

On May 31, 2019, USCIS issued a memorandum on “Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children”, which impacts how children’s asylum claims will be adjudicated. This Practice Alert provides information as to what the memo seeks to change about children’s asylum and how to best respond to this memo for pending asylum cases.

We do not yet fully know how the government will put this memo into effect and our recommendations below are subject to change. We will update this alert as developments occur. Please ensure that you check with your pro bono mentor for more detailed advice.

### **What does the Memo Change?**

USCIS is changing long standing policy that minors designated as Unaccompanied Alien Children (UACs) retain that designation and its accompanying protections throughout the life of their claim in most situations. The practical impact of this change strips many children of their right to apply for asylum with USCIS and have an interview with an asylum officer. This system is less adversarial and more child-friendly than a court. If a child did not get granted asylum at the asylum office, the child had an automatic chance to have their case heard again in front of an immigration judge.

This memo seeks to change this practice by cutting out the first step and making most children go directly to an immigration judge.

### **What is a UAC?**

A UAC is a child who does not have lawful immigration status in the United States, is under 18 years of age, and has no parent or legal guardian in the United States available to provide care and custody. UACs generally cross the border without a parent or guardian.

Under current policy, a child remains a UAC (with the legal protections described above) even if they turn 18 or are reunified with their parent(s). This makes sense given the current system of children’s detention and adjudication, as it allows for child-friendly treatment and does not punish families for reunifying. The UAC status was only taken away with an affirmative action by the government against an individual child, which was not common practice.

### **What does the USCIS Memo say about when a child is no longer a UAC?**

Under the new Memo, a child bears the burden of showing they are a UAC at the time their I-589 was filed. This means that the child must show that they meet all three prongs.

- a. Age – must be under 18
- b. Legal status – must be without lawful status
- c. Available parent or guardian – it appears that the mere presence of a biological parent in the US could be enough to disqualify a child from UAC status based on this memo. The burden is on the child to establish their parent is **unwilling/unable** to care for them.

Asylum officers are instructed to conduct their own factual inquiry to determine if a child meets the UAC definition. This means inquiry into age, legal status, and the availability of a parent/legal guardian to provide care for the child. Asylum officers are also instructed to collect testimony and documentary evidence to support their jurisdictional determination.

### **When does the new USCIS Memo go into effect?**

The USCIS memo states that “any USCIS decision” issued 30 days after the date of the memo (May 31st 2019) needs to follow the new framework. Based on this language, it appears that pending applications where no decision has been issued will likely be affected. Of course, it remains to be seen how it will be applied.

From a conservative strategy standpoint, assume that this policy will apply to all new or pending applications until we see how the memo is put into effect.

### **What should I do for my pro bono client?**

Until we have more information as to how the USCIS Memo will be deployed, the following is our advice:

- 1) If you have a case where the I-589 has already been filed, make sure you collect all evidence that at the time of filing that the child met the UAC definition:
  - a. Their birth certificate
  - b. Their ORR file to show dates they were in custody
  - c. The Notice to Appear that was issued as proof that DHS has charged them with a violation of immigration law and alleged they are not citizens of the US
  - d. Information about the whereabouts of their biological parents or legal guardians at time of filing; and if they are in the U.S., how they were unable/unwilling to care for the child
  - e. Be prepared to make the argument in your letter brief you will file with the asylum office before their interview, that your client meets the UAC definition at the time of filing.
- 2) If you have an asylum case where you have not yet filed the I-589 and your client is living with a biological parent or legal guardian:
  - a. File before June 30<sup>th</sup> in order to preserve asylum office jurisdiction. If you do not file before June 30<sup>th</sup>, you will be issued a no-jurisdiction finding by USCIS because your client is no longer a UAC according to the legal definition.
- 3) If you have an asylum case where you have not yet filed the I-589 and your client is living with a person who is not a biological parent or guardian:
  - a. If you are also pursuing SIJS be sure to file the I-589 BEFORE filing custody or guardianship
  - b. Be sure to have evidence of age, lack of legal status, information and evidence about the whereabouts of their biological parents, and the ORR file (see item 1)
  - c. File your I-589 and be prepared to make the argument in your letter brief that your client meets the UAC definition at the time of filing of the I-589.
- 4) If you have an asylum case where your client is currently detained, they continue to meet the UAC definition but you must be able to address the whereabouts of parents and/or legal guardians, and how/if they are unable/unwilling to care for them
  - a. For example, if your client's dad lives in the US but has abandoned him and has no contact with him, that is an argument that he is not available to provide care for your client.

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