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Unaccompanied Alien Children—Legal Issues: Answers to Frequently Asked Questions

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Summary

The beginning of FY2016 has seen an uptick in the number of alien minors apprehended at the U.S. border without a parent or legal guardian in comparison to the same time period in the prior year. This increase has prompted renewed questions regarding so-called unaccompanied alien children (UACs), many of which were previously raised in FY2013-FY2014, when a significant number of UACs were apprehended along the southern U.S. border.

Some of these questions pertain to the numbers of children involved, their reasons for coming to the United States, and current and potential responses of the federal government and other entities to their arrival. Other questions concern the interpretation and interplay of various federal statutes and regulations, administrative and judicial decisions, and settlement agreements pertaining to alien minors. This report addresses the latter questions, providing general and relatively brief answers to 15 frequently asked questions regarding UACs.

In particular, some of the questions and answers in this report provide basic definitions and background information relevant to discussions of UACs, such as the legal definition of *unaccompanied alien child*; the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status; the terms and enforcement of the *Flores* settlement agreement; and why UACs encountered at a port of entry—as some recent arrivals have been—are not turned away on the grounds that they are inadmissible. Other questions and answers explore which federal agencies have primary responsibility for maintaining custody of alien children without immigration status; removal proceedings against such children; the release of alien minors from federal custody; the "best interest of the child" standard; and whether UACs could obtain asylum due to gang violence in their home countries. Yet other questions and answers address whether UACs have a right to counsel at the government's expense; their ability under the Vienna Convention on Consular Relations to have consular officials of their home country notified of their detention; and whether UACs are eligible for inclusion in the Obama Administration's Deferred Action for Childhood Arrivals (DACA) initiative.

Other CRS reports address the pre-FY2015 surge in the number of UACs encountered at the U.S. border with Mexico, as well as how UACs who are apprehended by immigration officials are processed and treated. These include CRS Report R43599, *Unaccompanied Alien Children: An Overview*, by (nameredacted) and (name redacted) ; CRS Report R43628, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, coordinated by (name redac ted) ; CRS Report R43734, *Unaccompanied Alien Children: Demographics in Brief*, by (name redacted) and (name redacted) ; CRS Insight IN10107, *Unaccompanied Alien Children: A Processing Flow Chart*, by (name redacted) ; and CRS Report R43664, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief*, by (name redacted) .

Yet other CRS reports discuss the circumstances in foreign countries that some see as contributing to UACs' unauthorized migration to the United States. These include CRS Report R43702, *Unaccompanied Children from Central America: Foreign Policy Considerations*, coordinated by (name redacted) ; CRS Report R41731, *Central America Regional Security Initiative: Background and Policy Issues for Congress*, by (name redacted) and (name redacted) ; CRS Report RL34112, *Gangs in Central America*, by (name redacted) ; CRS Report R43616, *El Salvador: Background and U.S. Relations*, by (name redacted) ; CRS Report R42580, *Guatemala: Political, Security, and Socio-Economic Conditions and U.S. Relations*, by (name redact ed) ; and CRS Report RL34027, *Honduras: Background and U.S. Relations*, by (name redacted)

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Recent reports regarding an uptick in the number of alien minors apprehended at the U.S. border without a parent or legal guardian have prompted renewed questions regarding so-called unaccompanied alien children (UACs). Many of these questions were previously raised in FY2013-FY2014, when a significant number of UACs were apprehended along the southern U.S. border.[1] Although the number of UAC apprehensions dropped in FY2015, the beginning of FY2016 has seen an increase in the number of UACs apprehended along the southern border in comparison to the same time period in the prior year.[2]

Some of these questions pertain to the numbers of children involved, their reasons for coming to the United States, and current and potential responses of the federal government and other entities to their arrival. Other questions concern the interpretation and interplay of various federal statutes and regulations, administrative and judicial decisions, and settlement agreements pertaining to alien minors. This report addresses the latter questions, providing general and relatively brief answers to 15 frequently asked questions regarding UACs.

In particular, this report begins with questions and answers that give basic definitions and background information pertaining to UACs, including how federal law defines *unaccompanied alien child* and the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status. It then turns to questions and answers pertaining to custody, control, and enforcement of immigration laws as to UACs, such as federal agencies' responsibilities in maintaining custody of UACs, and UACs' eligibility for relief from removal. It concludes with questions and answers regarding UACs' rights, privileges, and benefits while in the United States, including whether UACs have a right to counsel at the government's expense in removal proceedings and whether UACs are eligible for inclusion in the Obama Administration's Deferred Action for Childhood Arrivals (DACA) initiative.

Other CRS reports address the pre-FY2015 surge in the number of UACs encountered at the U.S. border with Mexico, as well as how UACs who are apprehended by immigration officials are processed and treated. These include CRS Report R43599, *Unaccompanied Alien Children: An Overview*, by (name redacted) and (name redacted); CRS Report R43628, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, coordinated by (name redacted); CRS Report R43734, *Unaccompanied Alien Children: Demographics in Brief*, by (name redacted) and (name redacted); CRS Insight IN10107, *Unaccompanied Alien Children: A Processing Flow Chart*, by (name redacted); and CRS Report R43664, *Asylum Policies for Unaccompanied Children Compared with Expedited Removal Policies for Unauthorized Adults: In Brief*, by (name redacted).

[1] *See* U.S. Customs and Border Protection, *Southwest Unaccompanied Alien Children Statistics FY2016*, at http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy2016 (last accessed January 25, 2016) (providing information about UAC encounters along the southwest border, including table detailing UAC encounters from FY2009 through FY2015, as well as ongoing FY2016).

[2] *See, e.g.*, *id.* (indicating a 117% increase in southwest border UAC apprehensions from October 1, 2015-December 31, 2015, in comparison to the same time period in the prior year); Jerry Markon and Joshua Partlow, *Unaccompanied Children Crossing Southern Border in Greater Numbers Again, Raising Fears of a New Migrant Crisis*, WASH. POST, December 16, 2015, *available at* https://www.washingtonpost.com/news/federal-eye/wp/2015/12/16/unaccompanied-children-crossing-southern-border-in-greater-numbers-again-raising-fears-of-new-migrant-crisis/ ("In October and November, more than 10,500 children crossed the U.S.-Mexico border by themselves, the vast majority from El Salvador, Guatemala and Honduras, according to U.S. government data analyzed by the Migration Policy Institute, a nonpartisan think tank. That's a 106 percent increase over the same period last year, reflecting a steady increase that began in March.").

Yet other CRS reports discuss the circumstances in foreign countries that some see as contributing to UACs' unauthorized migration to the United States. These include CRS Report R43702, *Unaccompanied Children from Central America: Foreign Policy Considerations*, coordinated by (name redacted); CRS Report R41731, *Central America Regional Security Initiative: Background and Policy Issues for Congress*, by (name redacted) and (name redacted); CRS Report RL34112, *Gangs in Central America*, by (name redacted); CRS Report R43616, *El Salvador: Background and U.S. Relations*, by (name redacted); CRS Report R42580, *Guatemala: Political, Security, and Socio-Economic Conditions and U.S. Relations*, by (name redacted); and CRS Report RL34027, *Honduras: Background and U.S. Relations*, by (name redacted).

Definitions and Background

What is an unaccompanied alien child?

Pursuant to Section 462 of the Homeland Security Act of 2002, as amended, an *unaccompanied alien child*, is defined as a person who:

- is under the age of 18;
- lacks lawful immigration status; and
- either (1) has no parent or legal guardian in the United States or (2) has no parent or legal guardian in the country who is available to provide care and physical custody of the child.[3]

Accordingly, not every minor without lawful immigration status is a UAC. Notably, if a child and parent without lawful immigration status are apprehended by immigration authorities and detained together while awaiting removal, the child is not considered a UAC.[4] Moreover, the fact that a child is initially a UAC does not necessarily mean that he/she will remain within the scope of this definition thereafter (e.g., the child is reunited with a parent, or turns 18).

In practice, however, federal officials seem to have historically based their determinations as to whether a child is unaccompanied upon the child's circumstances at and in the hours immediately following the child's apprehension.[5] If a child is not apprehended with a parent or guardian, or cannot be reunited with a parent or guardian within a matter of hours, the child is generally treated as a UAC for purposes of the transfer from Department of Homeland Security (DHS) custody to Department of Health and Human Services (HHS) custody, as discussed below,[6] regardless of whether the child has a parent or parents in the United States with whom he/she could eventually be reunited.[7] On account of policy considerations, DHS sometimes opts not to

[3] P.L. 107-296, §462, 116 Stat. 2202-2205 (November 25, 2002) (codified, as amended, at 6 U.S.C. §279(g)(2)).

[4] *See generally* Bunikyte v. Chertoff, No. A-07-CA-164-SS, No. A-07-CA-165-SS, No. A-07-CA-166-SS, 2007 U.S. Dist. LEXIS 26166, at *14-*15 (W.D. Tex., April 9, 2007) (parents generally deemed responsible for the care of minor children when parents are detained with minor children).

[5] This practice is informed by statutory requirements that children suspected of being UACs be screened promptly to assess whether they are encompassed by the statutory definition. *See* 8 U.S.C. §1232(a)(4) & (b)(2)-(3) (concerning screening and transfer requirements for UACs from contiguous and non-contiguous countries).

[6] See generally "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?"

[7] *See* D.B. v. Poston, No. 1:15-cv-745, 2015 WL 4647932 at *8 (E.D. Va., August 15, 2015) (discussing a U.S. Customs and Border Protection (CBP) determination that a minor without lawful immigration status, who ran away (continued...)

review or reconsider its initial UAC determination.[8] Moreover, once a UAC designation has been made by DHS, HHS's ability to independently reconsider that determination may be statutorily constrained to the extent it requires a reassessment of the child's immigration status.[9]

Legislation introduced in the 113th and 114th Congresses would mandate a somewhat different approach, expressly providing for children to cease being treated as UACs as soon as a "parent, legal guardian, sibling over 18 years of age, aunt, uncle, grandparent, or cousin over 18 years of age of the alien is found in the United States and is available to provide care and physical custody."[10]

What is the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status?

Some—but not necessarily all—UACs may be eligible for Special Immigrant Juvenile (SIJ) status. As previously noted (see "What is an unaccompanied alien child?"), the term *unaccompanied alien child* is broadly defined to include aliens under the age of 18 who have no parent or legal guardian in the United States, or whose parent or legal guardian is unavailable to provide care and physical custody. Eligibility for SIJ status under Section 101(a)(27)(J) of the Immigration and Nationality Act (INA) and its implementing regulations is also limited to aliens who are young (under 21 years of age) and essentially lack the care or custody of their parents or legal guardians.[11]

However, eligibility for SIJ status is further restricted to aliens (1) who have been declared dependent on a U.S. juvenile court, or whom such a court has legally committed to, or placed under the custody of, a state agency or department or other state- or court-appointed individual or entity, and (2) whose reunification with "1 or both ... parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law."[12] In addition, administrative or judicial

(...continued)

from a U.S. home and did not wish to communicate with his mother living over 160 miles away, was a UAC because he did not have a parent who "was available to *quickly* provide care and physical custody").

[8] U.S. Citizenship and Immigration Services, Memorandum, *Updated Procedures for Determinations of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, May 28, 2013, at 1-2 (instructing that whereas USCIS Asylum Offices had earlier made independent factual inquiries as to whether an asylum applicant was a UAC, such Officers would now generally rely upon a determination by another DHS entity that the applicant was a UAC, and "should not expend resources to pursue inquiries into the correctness of the prior DHS determination").

[9] *See Poston*, No. 1:15-cv-745, 2015 WL 4647932 at *9 and *11 (observing that once a minor "was classified as a UAC by [DHS], in accordance with federal law," HHS was required to treat him as such, and that HHS "has *no responsibility* for adjudicating the immigration status of any individual"). *But see USCIS Updated Procedures for Asylum Applications by UACs*, *supra* note 8, at 2 (appearing to recognize that HHS may take affirmative action to terminate a UAC finding).

[10] *See, e.g.*, Asylum Reform and Border Protection Act of 2015, H.R. 1153, 114th Cong., §8; Asylum Reform and Border Protection Act of 2014, H.R. 5137, 113th Cong., §10. This legislation would also provide that a child is not to be seen as unaccompanied if a "sibling over 18 years of age, aunt, uncle, grandparent, or cousin over 18 years of age is available to provide care and physical custody." *Id*. *Cf.* Cortez-Vasquez v. Holder, 440 Fed. App'x 295, 298 (5th Cir. 2011) (taking the view that an alien minor "accompanied by his adult sister" is not a UAC).

[11] *See* Immigration Act of 1990, P.L. 101-649, §153, 104 Stat. 5005-5006 (November 29, 1990) (codified, as amended, at INA §101(a)(27)(J), 8 U.S.C. §1101(a)(27)(J)); 8 C.F.R. §204.11(c). Currently, the age limit pertains to the date on which the application for SIJ status is filed, not that when it is granted. *See generally* 8 U.S.C. §1232(d)(6). Under an earlier version of this rule, some aliens "aged out" while their petitions for SIJ status were pending.

[12] INA §101(a)(27)(J)(i), 8 U.S.C. §1101(a)(27)(J)(i). The language regarding "reunification with 1 or both ... parents" has been subject to varying interpretations, some of which would permit the granting of SIJ status to aliens who could be reunited with one parent, but not the other. Other interpretations would not permit this. *See generally* CRS Legal (continued...)

proceedings must have determined that it would not be "in the alien's best interest" to be returned to his or her previous country of nationality or last habitual residence, and the Secretary of Homeland Security must consent to the granting of SIJ status.[13] DHS regulations contain some additional restrictions upon eligibility (e.g., that the alien's dependency on the court arises because "family reunification is no longer a viable option" due to abuse, neglect, abandonment, or "a similar basis found under State law").[14] However, these regulations have not been amended since Section 101(a)(27)(J) of the INA was amended in 2008, and it is unclear whether they are to be seen as legally binding upon the agency at present.[15]

SIJ status, in itself, gives aliens a legal basis to remain in the United States and adjust their status to that of lawful permanent resident aliens (LPRs), which, in turn, would eventually enable them to apply for U.S. citizenship. Specifically, Section 245 of the INA provides that aliens granted SIJ status are deemed to have been paroled—a term discussed in greater detail below at "Why aren't UACs encountered at ports of entry turned away as inadmissible?"—into the United States and may apply for LPR status.[16] Being classified as a UAC, in contrast, does not, in itself, furnish any legal basis to remain in the United States or to adjust to LPR status. However, an individual UAC could potentially be eligible for certain forms of relief from removal, depending upon his or her particular circumstances. See "Are children without immigration status eligible for relief from removal?" and "Can UACs obtain asylum due to gang violence in their home countries?."

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Sidebar WSLG1072, *Special Immigrant Juvenile Status: What Does It Mean for Reunification with "1 or Both" Parents Not to Be Viable? (Part 1)*, by (name redacted); CRS Legal Sidebar WSLG1073, *Special Immigrant Juvenile Status: What Does It Mean for Reunification with "1 or Both" Parents Not to Be Viable? (Part 2)*, by (name redacted). The INA is codified in Title 8 of the *United States Code*, and references to it in the footnotes of this report also include references to the corresponding sections of Title 8. However, Title 8 also includes provisions that are not part of the INA. Citations to such provisions will have no corresponding citation to the INA.

[13] *See* INA §101(a)(27)(J)(ii)-(iii), 8 U.S.C. §1101(a)(27)(A)(ii)-(iii). A further constraint upon the granting of SIJ status is that HHS must "specifically consent[]" to a juvenile court's jurisdiction to determine the "custody status or placement" of an alien in HHS custody. INA §101(a)(27)(J)(iii)(I), 8 U.S.C. §1101(a)(27)(A)(iii)(I). In the past, questions were raised about federal agencies' practices in handling juveniles' requests for consent to juvenile court jurisdiction. *See, e.g.*, Perez-Olano v. Gonzalez, 2008 U.S. Dist. LEXIS 85675, at *46-*52 (C.D. Cal., January 8, 2008) (invalidating, on statutory interpretation grounds, U.S. Immigration and Customs Enforcement's (ICE's) practice of requiring its specific consent to all SIJ-predicate orders); Perez-Olano v. Holder, Case No. CV 05-3604, Settlement Agreement (C.D. Cal., May 4, 2010) (copy on file with the authors) (generally requiring federal officials to expedite requests for consent to juvenile court jurisdiction). However, such concerns may have been allayed as a result of the litigation and settlement agreement noted here.

[14] 8 C.F.R. §204.11(a) (definition of *eligible for long-term foster care*) & (c)(3)-(4) (eligibility criteria).

[15] Agency regulations are generally seen to be binding upon the agency until they are withdrawn or amended. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1386 (5th Cir.1979) ("The *Accardi* doctrine stands for the unremarkable proposition that an agency must abide by its own regulations."). A statute that is directly contrary to agency regulations could be seen to render the regulations unenforceable. However, the analysis could be somewhat different where a statute is amended in such a way that particular regulations are no longer required, but could be seen to be within the agency's authority to promulgate.

[16] INA §245(g) & (h)(1), 8 U.S.C. §1255(g) & (h)(1) (SIJs deemed to have been paroled); INA §245(h)(2), 8 U.S.C. §1255(h)(2) (applications for LPR status). Certain grounds of inadmissibility are or may be waived for aliens granted SIJ status. *See infra* note 106. Natural or prior adoptive parents of aliens provided SIJ status may not be accorded any right, privilege or status, by virtue of such parentage, under the INA, although other close natural or prior adoptive relatives (e.g., siblings) are not similarly barred from seeking certain rights, privileges or status by virtue of their relationship to an alien with SIJ status. INA §101(a)(27)(J)(iii)(II), 8 U.S.C. §1101(a)(27)(J)(iii)(II).

What is the *Flores* Settlement Agreement?

The *Flores* settlement agreement (also known as the *Flores* agreement or *Flores* settlement) is a 1997 agreement resolving a long-running challenge to certain practices of the then-Immigration and Naturalization Service (INS) as to the detention of UACs.[17] The *Flores* litigation began in 1984, when INS's Western Regional Office adopted a policy that generally barred the release of detained minors to anyone other than a parent or lawful guardian except in "unusual and extraordinary cases."[18] This policy was challenged in a class action lawsuit brought on behalf of detained unaccompanied minors. Following several lower court decisions, the litigation reached the Supreme Court, which rejected a facial challenge to the constitutionality of this policy in its 1993 decision in *Flores v. Reno*. In so doing, a majority of the Court expressly rejected the argument that UACs who have no available parent or guardian have a "fundamental right" to be placed in the custody of a willing and able private custodian, instead of government custody.[19] However, notwithstanding the Court's decision, the *Flores* litigation continued, in part, over the conditions in which UACs were detained, and the parties ultimately concluded that settlement was "in their best interests and best serves the interests of justice."[20]

The *Flores* agreement articulates a number of broad principles and policies applicable to the detention of alien minors, some of which are also reflected in subsequent legislation or regulations. See "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?" and "May children without immigration status be released from DHS or HHS custody?." Among other things, the agreement establishes that alien minors in federal custody will be treated with "dignity, respect and special concern for their particular vulnerability as minors."[21] It also establishes procedures for the temporary placement of alien minors following their arrest, which include "expeditiously process[ing]" the minor, providing the minor with a notice of rights, and generally segregating UACs from unrelated adults.[22] In addition, it sets forth a "general policy" favoring the release of UACs "without unnecessary delay" to their parents, legal guardians, adult relatives, certain other adults or entities designated by the parent or guardian, licensed programs willing to accept legal custody, or under certain conditions, another entity or adult individual, in this order of preference.[23]

What the *Flores* agreement may require as to any specific alien is less clear, in part, because the agreement incorporates a number of exceptions to its requirements. For example, the agreement specifically contemplates that the "general policy favoring release" would not preclude the continued detention of individual minors in order to secure their timely appearance before

[17] *See generally* Flores v. Reno, Case No. CV 85-4544-RJK(Px), Stipulated Settlement Agreement (C.D. Cal., 1997) (copy on file with the authors). In a number of places, the settlement agreement refers to "unaccompanied minors." However, the plaintiff class is defined as "[a]ll minors who are detained in the legal custody of the INS," and at least two courts have expressly construed the agreement to apply to minors who are detained with their parents. *See Bunikyte*, 2007 U.S. Dist. LEXIS 26166, at *8; Flores v. Johnson, No. 2:85-cv-04544-DMG-AGR, Order, at 7 (C.D. Cal., July 24, 2015) (copy on file with the authors), *reconsid. denied*, Flores v. Lynch, 2015 U.S. Dist. LEXIS 112911 (C.D. Cal., August 21, 2015). The *Flores* agreement also refers to the Immigration and Naturalization Service (INS), but has been found to be binding upon its successor agencies (such as DHS). *See, e.g.*, *Bunikyte*, 2007 U.S. Dist. LEXIS 26166, at *50. *See also infra* at note 41.

[18] *See* Reno v. Flores, 507 U.S. 292, 295-296 (1993).

[19] *Id.* at 301-303.

[20] *See* Stipulated Settlement Agreement, *supra* note 17, at 3.

[21] *Id.* at ¶ 11.

[22] *Id.* at ¶ 12.A.

[23] *Id.* at ¶¶ 14-15.

immigration authorities or the immigration court, or to ensure the safety of the minor or other persons.[24] In addition, courts have imposed certain limitations upon the agreement's enforceability.[25] In particular, the agreement has been found to be enforceable only through actions seeking compliance with its terms,[26] not through actions seeking monetary damages for alleged violations of its terms. In particular, at least one court has expressly rejected the argument that the *Flores* agreement "create[s] a due process entitlement (a protected property or liberty interest) because the terms and conditions of the agreement currently serve as interim federal regulations, and the language of the agreement is mandatory with regard to the services and protections to be provided to unaccompanied minors."[27]

Also, where legislation enacted subsequent to the *Flores* agreement provides for alternate treatment of UACs, that legislation could be seen to govern instead of the agreement, particularly in cases where the legislation provides for aliens to be treated more favorably than under the agreement.[28]

The *Flores* agreement was entered into in 1997, and was initially set to terminate (except for the requirement that minors generally be housed in licensed facilities) at the earlier of (1) five years after its final approval by the court, or (2) three years after the court determines that federal officials are in substantial compliance with the agreement.[29] However, a 2001 stipulation and order extended its term until "45 days after the federal government promulgates final regulations implementing the Agreement."[30] No such regulations have been promulgated to date.

Why aren't UACs encountered at ports of entry turned away as inadmissible?

UACs encountered at ports of entry are generally inadmissible under Section 212(a)(7) of the INA.[31] This section generally bars the admission to the United States of

[24] *Id.* at ¶ 11. Similarly, the agreement grants federal officials greater latitude in the event of an "emergency" or "influx of minors into the United States." *Id.* at ¶ 12.A. However, in light of subsequently enacted legislation (see "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?"), this exception seems most likely to be relevant to *accompanied* minors. The agreement defines an *emergency* as "any act or event that prevents the placement of minors pursuant to Paragraph 19 [i.e., with licensed facilities]" within the three- to five-day time frame contemplated by the agreement, and an *influx* as occurring whenever federal officials have in their custody more than 130 minors eligible for placement in a licensed program. *See id.* at ¶ 12.B.

[25] *See, e.g.*, Fabian v. Dunn, No. SA-08-cv-269-XR, 2009 U.S. Dist. LEXIS 26552 (W.D. Tex., August 14, 2009); Walding v. United States, No. SA-08-CA-124-XR, 2009 U.S. Dist. LEXIS 26546 (W.D. Tex. March 31, 2009).

[26] *Walding*, 2009 U.S. Dist. LEXIS 26546, at *74-*75.

[27] *Id.* at *56.

[28] For example, the *Flores* agreement makes provisions for the government to have additional time to transfer alien minors from the facility of their immediate post-arrest placement to a licensed facility in the event of an "emergency" or "influx of minors." *See* Stipulated Settlement Agreement, *supra* note 17, at ¶ 12a. However, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 (P.L. 110-457), as amended, does not include similar provisions.

[29] *See* Stipulated Settlement Agreement, *supra* note 17, at ¶ 40.

[30] *See* Flores v. Reno, Case No. CV 85-4544-RJK(Px), Stipulation Extending the Settlement Agreement and for Other Purposes, and Order Thereon (C.D. Cal., December 7, 2001) (copy on file with the authors).

[31] *See* 8 U.S.C. §1182(a)(7)(A)(i). Individual UACs could potentially also be inadmissible on other grounds. *See generally* INA §212, 8 U.S.C. §1182 (establishing health-, crime-, and security-related grounds of inadmissibility). *See also* INA §101(a)(13)(A), 8 U.S.C. §1101(a)(13)(A) (defining *admission*). Aliens encountered between ports of entry raise somewhat different issues. Some UACs may also be unlawfully present within the interior of the United States when encountered by immigration officers.

> any immigrant [who] at the time of application for admission ... is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the [Secretary of Homeland Security].[32]

However, admission is not the same as entry for purposes of the INA. *Admission* is defined as the "lawful entry into the United States after inspection and authorization by an immigration officer."[33] *Entry*, in contrast, is generally seen to encompass any "coming of an alien into the United States,"[34] and may be permitted, pursuant to other provisions of federal law, in circumstances where admission is not legally permissible.

In the case of UACs, Section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, as amended, could be said to implicitly authorize UACs to enter the United States.[35] Section 235 distinguishes between UACs from "contiguous countries"—namely, Canada and Mexico—and UACs from other countries. UACs from contiguous countries found at a land border or port of entry who are determined to be inadmissible (e.g., for lack of proper documentation) may be permitted to withdraw their application for admission and be returned to their home country, subject to certain conditions.[36] UACs from other countries, in contrast, are not subject to such treatment, but are instead required to be transferred to the custody of the Secretary of Health and Human Services within 72 hours of being determined to be UACs,[37] as discussed below (see "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?").

Other provisions of law could also be construed to permit UACs to enter the United States. Key among these provisions is Section 212(d)(5)(A) of the INA, which permits the Secretary of Homeland Security to *parole*—or permit the physical entry of aliens into the United States without being admitted—on a "case-by-case basis for urgent humanitarian reasons or significant public benefit."[38] Among other things, parole under Section 212(d)(5)(A) is used to permit aliens seeking asylum to enter the United States. See "Can UACs obtain asylum due to gang violence in their home countries?."[39]

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[32] INA §212(a)(7)(A)(i), 8 U.S.C. §1182(a)(7)(A)(i). Under the INA, aliens are presumed to be *immigrants* unless they fall into designated categories (e.g., ambassadors, temporary visitors for business or pleasure). INA §101(a)(15), 8 U.S.C. §1101(a)(15). There are two exceptions to this general rule. One exception—permitting the waiver of the Section 212(a)(7) grounds of inadmissibility for aliens who are in possession of immigrant visas that, unbeknownst to them, are invalid—is generally inapplicable where UACs are concerned. INA §212(k), 8 U.S.C. §1182(k). The other exception permits the admission of aliens "as specifically provided in this Act." INA §212(a), 8 U.S.C. §1182.

[33] INA §101(a)(13)(A), 8 U.S.C. §1101(a)(13)(A).

[34] Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Section 101(a)(13) of the INA defined *entry* in this way. Even after this definition of *entry* was stricken in 1996, similar constructions of the term have still been applied in other contexts. *See, e.g.*, *Matter of* Rosas-Ramirez, 22 I. & N. Dec. 616 (1999) (discussing whether adjustment of status while within the United States constitutes an "admission" for purposes of Section 237(a)(2)(A)(iii) of the INA, and noting that *admission* is defined, in part, in terms of "entry").

[35] P.L. 110-457, §235, 122 Stat. 5074 (December 23, 2008) (codified, as amended, at 8 U.S.C. §1232).

[36] 8 U.S.C. §1232(a)(2)(A).

[37] 8 U.S.C. §1232(a)(3) & (b)(3). These provisions have also been taken to mean that UACs must generally be retained in federal custody for at least for a brief time, instead of being released immediately to families or community groups.

[38] *See* 8 U.S.C. §1182(d)(5)(A). *See also* INA §101(a)(13)(B), 8 U.S.C. §1101(a)(13)(B) (aliens paroled under Section 212(d)(5) "shall not be considered to have been admitted").

[39] Section 208 of the INA specifically permits arriving aliens to apply for asylum, "irrespective of [their] status." INA §208(a)(1), 8 U.S.C. §1158(a)(1).

Custody, Control, and Enforcement

Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?

The primary federal agencies responsible for maintaining custody over alien children without immigration status are DHS and HHS. Many UACs encountered by DHS in the course of its immigration enforcement activities are required to be transferred to HHS custody. However, not all UACs encountered by DHS are required to be transferred to HHS. Notably, HHS does not play a role in detaining certain arriving UACs from contiguous countries (i.e., Canada and Mexico) who have agreed to be voluntarily repatriated to their home countries. Moreover, DHS maintains responsibility over *accompanied* alien children who are detained pending removal.[40]

DHS is the primary agency responsible for enforcing the nation's immigration laws, including by apprehending aliens who attempt to enter the United States without legal authorization, and detecting aliens within the country whose unauthorized presence or commission of a status violation makes them removable.[41] In particular, alien children traveling across a land border or a port of entry may be encountered by immigration enforcement officers within DHS[42]—primarily those within U.S. Customs and Border Protection (CBP).[43] If such children are suspected of attempting to enter or have entered the United States without legal authorization, they may be taken into custody and thereafter removed or otherwise repatriated in accordance with applicable federal immigration statutes and regulations.

Section 462 of the Homeland Security Act of 2002 generally transferred responsibility for the care of UACs (but not accompanied alien children) from immigration enforcement authorities to HHS's Office of Refugee Resettlement (ORR).[44] Once such children are transferred to its custody, ORR is responsible for "coordinating and implementing the care and placement" of the children,[45] including by placing UACs in state-licensed care facilities and foster care.[46] However, the transfer of a UAC from DHS custody to ORR does not preclude DHS from removing the

[40] Insofar as the *Flores* settlement agreement refers to "[a]ll minors who are detained in the legal custody of the INS [or its successor agencies]," it could be seen to impose certain requirements as to the detention or release of *accompanied* alien children. *See generally* CRS Legal Sidebar WSLG1373, *UPDATED: 2014 Immigration Detention Policy Found to Breach the 1997 Flores Settlement Agreement*, by (name redacted).

[41] For many decades, the INS within the Department of Justice (DOJ) was delegated responsibility for immigration enforcement activities. Following the establishment of DHS pursuant to the Homeland Security Act of 2002 (P.L. 107-296), the INS was abolished and its enforcement functions were transferred to DHS. *See* 6 U.S.C. §§251, 291.

[42] Interior immigration enforcement activities, including apprehending and effectuating the removal of aliens within the United States who are believed to be present in violation of federal immigration laws, are primarily the responsibility of ICE within DHS.

[43] In particular, CBP's Office of Field Operations is primarily responsible for border security matters at ports of entry, while U.S. land borders between ports of entry are monitored by agents from CBP's Office of Border Patrol.

[44] 6 U.S.C. §279.

[45] 6 U.S.C §279(b)(1)(A). *See also* 8 U.S.C. §1232(b), (d).

[46] *See, e.g.*, Dep't of Health & Human Servs., Office of Refugee Resettlement, About Unaccompanied Children's Services, *available at* http://www.acf.hhs.gov/programs/orr/programs/ucs/about (last accessed June 26, 2014). *See also Bunikyte*, 2007 U.S. Dist. LEXIS 26166, at *25-*27 (finding that a state's granting a licensing exception to a facility does not discharge the government's obligation under the *Flores* settlement agreement to house detained minors in licensed facilities, and noting the steps that the Berks Family Residential Center took to obtain licensing, given that it did not fit within the existing taxonomy of state licensees).

alien from the United States.[47] If a UAC in ORR custody is ultimately ordered removed, DHS may briefly take physical custody of the UAC in order to effectuate his or her removal.[48]

Not every UAC encountered by DHS is required to be transferred to the custody of HHS's ORR.[49] If a UAC from Canada or Mexico is apprehended at a land border or a U.S. port of entry and deemed inadmissible under federal immigration laws, the UAC may be offered the opportunity to be voluntarily returned to his or her home country in lieu of being placed in immigration removal proceedings (a process distinct from "voluntary departure," discussed *infra,* "May children without immigration status be placed in removal proceedings?").[50] If the UAC agrees to repatriation, he/she may generally remain in DHS custody for the brief period until being repatriated.[51]

By statute,[52] a determination must be made within 48 hours that an alien child is eligible for voluntary return on account of being a UAC from Canada or Mexico. If a determination cannot be made within this period, or the child does not meet the criteria for repatriation, DHS must immediately transfer the child to ORR custody.

More generally, other than in exceptional circumstances, any child in the custody of DHS or another federal agency must be transferred to the custody of ORR within 72 hours of the agency having made the determination that he/she is a UAC.[53]

May children without immigration status be placed in removal proceedings?

Children without immigration status may be placed in removal proceedings.[54] However, federal law requires that UACs (but not other alien children identified for removal) be placed in specific types of proceedings if federal immigration authorities seek to remove them from the United States. Moreover, as discussed earlier ("Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?"), arriving UACs from Canada

[47] *See* 8 U.S.C. §1232(a)(5)(D) (placement of UACs in removal proceedings).

[48] *See* 8 C.F.R. §241.3(a) (aliens ordered removed shall be taken into DHS custody pursuant to a warrant of removal).

[49] An arriving alien may, in limited circumstances, also be released from DHS custody and paroled into the United States under INA §212(d)(5), if parole is justified by "urgent humanitarian reasons" or "significant public benefit." *See* 8 C.F.R. §212.5(b) (concerning parole of arriving juvenile aliens).

[50] 8 U.S.C. §1232(a)(2).

[51] *See* 8 C.F.R. §235.4 (DHS custody over aliens who withdraw their application for admission).

[52] 8 U.S.C. §1232(a)(4). As previously noted, the *Flores* agreement could be seen to govern on specific questions not otherwise addressed in statute, and as to populations not covered by the statute (i.e., accompanied alien children).

[53] 8 U.S.C. §1232(b)(3). The *Flores* agreement also generally requires that UACs be transferred from "placement" with DHS following initial arrest to temporary placement in a licensed program (pending release or the conclusion of immigration proceedings) within 72 hours. *See* Stipulated Settlement Agreement, *supra* note 17, at ¶¶ 12a, 19.

[54] Indeed, plaintiffs in at least one case have alleged that the INA *requires* that any alien unlawfully present in the United States be placed in removal proceedings. A federal district court initially found for the plaintiffs in this case. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 740-741 (N.D. Tex. 2013). However, the court subsequently found that it lacked jurisdiction over the plaintiffs' claims and dismissed the case. Crane, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013) (copy on file with the authors). This dismissal was subsequently affirmed on other grounds by the U.S. Court of Appeals for the Fifth Circuit. Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015). For more on the *Crane* litigation, see generally CRS Legal Sidebar WSLG498, *Federal District Court Finds that DACA Is Prohibited by the INA*, by (name redacted); CRS Legal Sidebar WSLG758, *District Court Finds It Lacks Jurisdiction over ICE Agents' Challenge to DACA*, by (name redacted); and CRS Legal Sidebar WSLG1223, *Appeals Court Affirms Dismissal of Challenge to 2012 Deferred Action Program*, by (name redacted).

and Mexico may be voluntarily returned to their home countries in lieu of being placed in removal proceedings, if certain criteria are met.

Federal statute establishes specific requirements concerning the removal of UACs (but not accompanied children). Many aliens arriving in the United States who are deemed inadmissible by an immigration officer may be immediately ordered removed, through a streamlined process known as expedited removal, which entails a determination of inadmissibility by immigration officials, rather than an immigration judge.[55] However, arriving UACs are exempted from this process.[56] In general, if DHS seeks to remove a UAC from the United States, regardless of whether the UAC is arriving or encountered in the United States, it must place the child in removal proceedings before an immigration judge (sometimes referred to as formal removal proceedings).[57] UACs placed in formal removal proceedings are also required to be provided access to counsel, to the extent practicable and consistent with statutory restrictions on the provision of counsel at the government's expense in immigration proceedings.[58] A UAC is also eligible for voluntary departure under Section 240B of the INA in lieu of undergoing removal proceedings, at no cost to the child.[59]

Special rules govern the handling of arriving UACs from Canada and Mexico. In general, arriving aliens are considered "applicants for admission" into the United States for immigration purposes.[60] As previously discussed (see "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?"), arriving UACs who are nationals or habitual residents of Canada and Mexico may be voluntarily returned to their home countries in lieu of being placed in removal proceedings, if they consent to the withdrawal of their application for admission.[61] "Voluntary return" following a withdrawal of an application of admission is a distinct alternative to "voluntary departure" under Section 240B of the INA.[62]

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[55] INA §235(b), 8 U.S.C. §1225(b).

[56] 8 U.S.C. §1232(a)(5)(D) (requiring placement of UACs in formal removal proceedings, except when they are arriving from Canada or Mexico and have agreed to be voluntarily returned).

[57] *Id.*; INA §240, 8 U.S.C. §1229a. These proceedings are adversarial in nature and are conducted before an immigration judge within the DOJ's Executive Office of Immigration Review (EOIR). An alien placed in such proceedings may, among other things, examine evidence and contest the government's case against his/her removability, present evidence on his/her own behalf, cross-examine witnesses, and be represented by counsel (generally) at no expense to the government. *Id.* Decisions by an immigration judge may be appealed to EOIR's Board of Immigration Appeals (BIA)—the highest administrative tribunal responsible for interpreting and applying immigration law—and, in many cases, to a federal court.

[58] 8 U.S.C. §1232(a)(5)(D) & (c)(5). The INA provides, however, that aliens placed in removal proceedings have a privilege of being represented by counsel at no expense to the government. INA §292, 8 U.S.C. §1362. *See* "Do UACs have a right to counsel at the government's expense in removal proceedings?."

[59] 8 U.S.C. §1232(a)(4). An alien granted voluntary departure must typically pay the costs associated with departing the United States. INA §240B(a)(1), 8 U.S.C. §1229C(a)(1).

[60] INA §235(a)(1), 8 U.S.C. §1225(a)(1). DHS regulations generally define an *arriving alien* as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States.... " 8 C.F.R. §1.2.

[61] 8 U.S.C. §1232(a)(2).

[62] Among other things, an arriving alien who is permitted to withdraw his/her application for admission must generally depart immediately from the United States, while an alien granted voluntary departure is often permitted to remain in the country for a specified period. *Compare* INA §235(a)(4), 8 U.S.C. §1225(a)(4) (providing that an alien permitted to withdraw his/her application will "depart immediately") *with* INA §240B(a)(2) & (b)(2), 8 U.S.C. §1229C(a)(2) & (b)(2) (specifying time period when alien may be permitted to voluntarily depart). A violation of a voluntary departure order may result in civil monetary penalties and other consequences not applicable to persons who immediately depart following the withdrawal of an application of admission. *See* INA §240B(d), 8 U.S.C. §1229C(d).

The availability of voluntary return to an arriving UAC from Canada or Mexico is contingent upon immigration authorities determining that the child (1) was not a victim of a "severe form of trafficking" or at risk of being trafficked if repatriated;[63] (2) "does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution"; and (3) is able to make an independent decision to agree to repatriation in lieu of being placed in removal proceedings.[64]

Arriving UACs from Canada or Mexico who do not satisfy these criteria, or who do not agree to withdraw their application for admission, may be treated in the same manner as other UACs, including being placed in formal removal proceedings before an immigration judge.[65]

Are children without immigration status eligible for relief from removal?

In certain instances, aliens whose entry or continued presence in the United States is otherwise not permitted under federal immigration law may be eligible for relief from removal.[66] If such relief is granted, an otherwise removable alien may be permitted to remain in the United States and, depending upon the form of relief granted, adjust to LPR status.

There is no statute or treaty-based form of relief available for alien children based solely upon their juvenile status. However, some children without immigration status may obtain relief from removal depending upon their individual circumstances, including whether they are victims of trafficking, would face persecution on a protected ground if returned to their home country, or are subject to abuse or abandonment by their parents. The most relevant forms of relief from removal are discussed below.

Asylum. Any alien—regardless of age[67]—may be eligible for asylum if the alien is unable or unwilling to return to his/her home country due to a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.[68] An alien granted asylum may be eligible to work in the United States and adjust to LPR status.[69] In general, an alien can either apply for asylum "affirmatively" with U.S. Citizenship and Immigration Services (USCIS) within DHS or "defensively" in the context of removal proceedings before an immigration judge. However, Section 208 of the INA mandates that asylum officers within USCIS have initial jurisdiction over any asylum claim made by a UAC

[63] *Severe form of trafficking* is defined to cover both sex and labor trafficking. *See* 22 U.S.C. §7102(9).

[64] 8 U.S.C. §1232(a)(2).

[65] *Id.*

[66] UACs also enjoy another type of protection as to removal, in that immigration judges may not accept admissions of removability from unrepresented UACs. *See* 8 C.F.R. §1240.10(c) ("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."). This bar does not, however, extend to admissions to factual allegations, because minors under the age of 16 are "not presumed incapable of understanding the context of the allegations and determining whether they are true." *Matter of* Amaya-Castro, 21 I. & N. Dec. 583 (BIA 1996). *See also* Gonzales-Reyes v. Holder, 313 Fed. App'x 690, 696-697 (5th Cir. 2009).

[67] *See, e.g.*, Gonzalez v. Reno, 212 F.3d 1338, 1348, 1351 (11th Cir. 2000) (no *per se* bar to a six-year-old filing an application for asylum, since Section 208(a) of the INA states that "[a]ny alien ... may apply," although an application on behalf of such a young child that is opposed by his/her parent may be viewed as a nullity).

[68] INA §208(b)(1)(A), 8 U.S.C. §1158(b)(1)(A)(permitting the granting of asylum to eligible aliens who fall within the definition of *refugee* found at INA §101(a)(42), 8 U.S.C. §1101(a)(42)).

[69] INA §§208(c), 209(b); 8 U.S.C. §§1158(c), 1159(b).

even if the UAC is in removal proceedings.[70] In addition, other provisions of federal law make it easier for UACs to be granted asylum on account of persecution.[71] For further discussion, see also "Can UACs obtain asylum due to gang violence in their home countries?."

SIJ Status. As previously noted (see "What is the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status?"), some alien children without lawful status may be eligible for SIJ status, and, on the basis of this status, become LPRs.[72] Eligibility for SIJ status is limited to juveniles who, among other things, (1) have been declared by a state court to be a dependent on the court, or have been legally placed by the court with a state or an appointed private entity; (2) are unable to reunite with one or more parents on account of abuse, abandonment, or neglect; and (3) have been determined not to have his/her best interest served by being returned to his/her native country or country of last habitual residence.[73] The availability of an immigrant visa for aliens who obtain SIJ status is subject to the numerical cap on the allocation of immigrant visas for "special immigrants" (a category that includes several types of aliens in addition to those with SIJ status).[74]

Nonimmigrant Visa for Victims of Trafficking and Other Crimes. Alien children without immigration status could also be eligible for nonimmigrant visas allowing them to temporarily remain in the country (and potentially adjust to LPR status) if they are the victims of trafficking or certain other crimes. The INA provides that an alien may be granted a nonimmigrant visa (commonly referred to as a "T visa") if he or she is a victim of a severe form of trafficking, and satisfies at least one other specified requirement, such as being under the age of 18.[75] A T visa generally allows an alien to live in the United States for up to four years (subject to extension in limited cases), and the alien may apply for adjustment to LPR status after three years.[76] Up to 5,000 T visas may be issued per year.[77]

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[70] INA §208(b)(3)(C), 8 U.S.C. §1158(b)(3)(C). If the UAC's asylum application is denied, he/she may be placed in removal proceedings (in which the child may challenge the basis for the denial of the application).

[71] Specifically, unlike other asylum applicants, UACs may be eligible for asylum even if they could be removed, pursuant to a bilateral or multilateral agreement, to a third country where they would not face persecution and would have access to procedures by which to obtain asylum or equivalent temporary protection in that country. Additionally, UACs' asylum applications are not subject to the time bar that normally requires aliens to apply for asylum within one year of arriving in the United States. INA §208(a)(2)(E), 8 U.S.C. §1158(a)(2)(E), as added by Section 235(d)(7)(A) of the TVPRA (P.L. 110-457). *But see* Harmon v. Holder, 758 F.3d 728 (6th Cir. 2014) (declining to adopt the alien's argument that the TVPRA "permanently exempts former unaccompanied alien children from the one-year filing deadline for asylum applications"). The alien in this case was 41 years old, and had entered the United States as an unaccompanied child in 1994. She applied for asylum in 2007.

[72] *See* INA §§101(a)(27)(J), 203(b)(4), & 245(h); 8 U.S.C. §§101(a)(27)(J), 1153(b)(4), & 1255(h).

[73] INA §101(a)(27)(J), 8 U.S.C.§1101(a)(27)(J). There are other preconditions for SIJ status. *See generally* "What is the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status?."

[74] *See* INA §203(b)(4), 8 U.S.C. §1253(b)(4) (providing for the allocation of immigration visas to "special immigrants," other than certain subcategories subject to separate requirements, is "a number not to exceed 7.1 percent of such worldwide level" of immigration visas for "employment-based immigrants" under INA §203(b)).

[75] INA §101(a)(15)(T), 8 U.S.C. §1101(a)(15)(T) (other potential qualifying factors include cooperating with a relevant law enforcement investigation or prosecution of acts of trafficking, or being unable to cooperate with such efforts on account of physical or psychological trauma). *But see* United States v. Resuleo-Flores, No. CR 11-0686 51, 2012 U.S. Dist. LEXIS 30201, at *27 (N.D. Cal., March 7, 2012) (alien under the age of 16 who recanted her charges to the police could nonetheless be found to have cooperated with law enforcement given her initial reporting of the crime, especially as her guardians discouraged her from further cooperation).

[76] INA §214(o), 8 U.S.C. §1184(o); INA §245(*l*), 8 U.S.C. §1255(*l*).

[77] INA §214(o), 8 U.S.C. §1184(o).

A separate nonimmigrant visa (commonly referred to as a "U visa") is available for aliens who (1) have suffered substantial physical or mental abuse on account of being victims of specified criminal activities;[78] (2) possess information regarding the criminal activity; and (3) have been or are likely to be helpful in a law enforcement investigation or prosecution of such activity.[79] A U visa may remain valid for up to four years (subject to extension in limited circumstances), and the visa-holder may apply for adjustment to LPR status after three years.[80] Up to 10,000 U visas may be issued per year.[81]

May children without immigration status be released from DHS or HHS custody?

DHS and HHS maintain custody over children without immigration status for different purposes. In the case of DHS, the primary purpose is to secure the child's presence at removal proceedings and during the execution of a final order of removal.[82] The purpose of HHS obtaining custody over UACs is generally not focused upon immigration enforcement, but instead to provide UACs with temporary shelter care and protect them from trafficking and other forms of exploitation.[83]

As a general matter, individual aliens placed in removal proceedings by DHS are potentially subject to detention, but may also be released on bond or parole—which here refers to release from custody, not entry into the United States—unless they fall under a category subject to mandatory detention.[84] DHS regulations and the *Flores* settlement agreement provide criteria for when juveniles in removal proceedings may be released from custody. The *Flores* settlement agreement establishes a "general policy" favoring the release of children from detention.[85] However, both the agreement and DHS regulations recognize that release is not required when DHS determines that the juvenile's continued detention is necessary to ensure his/her safety or the safety of others, or is required to secure the juvenile's presence at immigration removal proceedings.[86] DHS regulations provide that a juvenile may be released, in order of preference, to (1) a parent, legal guardian, or other adult relative (brother, sister, aunt, uncle, or grandparent) who is not presently in DHS detention; (2) another adult individual or entity who is designated by a parent or guardian in DHS custody and who agrees to care for the juvenile and ensure his/her

[78] Covered criminal activities include, *inter alia*, domestic violence, rape, trafficking, kidnapping, involuntary servitude, and felonious assault. INA §101(a)(15)(U)(iii), 8 U.S.C. §1101(a)(15)(U)(iii).

[79] INA §101(a)(15)(U), 8 U.S.C. §1101(a)(15)(U). When the alien is a child under the age of 16, the eligibility requirements concerning law enforcement assistance may be performed by a parent, guardian, or next friend. *Id.*

[80] INA §214(p), 8 U.S.C. §1184(p).

[81] INA §245(m), 8 U.S.C. §1255(m).

[82] If DHS opts not to pursue immigration enforcement proceedings against an alien, the alien must be released from its custody.

[83] *See* 6 U.S.C. §279(b) (describing general functions with respect to UACs); 8 U.S.C. §1232(c) (requiring the establishment of policies and programs to protect UACs from trafficking and other harmful activities).

[84] INA §236(a), 8 U.S.C. §1226(a). The granting of parole (in the sense of release from custody) to aliens detained by immigration authorities pending a decision on their removal is understood to be distinct from the parole of arriving aliens into the United States under INA §212(d)(5) on account of urgent humanitarian reasons or a significant public benefit. *See Matter of* Castillo-Padilla, 25 I. & N. Dec. 257 (BIA 2010). *See also* 8 C.F.R. §212.5 (standards for parole of aliens into United States pursuant to INA §212(d)(5)). For more on "mandatory detention," see generally CRS Legal Sidebar WSLG524, *How "Mandatory" Is the Mandatory Detention of Certain Aliens in Removal Proceedings?*, by (name redacted) .

[85] Stipulated Settlement Agreement, *supra* note 17, at ¶ 11.

[86] *Id.*; 8 C.F.R. §236.3(b).

presence at removal proceedings; or (3), in unusual and compelling circumstances, another adult individual or entity designated by DHS who agrees to care for the child and ensure his/her presence at removal proceedings.[87] Additionally, in cases where a juvenile is detained by DHS along with a parent, legal guardian, or adult family member, DHS may on a case-by-case basis opt to release the juvenile and accompanying adult from detention simultaneously.[88]

As noted earlier (see "Which federal agencies have primary responsibility for maintaining custody of alien children without immigration status?"), federal statute designates HHS's ORR with responsibility for the care and custody of UACs, other than certain arriving UACs from Canada and Mexico who have been immediately and voluntarily returned to their home countries.[89] When functions formerly handled by immigration authorities concerning UACs were transferred to HHS via the Homeland Security Act of 2002, HHS also became subject to the terms of the *Flores* settlement agreement.[90] Section 235 of the TVPRA provided further guidance concerning HHS standards for the care and control of UACs within the agency's custody.[91]

Following the transfer of a UAC to the custody of HHS's ORR, the UAC is generally released shortly thereafter to the physical custody of an ORR-contracted care facility.[92] The type of facility (e.g., shelter care, secure care, or foster care) may depend upon the particular needs of the UAC, the UAC's age, and whether the UAC poses a flight risk or a danger to himself/herself or others.[93] UACs remain in the legal custody of the federal government even though they may be temporarily placed in the physical custody of a licensed care provider.[94] UACs could potentially remain in such facilities pending culmination of removal proceedings against them (at which point they may be removed from the United States); until they turn 18 (at which point they may be turned over to DHS custody, provided that DHS has initiated removal proceedings against

[87] 8 C.F.R. §236.3(b).

[88] *Id.* In one recent case, a federal district court found that the terms of the *Flores* agreement could, in certain circumstances, require federal officials to release aliens who are parents of minor children in order to facilitate the children's release. *See* Flores v. Johnson, No. 2:85-cv-04544-DMG-AGR, Order, at 7 (C.D. Cal., July 24, 2015) (copy on file with the authors), *reconsid. denied*, Flores v. Lynch, 2015 U.S. Dist. LEXIS 112911 (C.D. Cal., August 21, 2015). *But compare Bunikyte*, 2007 U.S. Dist. LEXIS 26166, at *49-*53 (rejecting the argument that the *Flores* agreement required that detained parents be released so that their children could be released with them).

[89] 6 U.S.C. §279; 8 U.S.C. §1232.

[90] 6 U.S.C. §552(a) (concerning continued recognition of "completed administrative actions," including agreements, made by agencies whose functions were transferred to other departments pursuant to the Homeland Security Act).

[91] 8 U.S.C. §1232.

[92] Stipulated Settlement Agreement, *supra* note 17, at ¶ 14. Paragraph 28.A of the *Flores* agreement requires the government to monitor contractors' performance to ensure that the terms of the agreement are met. *See, e.g.*, Walding v. United States, 955 F. Supp. 2d 759, 781 (W.D. Tex. 2013). For a more detailed description of ORR's responsibility for UACs, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*, by (name redacted) and (name redacted); Olga Byrne & Elise Miller, Vera Institute of Justice, *The Flow of Unaccompanied Children Through the Immigration System*, at 8-21 (March 2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf.

[93] *See* CRS Report R43599, *Unaccompanied Alien Children: An Overview*, by (name redacted) and (name redacted); Byrne and Miller, *supra* note 92, at 19. *See also* 8 U.S.C. §1232(c)(2) (generally requiring HHS to place UACs within its custody in "the least restrictive setting that is in the best interest of the child").

[94] *See* Dep't of Health & Human Services, Office of Refugee Resettlement, Notice of Grant Opportunity for Residential Services for Unaccompanied Children, at 2 (2014), *available at* http://www.acf.hhs.gov/grants/open/foa/files/HHS-2014-ACF-ORR-ZU-0608_0.pdf ("UAC are in the legal custody of the Federal Government throughout their stay in ORR care but will be in the physical custody of the residential care provider.").

them);[95] or until such times as ORR finds a parent, legal guardian, or other entity who may take custody of the UAC, in accordance with the terms of the *Flores* settlement agreement.[96]

The Secretary of HHS must consent to the jurisdiction of a juvenile court before the court may declare a child in HHS custody to be a dependent of the court or before the court may legally commit or place the juvenile in the custody of a state agency or a court-appointed person or entity.[97] As previously noted, such action by a state court is necessary before a juvenile can be granted SIJ status.[98]

What is the "best interest of the child" standard, and how does it apply to immigration detention and removal decisions?

As the term suggests, the "best interest of the child" standard prioritizes an affected child's interests in the context of adjudication or other decisionmaking processes. The standard is typically employed by courts or administrative bodies considering issues implicating a child's welfare, including child custody and placement decisions.[99] There is no uniform consensus as to the particular factors that should be considered (or the weight given to each of these factors) when applying the "best interest of the child standard," and application of the standard can vary depending upon the context.[100]

The "best interest of the child" standard generally does not provide legal guidance as to whether or not a child is subject to removal.[101] A 2007 guidance document issued by the DOJ's Executive Office of Immigration Review (EOIR) concerning immigration court cases involving UACs notes the following:

> Issues of law—questions of admissibility, eligibility for relief, etc.—are governed by the Immigration and Nationality Act and the regulations. The concept of "best interest of the

[95] 8 U.S.C. §1232(c)(2)(B). DHS is required to consider placing such persons "in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight," and transferred persons are made eligible to participate in alternative to detention programs. *Id.*

[96] *See* Stipulated Settlement Agreement, *supra* note 17, at ¶¶ 12.A & 14.

[97] INA §101(a)(27)(J)(iii)(I), 8 U.S.C.§1101(a)(27)(J)(iii)(I).

[98] *See supra* at "What is the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status?."

[99] *See generally* Dept. of Health & Human Services, Children's Bureau, *Determining the Best Interests of the Child* (last updated November 2012) [hereinafter "HHS Overview of State Statutes"], *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf (providing overview of standard, its application, and various state statutes implementing the standard); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 376 (2008) (discussing origins and development of standard).

[100] *See generally* HHS Overview of State Statutes, *supra* note 99 (identifying and discussing state laws providing guidance for application of "best interest of the child" standard); Kohm, *supra* note 99 (discussing judicial discretion in assessing and interpreting what serves a child's best interest).

[101] In 2002, a federal district court held that INA provisions concerning alien removal and relief from removal should be construed in a manner consistent with international agreements and customary international law, including "principles of customary international law that the best interests of the child must be considered where possible." Beharry v. Reno, 183 F. Supp. 2d 584 (E.D. N.Y. 2002). This ruling was subsequently vacated on jurisdictional grounds, 329 F.3d 51 (2d Cir. 2003). The BIA has held that customary international law does not afford an alien a remedy from removal above and beyond those forms of relief established by the INA, and that, even assuming *arguendo* that customary law could provide a basis for such relief, immigration judges have not been delegated authority to make such determinations by the Attorney General. *See Matter of* A–E–M–, 21 I. & N. Dec. 1157 (BIA 1998).

> child" does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law.[102]

The "best interest of the child" standard may, however, inform the conduct of immigration removal proceedings,[103] even if the standard is not relevant to a determination of whether the child is removable. A child's interests are also relevant to other determinations by immigration authorities, including when or whether to release a child without immigration status from detention during the course of removal proceedings (though consideration of this interest is not dispositive, and it may be overcome by competing government interests, including ensuring the child's presence at removal hearings).[104] As noted above (see "What is the difference between being a UAC and having Special Immigrant Juvenile (SIJ) status?"), in determining an alien child's eligibility for SIJ status, immigration authorities must consider whether it would be in the child's best interest not to be repatriated to his/her home country.[105] However, other criteria must also be satisfied for a child to be deemed eligible for SIJ status.[106]

On the other hand, the "best interest of the child" standard is statutorily required to be considered by ORR in certain decisions involving UACs placed in its custody. In 2008, Congress mandated that UACs placed in ORR custody "be promptly placed in the least restrictive setting that is in the best interest of the child."[107]

Can UACs obtain asylum due to gang violence in their home countries?

Some UACs could potentially be found to be eligible for asylum as a result of gang-related violence in their home countries, although the existence of such violence is not, in itself, a basis for asylum.[108] Rather, eligibility for asylum is determined on a case-by-case basis, with the

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[102] Dep't of Justice, Exec. Office of Immigration Review, Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 7-01, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, at 4 (2007), available at http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf.

[103] *Id.* ("[T]his concept is a factor that relates to the immigration judge's discretion in taking steps to ensure that a 'child-appropriate' hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.").

[104] *See* 8 C.F.R. §236.3 (DHS standards for releasing juveniles in removal proceedings from custody); Stipulated Settlement Agreement, *supra* note 17, at ¶¶ 14, 19, & Exhibit 1 (specifying conditions at the locations where children are held by immigration authorities, identifying a "general policy" favoring the release of children from custody, but providing that children are not required to be released when authorities believe that detention is necessary to secure the child's presence at removal proceedings or ensure the child's release does not pose a danger to the child or others).

[105] INA §101(a)(27)(J), 8 U.S.C. §1101(a)(27)(J).

[106] *Id.* (also requiring that an SIJ applicant (1) has been declared by a state court to be a dependent of the court, or to have been legally placed by the court with a state or an appointed private entity; and (2) is unable to reunite with one or more parents on account of abuse, abandonment, or neglect). Moreover, some grounds of inadmissibility may bar an alien with SIJ status from adjusting to LPR status. *See* INA §245(h), 8 U.S.C. §1255(h) (exempting SIJs from being ineligible for adjustment of status on certain inadmissibility grounds, and permitting immigration authorities to waive other inadmissibility grounds).

[107] 8 U.S.C. §1232(c)(2)(A). The requirement that children be placed in the "least restrictive setting" mirrors language found in the *Flores* settlement agreement. *See, e.g.*, Settlement Agreement, *supra* note 17, at ¶ 23.

[108] *Compare* INA §101(a)(42), 8 U.S.C. §1101(a)(42) ("For purpose of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion."). For more on asylum and gang violence, see generally archived CRS Report R43716, *Asylum and Gang Violence: Legal Overview*, by (name redacted) and CRS Legal Sidebar WSLG1059, *The Role of Domestic Law & UNHCR Guidance in Determining Eligibility for Refugee Status and*
(continued...)

individual alien applying for asylum having the burden of establishing that he/she is unable or unwilling to return to his/her home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, political opinion, or membership in a particular social group.[109] *Persecution* is not defined by either the INA or its implementing regulations, but has been construed to mean "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.... [It is] an extreme concept that does not include every sort of treatment our society regards as offensive."[110] Generalized violence or lawlessness may be distinguished from persecution,[111] as may be harms that are not seen as arising from the actions of the government or entities that the government cannot or will not control.[112] Any persecution must also be "on account of" a protected ground (i.e., race, religion, etc.), a phrase which has been taken to mean that the protected ground serves as "at least one central reason for the persecution."[113]

Those seeking asylum based on gang-related violence have often asserted persecution on account of membership in a particular social group or, less commonly, political opinion (i.e., an actual or imputed political opinion that they are opposed to the gangs).[114] The relevant social group has been defined in various ways—including (1) those who oppose (or are taking "concrete" or "active" steps to oppose) the gangs' activities;[115] (2) those who resist attempts to recruit them to the gang;[116] (3) former gang members who have renounced their membership;[117] (3) witnesses who have testified against the gangs;[118] and (4) families that have been affected by gang

(...continued)

Asylum, by (name redacted).

[109] *See generally* INA §208(b)(1)(B)(i), 8 U.S.C. §1158(b)(1)(B)(i). Certain aliens arriving at the U.S. border or a port of entry are required to show a "credible fear" of persecution in order to avoid removal or return to their home country. *See* INA §235(a)(2) & (b)(1)(B)(ii), 8 U.S.C. §1225(a)(2) & (b)(1)(B)(ii) (stowaways and certain arriving aliens, respectively); 8 U.S.C. §1232(a)(2)(A) (UACs from contiguous countries). However, with the exception of UACs from contiguous countries, credible fear generally does not factor into the asylum process since UACs are subject to formal removal proceedings under Section 240 of the INA, not expedited removal under Section 235. *See* 8 U.S.C. §1232(a)(5)(D)(i).

[110] Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995). *See also* Osaghae v. INS, 942 F.2d 1160, 1163 (7th Cir. 1991) ("'Persecution' means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate."); H.R. REP. NO. 95-1452, at 5, *as reprinted in* 1978 U.S.C.C.A.N. 4700, 4704 ("Generally [the] case law has described persecution as the infliction of suffering or harm under government sanction, upon persons who differ in a way regarded as offense (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments.").

[111] *See, e.g.*, Jutus v. Holder, 723 F.3d 105 (1st Cir. 2013) (application denied where alien noted only "widespread societal violence and inadequate police and judicial protection" in Guatemala); Escobar v. Holder, 698 F.3d 36, 39 (1st Cir. 2012) ("[B]eing a target for thieves on account of perceived wealth ... is merely a condition of living where crime is rampant and poorly controlled.").

[112] *Compare* Fuentes-Chavarria v. Holder, 562 Fed. App'x. 625, 629 (10th Cir. 2014) (evidence did not establish that the feared harms would occur "on behalf of the government or with the government's willful blindness") *with* Karki v. Holder, 715 F.3d 792, 807 (10th Cir. 2013) (in light of circumstances, government's failure to prevent or prosecute acts of a political party was sufficient to show the government would likely acquiesce).

[113] Crespin-Valladares v. Holder, 632 F.3d 117, 127 (4th Cir. 2011). A "central reason," in turn, has been described as one that is more than "incidental, tangential, superficial, or subordinate to another reason for harm." Quineros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009) (quoting *Matter of* J-B-N-, 24 I. & N. Dec. 208, 214 (BIA 2007)).

[114] *See, e.g.*, Castillo Sanchez v. U.S. Attorney General, 523 Fed. App'x 682 (11th Cir. 2013).

[115] *See, e.g.*, Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014).

[116] *See, e.g.*, Flores Munoz v. Holder, 560 Fed. App'x. 420 (5th Cir. 2014); *Matter of* S-E-G-, 24 I. & N. Dec. 579 (2008).

[117] *See, e.g.*, Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009).

[118] *See, e.g.*, Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013).

violence[119]—and with various degrees of success. In a number of cases, administrative and judicial tribunals have declined to recognize the proposed social group because it is amorphous, and the individuals making up the group would not be perceived as a group by the society in question.[120] However, such determinations generally reflect the tribunals' view of the evidence that the alien offered regarding social perceptions in his/her home society,[121] not *per se* rules as to what constitutes a particular social group.[122] In other cases, individual aliens' claims regarding their treatment at the hands of their alleged persecutors are not seen as credible, for example, because of inconsistencies in their stories.[123] Some aliens may also be statutorily barred from receiving asylum under the INA, although such bars seem unlikely to affect UACs who are not former gang members.[124]

UACs are treated the same as other aliens in terms of applications for asylum, with two notable exceptions, previously noted (see "Are children without immigration status eligible for relief from removal?"). First, all applications for asylum involving UACs must be heard by USCIS, regardless of whether the application involves an alien currently in removal proceedings. Claims involving aliens in proceedings—widely known as "defensive applications"—are otherwise heard exclusively by immigration judges, with only claims by aliens not in removal proceedings (i.e., "affirmative applications") being heard by USCIS.[125] However, Section 208 of the INA and its implementing regulations require that both defensive and affirmative applications by UACs be heard by USCIS.[126] Second, an alien's minority status could constitute an "extraordinary circumstance" that would permit an application for asylum to be filed more than one year after the alien's arrival in the United States.[127] Claims filed more than one year after arrival are

[119] *See, e.g.*, Perez-Perez v. Holder, 572 Fed. App'x. 508(4th Cir. 2014).

[120] *Compare* Ulloa Santos v. Attorney General, 552 Fed. App'x 197 (3d Cir. 2014) ("[T]he group appears to have been defined principally, if not exclusively, for purposes of this asylum case.") (internal citation and quotations omitted) *with* Olmos Borja v. Holder, 550 Fed. App'x 517, 519 (9th Cir. 2013) (finding the alien eligible for asylum).

[121] *See, e.g.*, *Flores Munoz*, 2014 U.S. App. LEXIS 8974, at *2 ("Though [the applicant] testified that members of a drug gang who killed her husband sought to recruit her to sell drugs for them and that she feared for her life because she turned down their requests, the evidence that she put forward does not compel the conclusion that Honduran society would view those who resist membership in drug gangs as a particular, visible group."); *Matter of* W-G-R-, 26 I. & N. Dec. 208, 222 (2014) ("scant evidence" produced by the applicant seen as insufficient). Significantly, in February 2014, the BIA rephrased the test for the cognizability of alleged social groups from one focused on "social visibility" to one focused on "social distinction." *See Matter of* W-G-R-, 26 I. & N. Dec. 208 (2014); *Matter of* M-E-V-G-, 26 I. & N. Dec. 227 (2014). Courts are still determining how this change may affect applications for asylum, including on gang-related grounds, although some commentators have opined that the new standard will make it more difficult for asylum applicants to prove their cases. *See, e.g.*, *Pirir-Boc*, 750 F.3d at 1085 (noting that the meaning of the term *particular social group* is "in flux, and it is premature to determine precisely how the rule [articulated in the BIA's recent decisions] will be implemented"); Ashley Huebner & Lisa Koop, New BIA Decisions Undermine U.S. Obligations to Protect Asylum Seekers, Nat'l Immigrant Justice Center, February 18, 2014, *available at* http://www.immigrantjustice.org/litigation/blog/new-bia-decisions-undermine-us-obligations-protect-asylum-seekers.

[122] *See, e.g.*, *Matter of M-E-V-G-*, 26 I. & N. Dec. at 251 (emphasizing that there is no "blanket rejection of all factual scenarios involving gangs," and that "[s]ocial group determinations are made on a case-by-case basis").

[123] *Compare* Boraj v. Holder, No. 12-4631, 559 Fed. App'x. 51, 53 (2d Cir. 2014) (applicant viewed as credible by the immigration judge) *with* Abrego-Centeno v. Attorney General, 552 Fed. App'x 130 (3d Cir. 2014) (applicant not seen as credible because he gave conflicting testimony).

[124] *See, e.g.*, INA §208(b)(2)(A)(iii) (aliens as to whom there are "serious reasons" to believe that they committed a "serious nonpolitical crime" outside the United States prior to their arrival are generally ineligible for asylum).

[125] *See* 8 C.F.R. §208.2(b).

[126] *See* INA §208(b)(3)(C), 8 U.S.C. §1158(b)(3)(C); 8 C.F.R. §208.2(a).

[127] *See, e.g.*, Ogayonne v. Mukasey, 530 F.3d 514, 519 (7th Cir. 2008); 8 C.F.R. §1208.4(a)(5)(ii).

otherwise barred absent the existence of "changed circumstances that materially affect the applicant's eligibility for asylum."[128]

How would considering UACs for admission as refugees—instead of asylum—change things?

The primary difference between refugees and asylees is the alien's location at the time he/she applies for such status. Eligibility for both refugee status and asylum depends upon the alien qualifying as a refugee,[129] as that term is defined by Section 101(a)(42) of the INA:

> The term "refugee" means (A) any 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, or (B) in such special circumstances as the President after appropriate consultation ... may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[130]

However, refugee status may only be granted to aliens who apply for such status while they are outside the United States,[131] while asylum may only be granted to aliens who apply for such status at the U.S. border or inside the United States.[132] As a practical matter, considering children or other persons from Central American countries for refugee status—as opposed to asylum—as some have proposed would thus mean that these individuals would not need to travel through Mexico (and potentially other countries) to the United States.[133] (Indeed, in fall 2014, the Obama Administration implemented a program which provides for unmarried children under 21 years of age residing in El Salvador, Guatemala, or Honduras whose parents are "legally present in the United States" to be considered for refugee status, or parole into the United States.)[134] Legally, though, individuals would have to meet the same requirements discussed previously (see "Can UACs obtain asylum due to gang violence in their home countries?") in terms of showing that they have suffered past persecution, or have a well-founded fear of future persecution on account

[128] INA §208(a)(2)(B) & (D), 8 U.S.C. §1158(a)(2)(B) & (D).

[129] *See* INA §207(c)(1), 8 U.S.C. §1157(c)(1) (refugee status); INA §208(b)(1)(A), 8 U.S.C. §1158(b)(1)(A) (asylum).

[130] INA §101(a)(42), 8 U.S.C. §1101(a)(42).

[131] *See* INA §207, 8 U.S.C. §1157 (refugees outside United States).

[132] *See* INA §208(a)(1), 8 U.S.C. §1158(a)(1) (aliens "physically present in the United States" or "arriving in the United States (whether or not at a designated port of arrival)").

[133] *See, e.g.*, Richard Cowan, *Calls in U.S. Congress for Refugee Status for Central American Kids*, Reuters, June 27, 2014, *available at* http://www.reuters.com/article/2014/06/27/us-usa-immigration-children-idUSKBN0F229L20140627.

[134] *See* U.S. Citizenship & Immigr. Servs., In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), *available at* http://www.uscis.gov/CAM (last updated June 1, 2015). Parents are deemed to be "legally present" for purposes of this program if they are LPRs or parolees, or have been granted temporary protected status, deferred action, deferred enforced departure, or withholding of removal. *Id*. Other eligibility requirements also apply. *See id*. The INA generally contemplates that refugees be outside their country of nationality. INA §101(a)(42), 8 U.S.C. §1101(a)(42). However, it permits so-called "in-country processing" of refugees under certain conditions. *See id*.; INA §207(e), 8 U.S.C. §1157(e). For more on in-country processing, see CRS Report R44020, *In-Country Refugee Processing: In Brief*, by (name redacted).

of a statutorily protected ground (i.e., race, religion). Fear of generalized violence or lawlessness would not necessarily suffice.[135]

There are, however, a couple of other notable distinctions between refugee status and asylum. One is that refugees are subject to the broader criminal grounds of inadmissibility (although with waivers available for many grounds for humanitarian, family unity, and public interest purposes), while asylees are ineligible for asylum after entry if they have been convicted of an aggravated felony.[136] Another is that applicants for refugee status must be sponsored by a "responsible person or organization," who guarantees the applicant's transportation from his or her present abode to his or her place of resettlement in the United States.[137] There is also generally a limit on the maximum number of refugees admitted to the United States each year,[138] and applicants who are accepted are typically placed on "waiting lists," from which "refugees or groups of refugees may be selected ... in a manner that will best support the policies and interests of the United States."[139] Neither sponsorship nor placement on a waiting list occurs with asylees. It is also worth noting that aliens seeking asylum may appeal the denial of their application, while "[t]here is no appeal" from a denial of an application for refugee status (although an alien could potentially apply for refugee status again).[140]

Derivative status may be generally granted to the spouses and minor children of those granted both refugee status and asylum.[141] Parents are not eligible for such derivative status. Both refugees and asylees may also become LPRs after one year.[142]

[135] *See supra* notes 109-110 and accompanying text.

[136] *Compare* INA §207(c)(3) (refugee status), 8 U.S.C. §1157(c)(3) ("The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.") *with* INA §208(b)(2)(A)(ii) & (B)(i) (asylum), 8 U.S.C. §1158(b)(2)(A)(ii) & (B)(i) ("Paragraph (1) [authorizing the granting of asylum] shall not apply to an alien if [it is determined that the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States ... For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.").

[137] 8 C.F.R. §207.2(c).

[138] *See generally* INA §207(a)(2), 8 U.S.C. §1157(a)(2) ("Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest."). However, the "subsection (b)" referred to here permits the President to set a number for refugees to be admitted to the United States during a succeeding period of up to one year in response to an "emergency refugee situation" after determining, following "appropriate consultation," that (1) an unforeseen refugee situation exists; (2) the admission of certain refugees in response to such situation is "justified by grave humanitarian concerns or ... otherwise in the national interest"; and (3) the admission of these refugees cannot be accomplished under the pre-existing "quota."

[139] 8 C.F.R. §207.5.

[140] 8 C.F.R. §207.3(b).

[141] 8 C.F.R. §207.7(a) (eligible derivatives of refugees); 8 C.F.R. §208.21(a) (spouses and children of asylees).

[142] INA §209(a) & (b), 8 U.S.C. §1159(a) & (b). As a technical matter, refugees are required to apply for such status, while with asylees, application is optional.

Rights, Privileges, and Benefits

Do UACs have a right to counsel at the government's expense in removal proceedings?

Two separate provisions of federal law address UACs' access to legal counsel. One provision—Section 235 of the TVPRA, as amended—generally requires the Secretary of HHS to "ensure" that UACs in HHS or DHS custody "have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking."[143] The other provision—Section 462 of the Homeland Security Act, as amended—requires the Director of the ORR at HHS to develop a plan to "ensure that qualified and independent legal counsel is timely appointed to represent the interests of each child."[144] However, because both provisions describe such access as being "consistent with" Section 292 of the INA and other provisions of federal law, they have not been construed as requiring the appointment of counsel at the government's expense since these provisions require that any such counsel be "at no expense to the Government."[145]

In several cases, UACs and their advocates have challenged Section 292 and the government's corresponding failure to provide counsel to UACs in removal proceedings, including on the grounds that it violates the Due Process Clause of the U.S. Constitution.[146] These challenges sometimes note that children in other types of civil proceedings have been found to have a categorical right to counsel at the government's expense, regardless of their individual circumstances. They often also note that the consequences of potential removal for aliens are comparable to the consequences of these other proceedings.[147] Courts have, to date, rejected these arguments, declining to recognize a categorical right to counsel at the government's expense for UACs or other aliens. However, at least four federal courts of appeal[148] have opined that the Due Process Clause could potentially require the appointment of counsel on a case-by-case basis for individual aliens who are incapable of representing themselves due to "age, ignorance, or mental capacity."[149] Section 504 of the Rehabilitation Act has also been construed in such a way that it

[143] P.L. 110-457, §235, 122 Stat. 5074 (December 23, 2008) (codified, as amended, at 8 U.S.C. §1232(c)(5)).

[144] P.L. 107-296, §462, 116 Stat. 2202 (November 25, 2002) (codified, as amended, at 6 U.S.C. §279(b)(1)(A)).

[145] 8 U.S.C. §1362. *See also* INA §208(d)(4), 8 U.S.C. §1158(d)(4) (requiring that applicants for asylum be advised of the "privilege" of being represented by counsel and given a list of persons who can provide *pro bono* representation); INA §238(b)(4)(B), 8 U.S.C. §1228(b)(4)(B) (providing that aliens convicted of aggravated felonies who are subject to expedited removal under Section 238 of the INA shall "have the privilege of being represented (at no expense to the government) by such counsel ... as the alien shall choose"); INA §240(a)(1)(E), 8 U.S.C. §1229a(a)(1)(E) (aliens placed in formal removal proceedings are to be given written notice that they may be represented by counsel); INA §240(b)(4)(A), 8 U.S.C. §1229a(b)(4)(A) (aliens in removal proceedings have right to counsel at no expense to the government).

[146] *See*, *e.g.*, Gonzalez Machado v. Ashcroft, Order Granting Motion to Dismiss, No. CS-01-0066-FVS (E.D. Wash. June 18, 2002) (copy on file with the authors); Perez-Funez v. District Director, 619 F. Supp. 656 (C.D. Cal. 1985).

[147] For further discussion of the other types of civil proceedings in which children have been found to have a categorical right to counsel at government expense, and the ways in which such proceedings may be distinguishable from removal proceedings, see generally CRS Report R43613, *Aliens' Right to Counsel in Removal Proceedings: In Brief*, by (name redacted), at notes 60-64 and accompanying text.

[148] *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 569 n.3 (6th Cir. 1975); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990); Ruiz v. INS, 787 F.2d 1294, 1297 n.3 (9th Cir. 1996); Barthold v. INS, 517 F.2d 689, 690-691 (5th Cir. 1975).

[149] *Cf.* Wade v. Mayo, 334 U.S. 672, 683-684 (1948) ("There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves in a prosecution of a relatively simple nature.... Where such (continued...)

could result in the appointment of counsel at the government's expense for unrepresented immigration detainees with "serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings."[150] Certain UACs could potentially be encompassed by the protections of Section 504.

Does Section 292 of the INA bar the federal government from paying for counsel for UAC?

The federal government's 2014 announcement that it would award $2 million in grants to enroll "about 100 lawyers and paralegals" to represent children in immigration proceedings[151] prompted questions about whether the government is barred, under Section 292 of the INA, from using appropriated funds to provide counsel to UACs in removal proceedings. As previously noted (see "Do UACs have a right to counsel at the government's expense in removal proceedings?"), Section 292 generally governs aliens' right to counsel, and provides that,

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose.[152]

Some have previously suggested that this provision, by itself or in conjunction with 5 U.S.C. §3106—which generally bars agencies from "employ[ing] an attorney or counsel for the conduct of litigation in which the United States ... is a party"—precludes the government from providing or otherwise paying for aliens' counsel in removal proceedings.[153] Those making this argument seemingly construe the language about aliens' "privilege" to have counsel at their own expense to mean that the government may not pay for counsel for them. However, this interpretation does not appear to have been adopted by any court, and other interpretations could be advanced. In particular, an argument could be made that these provisions only restrict aliens' ability to claim an

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incapacity is present, the refusal to appoint counsel is a denial of due process of law.").

[150] Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). In response to the district court's decision in *Franco-Gonzales*, DOJ and DHS adopted a "nationwide policy" regarding unrepresented immigration detainees with "serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings." Among other things, this policy calls for procedures that would make "qualified representatives"—a term which includes, but is not limited to licensed attorneys—available to such individuals at the government's expense or on a *pro bono* basis. Dep't of Justice, Press Release, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions, April 22, 2013, *available at* http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html.

[151] *See, e.g.*, Kirk Semple, *Youths Facing Deportation To Be Given Legal Counsel*, N.Y. TIMES, June 6, 2014, *available at* http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?_r=0.

[152] *See* 8 U.S.C. §1362.

[153] *See, e.g.*, Escobar Ruiz v. INS, 787 F.2d 1294 (9th Cir. 1986) (rejecting the argument that Section 292 of the INA bars the payment of attorney fees, pursuant to the Equal Access to Justice Act (EAJA), to prevailing plaintiffs); *Aguilera-Enriquez*, 516 F.2d at 568 (noting that the immigration judge in this case had found that Section 292 of the INA barred the provision of appointed counsel for the plaintiff); Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings, memorandum from David A. Martin, General Counsel, INS, to T. Alexander Aleinikoff, Executive Associate Commissioner, INS, December 21, 1995 (reading INA §292, in conjunction with 5 U.S.C. §3106, as barring the appointment of counsel for aliens in removal proceedings) (copy on file with the authors).

entitlement to counsel at the government's expense, and do not preclude the government from paying for aliens' counsel pursuant to other provisions of law or at its discretion.[154]

Are there legal requirements concerning consular notification and access when an alien child is taken into federal custody?

Along with the vast majority of countries, the United States is a party to the Vienna Convention on Consular Relations (VCCR), a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements.[155] Pursuant to Article 36 of the VCCR, when a national of a State party (i.e., country) is arrested or otherwise detained in another State party, appropriate authorities within the arresting State must inform the person arrested "without delay" of the ability to have his/her consulate notified. The VCCR does not require the arresting State to notify the appropriate consular officials in every instance; rather, it requires the arresting State to notify the foreign national in its custody that he/she has the option of having his/her consulate notified. A foreign consular officer also is provided the right to communicate and be provided access to a detained national, including the ability to visit the national in the detention facility and arrange legal representation.[156] DHS regulations require that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States."[157]

The United States also has bilateral agreements with a number of countries that require consular notification in the event that one of the parties arrests a national of the other party.[158] Most UACs encountered by CBP along the U.S.-Mexico border are from countries (including Mexico) that are parties to the VCCR but do not have separate agreements requiring mandatory consular notification.[159] The VCCR identifies consular functions as including "safeguarding ... the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons."[160] Some have argued that, consistent with the VCCR's recognition of this function, consular officers should be notified whenever a UAC or other alien child is taken into custody by immigration authorities,[161] but current DHS regulations provide for mandatory consular notification only when a bilateral agreement expressly requires it.[162]

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[154] *See* Views Concerning Whether It Is Legally Permissible to Use Discretionary Funding for Representation of Aliens in Immigration Proceedings, memorandum from David A. Martin, Principal Deputy General Counsel, Department of Homeland Security, to Thomas J. Perrelli, Associate Attorney General, Department of Justice, December 10, 2010 (copy on file with the authors). General principles of appropriations law could, however, potentially impose certain limitations on federal agencies' funding of counsel for aliens since appropriations may only be used for the purposes for which they were made. *See generally* 31 U.S.C. §1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

[155] Vienna Convention on Consular Relations, done April 24, 1963, 21 U.S.T. 77 [hereinafter "VCCR"].

[156] *Id.*, at art. 36.

[157] 8 C.F.R. §236.1(e). Countries with mandatory consular notification agreements are notified of the detention of one of their nationals even if the arrested aliens do not wish to have their consulate notified. *Id*.

[158] *See* State Dep't, Bureau of Consular Affairs, Countries and Jurisdictions with Mandatory Notifications, *available at* http://travel.state.gov/content/travel/english/consularnotification/countries-and-jurisdictions-with-mandatory-notifications.html (last accessed June 26, 2014).

[159] Compare id. with CRS Report R43599, *Unaccompanied Alien Children: An Overview*, by (name redacted) and (name redacted), Figure 1.

[160] VCCR, at art. 5.

[161] *See* Betsy Cavendish & Maru Cortazar, Children at the Border: The Screening, Protection and Repatriation of (continued...)

The United States may also enter into both legally binding and nonlegal arrangements with foreign countries concerning the repatriation of their nationals.[163] In recent years, DHS and local ICE or CBP field offices have entered nonlegal arrangements concerning the repatriation of Mexican nationals, including UACs. These arrangements typically call for notification of Mexican consular officials and other Mexican authorities when a UAC is to be repatriated, and provide for repatriation to occur during daylight hours.[164]

In addition to consular notification requirements relating to the detention of a foreign national, the VCCR also provides that appropriate authorities within the host country notify the appropriate consular post "without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State."[165]

Are UACs eligible for Deferred Action for Childhood Arrivals?

UACs who entered the United States in FY2014 are generally not eligible for deferred action—a type of temporary relief from removal, the receipt of which can result in aliens receiving work authorization and certain federal financial assistance—under the Deferred Action for Childhood Arrivals (DACA) initiative.[166] (As of the date of this report, the DACA initiative is still being implemented, although the Obama Administration has been enjoined from implementing a proposed expansion of DACA, as well as from establishing a DACA-like program for certain unlawfully present aliens who are the parents of U.S. citizens or LPRs.)[167] Pursuant to the DHS guidelines regarding DACA, eligibility is limited to aliens who have resided in the United States since June 15, 2007, and who were physically present in the United States on June 15, 2012.[168]

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Unaccompanied Mexican Minors, at 25, 46-47 (2011), *available at* http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

[162] 8 C.F.R. §236.1(e).

[163] Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally binding international agreement. The repatriation arrangements made between Mexico and DHS in recent years include language evidencing an intent for the arrangements not to be legally binding in nature. For background, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by (name redacted) , and State Department Office of the Legal Adviser, *Guidance on Non-Binding Documents*, at http://www.state.gov/s/l/treaty/guidance/.

[164] A compendium of several of these arrangements can be viewed at http://www.ice.gov/doclib/foia/repatriation-agreements/el-paso-tx-local-arrangement-for-repatriation-of-mexican-nationals.pdf. A template for local arrangements between CBP or ICE field offices and Mexican Consulates General can be viewed at http://www.ice.gov/doclib/foia/repatriation-agreements/local-arrangements-repatriation-of-mexican-nationals-full-list.pdf. The 2008 TVPRA includes a provision calling for the Secretary of State to negotiate agreements with Mexico and Canada concerning similar matters. P.L. 110-457, §235(a)(2)(C), codified at 8 U.S.C. §1232(a)(2)(C). However, the current arrangements between local ICE and CBP offices and Mexican authorities implement DHS-Mexico arrangements that predate the 2008 TVPRA.

[165] VCCR, art. 37.

[166] Federal regulations provide that aliens granted deferred action—through DACA or upon another basis—may be granted work authorization, provided they establish an "economic necessity for employment." 8 C.F.R. §274a.12(c)(14). Because aliens granted deferred action are deemed to be lawfully present, they could potentially also be seen as eligible for certain "public benefits" whose provision to unlawfully present aliens is restricted. *See* CRS Legal Sidebar WSLG923, *DACA Beneficiaries' Eligibility for In-State Tuition in Virginia*, by (name redacted).

[167] For further information, see generally CRS Legal Sidebar WSLG1437, *Fifth Circuit Declines to Lift Injunction Barring Implementation of the Obama Administration's 2014 Deferred Action Programs*, by (name redacted) and (name redacted) .

[168] Dep't of Homeland Security, Deferred Action for Childhood Arrivals, *available at* http://www.dhs.gov/deferred-(continued...)

Such residence must have been "continuous," which is generally construed to mean that any absences from the United States are "brief, causal, and innocent."[169] Thus, even if individual UACs happened to be re-entering the United States after a prior period of presence, the requirement as to continuous residence could present issues.

Immigration officials may, however, still grant deferred action to aliens outside of DACA if they have prioritized other aliens for removal, or if humanitarian factors weigh in favor of allowing individual aliens to remain in the United States.[170]

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action-childhood-arrivals (last accessed June 23, 2014).

[169] *Id*. This reflects the standard that the Supreme Court articulated in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), for determining whether a return to the United States following a short absence constituted an "entry," such that the alien was subject to what were then known as the grounds of excludability.

[170] Insofar as they are recent arrivals, UACs could be seen as priorities for removal under current guidance from DHS officials regarding prosecutorial discretion. *See*, *e.g.*, Jeh Charles Johnson, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, November 20, 2014, *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (designating "new immigration violators"—which includes aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014—as the second priority for removal, after aliens who pose threats to national security, border security, and public safety). However, these guidelines are not legally binding, and individual UACs could potentially have circumstances that are seen as making them a lower priority for removal (e.g., having family ties in the United States, or being a victim or witness of a crime).