies of your representation document (Form G-28), asylum application (Form I-589), and client's declaration.
- Bring any original documents to the interview for inspection by the officer.
- Bring your identification and, if applicable, your bar card.
- If you bring your own interpreter, ask the interpreter to bring their identification as well.
- Make a list of key points. If the asylum officer does not cover this information in their questioning, ask your client these questions related to these points when you are given time to do so at the end of the interview.
- After the officer has completed questioning, ask to proceed with a few follow-up questions of your client if necessary. Try to address any real or perceived inconsistencies in your client's story. Ask the officer whether they see any outstanding issues or problem areas. Offer to address these with additional evidence if possible.
- Take detailed notes of the interview, as it will not be videotaped or recorded by the government.
- Prepare an oral and, if possible, written closing statement. Summarize for the officer why the applicant is eligible for asylum and deserves to be granted asylum. Note that some but not all asylum officers are lawyers. Your summary is particularly helpful in cases where the officer would like to grant relief but needs your help in finding a legal basis for doing so.
- Review guidance for asylum officers particular to children's claims, such as the [USCIS RAIO Directorate – Officer Training Children's Claims Training Module](#) (December 20, 2019).
- Remember if an officer acts inappropriately, you should address the situation when it occurs and ask for a supervisor. Sometimes it may be necessary to make a complaint following an interview.

**Preparing Your Client for the Interview:**

- When beginning interview prep, it can be helpful to remind your client of their case status (e.g., asylum, EAD processing status, SIJS, immigration court). It will likely also help to review the date they submitted their I-589 and with whom (if a different attorney), as well as where they are at in the asylum process. Explain the goals and purpose of the asylum interview, and frame the interview within the bigger picture of their case strategy to help ease the stress of the interview and empower your client to focus better.
- Remind your client of the legal requirements for the case and what you are trying to prove, as well as your case theory and strategy. This information may help your client have a full understanding of the proceedings and their desired outcomes.
- Review the application and declaration with your client and note any changes.
- Depending on their age and skillsets, provide your client with a copy of the application and their declaration. Provide the declaration in your client's best language, if possible, so that they can review it easily. Ask your client to review dates/events if they can do so. Keep in mind that your strategy and how much emphasis to put on re-review of the declaration will depend on the child's age, abilities, and personality. For example, you do not want a very studious client to study the materials so much that they seem robotic during the interview. For some clients, it might be best to recommend reviewing a timeline so that they can review those details in advance instead of the full declaration. For a younger child, it may help to use drawings or a series of drawings that guide them through their story.
- If you are including any expert evidence, be sure your client is aware of what information is included in that evidence. It also helps to briefly review the other supplemental evidence submitted.
- Talk to your client about the initial questions an asylum officer will commonly ask at the beginning of an interview such as: "What is your name?", "Do you want this individual (full name of representative) to assist you today, to represent you?", "Have you seen this Form I-589 before?", and "Did someone review this form with you?" If your client only calls you by your first name, be sure that they know your full name, so they are not thrown off hearing your last name. Additionally, some time may have passed since the child last saw the I-589, especially if there was a delay between the time of filing the I-589 and the interview being scheduled. It is important to refresh the child's memory in advance of the interview regarding the form and its contents. Other common questions about the form that child should be prepared to answer are: "Did someone help you fill out this form?", and "If so, who?" Many children think that the correct answer is "no," when in most situations they received assistance. If a prior attorney worked with them on the application, they might need a reminder of that person's name. Another common question is: "Are you aware of the entire contents of your application?" Many times, youth may forget or be unaware of the full contents. It helps to review the contents beforehand in case this is asked. The youth can at least let the officer know then that their attorney reviewed the file's documents with them recently. Reviewing how to answer these frequently asked questions will help the child begin the interview with more confidence.

### Preparing Your Client for the Interview (continued):

- Talk to your client about telling their story through their interview. Ask them whether there are any aspects of their story that they really do not want to have to discuss. Discuss options for how you can go about making sure that the necessary information is still available for the asylum officer, such as referencing their declaration. Clearly set expectations for your client so they understand that you and the asylum officer will have the opportunity to ask questions.
- Conduct mock interviews with your client, with someone playing the role of the interpreter and someone playing the role of the asylum officer, if possible.
- Due to the COVID-19 pandemic, asylum offices had varying setups for asylum office interviews—including that the attorney and client could be in one room and the adjudicator in another room connected via iPads, or with everyone in separate rooms connected via iPads. Though USCIS's response to COVID-19 and related procedures are now archived on their website, the setups may still vary per jurisdiction, so it helps to ask others locally what to expect, if possible.
- For children with past trauma, going through the asylum interview process can be stressful when there are many unknown variables on the day of. To the extent possible, walk them through the process of the entire day during your prep sessions. This includes providing step by step information: from showing them the asylum office building on Google Maps so they know what it looks like, reviewing the COVID-19 screening questions (if applicable) prior to entering the building, wearing a mask (if applicable), walking through the X-ray machine at security, checking in at the window, getting a picture and fingerprints taken, to waiting sometimes for hours and expecting this to take the entire day. Providing this level of detail can minimize surprises and thereby empower them to navigate the stress of the asylum interview with more confidence.
- Explain the setup of the desk and other furniture in the office of an asylum officer so that your client knows what to expect. It may help to share visuals or to create a drawing, so the child has a better understanding.
- Explain your role and the role of others who will be at the interview.
- Explain that both you and the asylum officer will take notes during the interview. Remind your client to tell the truth, to listen carefully to the asylum officer's questions, and only answer the questions asked. Emphasize that the most important thing is that they answer truthfully.
- Practice reviewing questions including “yes” and “no” questions, so they can practice and be more comfortable with giving both answers.
- Empower your client. Let them know it is okay to ask for a break to go to the bathroom or rest a moment. It is okay to show emotion. It is also okay to ask the officer to repeat a question, let the officer know when they do not understand a question, and respond with “I do not know” or “I do not remember.” It often helps to practice this in prep sessions. Ask your client to practice asking for a break or asking to repeat a question when practicing. This will help empower them to do so the day of the interview.

**Preparing Your Client for the Interview (continued):**

- Instruct your client to wait for the interpreter to finish talking before responding. Help your client practice taking pauses while they speak, even mid-sentence, so that there is not too much information to be interpreted at any one time. Let them know that if they are asked to stop speaking by the interpreter or asylum officer, it is not a bad thing, it simply means they need a pause to catch up in the interpretation. It can be helpful to take a deep breath occasionally while speaking to allow for a natural pause for interpretation, and to help your client stay grounded in the moment.
- If your client has children included in the application, they will also need to attend. If your client does not have someone who can babysit, try to find a volunteer to come and agree to stay with the kids in the waiting room. Consider being prepared with activities and snacks for the kids. Depending on the children's ages, if they are very young and are not able to be interviewed (for example, if they are nonverbal), you can ask the officer at the beginning of the interview to ask questions of the child first (which your client can answer on their behalf as their parent). The child may then be able to go back to the waiting room with the volunteer caretaker.
- Let your client know what they can and cannot bring into the USCIS office and discuss appropriate attire. You may want to suggest bringing a sweater to have on hand in case the office is cold.
- Explain to your client what will happen after the interview. The asylum officer may approve the case or refer the case to the immigration court. They may wait to issue a decision until a later date, and then you will most likely have to pick up the decision from USCIS at a later date or wait for the decision by mail. Explain that even if the asylum officer does not approve the case, the case will be referred to an immigration judge to consider fresh.
- Ensure that your client is aware of the location of the asylum office and has a plan in place to get there that day. You may want to consider meeting your client somewhere else besides USCIS to enter together. It will be important to arrive early as timeliness is critical. Express to them the importance of eating in advance of arriving at the interview in case you are there all day.
- Ask your client if they have any questions or if there is anything you can do to better support them that day.



## ASYLUM OFFICE—SAMPLE ASYLUM INTERVIEW CHECKLIST (continued)

### Post Interview:

- Let your client know the interview has concluded and thank them for their strength.
- In a private space—perhaps outside the USCIS building—ask your client if they have any questions or if anything was confusing to them.
- It sometimes helps to provide an overview summary of what occurred before going over next steps.
- Then explain to your client what happens next, specifically, that the asylum officer will make a decision to either grant asylum or refer the case to an immigration judge.
- Ask your client how they are feeling. Encourage them to inform a family member, friend, and/or therapist if the interview experience has been especially traumatic. Consider whether to assist the child with deep breathing, stretching, a grounding technique like the 5-4-3-2-1 method,<sup>376</sup> or any other methods that may help with processing their feelings.
- Remind the child that, if their claim is not approved, it is not the end of the road since the case will be referred to the immigration court where a judge will review their case.
- You may also wish to schedule a separate meeting to go over this information, but you would not want to wait too long so the information is fresh and to resolve any outstanding issues or questions quickly.
- Waiting for the Asylum Office decision often takes time. Maintain communication with your client during the interim period between the interview and receiving the decision. Your client may be eligible for an EAD, if the asylum application has been pending with the Asylum Office for a sufficient amount of time. Read above to learn more about applying for an EAD for clients with a pending asylum application.

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<sup>376</sup> See Sara Smith, BSW, *5-4-3-2-1 Coping Technique for Anxiety*, University of Rochester Medical Center's Behavioral Health Partners Blog (Apr. 2018), <https://www.urmc.rochester.edu/behavioral-health-partners/bhp-blog/april-2018/54-3-2-1-coping-technique-for-anxiety.aspx>.

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