



# INITIAL JURISDICTION OVER UC ASYLUM CLAIMS

*Matter of M-A-C-O-, the Lafferty Memo, and JOP v. DHS*

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## I. Introduction

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 conferred initial jurisdiction for asylum claims filed by unaccompanied children (UCs) to U.S. Citizenship & Immigration Services (USCIS) asylum officers, even though UCs are in removal proceedings.<sup>1</sup> This change is critical for UCs because it means they have the opportunity to have their asylum claim heard in the non-adversarial setting of an affirmative asylum interview at USCIS, rather than in immigration court. An unaccompanied child, referred to in the law as an “unaccompanied alien child” or “UAC,” is defined as a child who “(A) has no lawful immigration status in the United States; (B) has not attained eighteen years of age; and (C) with respect to whom – (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”<sup>2</sup>

On October 16, 2018, the Board of Immigration Appeals (BIA) published *Matter of M-A-C-O-*, the first precedential decision concerning initial jurisdiction over asylum applications filed by UCs after their eighteenth birthday.<sup>3</sup> In *Matter of M-A-C-O-*, the BIA held that immigration judges have the power to determine initial jurisdiction over asylum applications filed by UCs. The BIA further held that, because *M-A-C-O-* was over eighteen years old at the time of filing, the immigration judge correctly found that she had jurisdiction over his asylum application rather than USCIS. *Matter of M-A-C-O-* did not address the parental availability element of the UC definition. On May 31, 2019, USCIS updated its policies concerning initial jurisdiction over applications filed by UCs following *Matter of M-A-C-O-*.<sup>4</sup> The new policy memorandum, known as the Lafferty Memo, directs asylum officers to independently determine whether an applicant met the UC definition at the time of filing.<sup>5</sup> Advocates challenged the Lafferty Memo in federal district court in *JOP v. DHS*, which is currently pending.<sup>6</sup> While *JOP* is pending, the district court has issued an injunction preventing USCIS from implementing the Lafferty Memo nationwide, and requiring USCIS to follow its prior policy, known as the Kim Memo. However,

<sup>1</sup> 8 U.S.C. § 1158(b)(3)(C).

<sup>2</sup> 6 U.S.C. § 279(g)(2).

<sup>3</sup> *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018).

<sup>4</sup> John Lafferty, Chief, USCIS Asylum Division, Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019) (hereinafter “Lafferty Memo”).

<sup>5</sup> See *id.* at 2.

<sup>6</sup> *JOP v. DHS*, 8:19-cv-01944 (D. Md.).

USCIS was undermining the injunction by deferring to immigration judge assertions of jurisdiction and reinterpreting what constitutes a de-designation of UC status pursuant to the Kim Memo. On December 21, 2020, the district court in *JOP* amended the preliminary injunction to stop USCIS from deferring to immigration judge assertions of jurisdiction. However, it has not enjoined USCIS's reinterpretation of what constitutes an affirmative act of de-designation of UC status.

*Matter of M-A-C-O-* and the Lafferty Memo follow several agency policy changes beginning in 2017 that have attempted to recast UC status as fluid and suggested that it should be reassessed throughout the course of a minor's immigration proceedings.

This practice advisory provides an overview of the current state of UC asylum jurisdiction following the *Matter of M-A-C-O-* decision and issuance of the Lafferty Memo. It also discusses the ongoing *JOP v. DHS* litigation and gives some arguments and tips for practitioners to help them advocate for their UC clients to receive the statutory protections afforded by the TVPRA.

## II. Policies and Practices on Initial UC Asylum Jurisdiction Prior to *Matter of M-A-C-O-*

### A. Department of Homeland Security (DHS)

#### 1. USCIS

Following the passage of the TVPRA in 2008, USCIS began implementation of the initial jurisdiction provision on March 23, 2009.<sup>7</sup> To determine whether it had jurisdiction over an application filed by a UC in removal proceedings, USCIS made an independent factual inquiry in each case to determine UC status, assessed at the time of filing.<sup>8</sup> The USCIS Ombudsman found in 2012 that this process created “delay and confusion.”<sup>9</sup> On May 28, 2013, USCIS issued the memorandum “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (Kim Memo).<sup>10</sup> Under the Kim Memo, if Customs & Border Protection (CBP) or Immigration & Customs Enforcement (ICE) already determined that the applicant is a UC, USCIS adopts that determination without further factual inquiry, unless there has been an affirmative act by the Department of Health & Human Services (HHS), ICE, or CBP to terminate the UC designation. This is true even if the child has since turned eighteen or reunified with a parent or legal guardian.<sup>11</sup> Consequently, since the Kim Memo was implemented in 2013, many UCs who had turned eighteen or reunified with a parent or legal guardian prior to filing their asylum applications retained the protections of the TVPRA and were able to have their cases heard initially before USCIS. As discussed above

<sup>7</sup> Joseph E. Langlois, Chief, USCIS Asylum Division, “Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (Mar. 25, 2009) (hereinafter Langlois Memo) <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/jurisdiction-provision-tvpra-alien-children2.pdf>.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> USCIS Ombudsman, “Ensuring a Fair and Effective Asylum Process for Unaccompanied Children,” 1 (Sept. 20, 2012), <https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac.pdf> (hereinafter USCIS Ombudsman).

<sup>10</sup> Ted Kim, Acting Chief, Asylum Division, “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (May 28, 2013).

<sup>11</sup> *Id.* at 2.

and in further detail in Section II.C.2, on May 31, 2019, following *Matter of M-A-C-O*, USCIS issued a new memorandum that changed this policy, effective June 30, 2019, but that is currently enjoined.

## 2. Other DHS Agencies

On February 20, 2017, DHS issued a memorandum announcing (among other things) an upcoming change in the processing of UC cases.<sup>12</sup> It departed from previous DHS practice, which had maintained UC status after a child was reunified with their parent, and instead characterizes UCs residing with parents and legal guardians as no longer meeting the statutory definition of a UC.<sup>13</sup> The memorandum also announced that USCIS, CBP, and ICE will issue uniform written guidance on UC classification including “standardized review procedures” to confirm UC status after the initial designation.<sup>14</sup> This guidance has not yet been issued.<sup>15</sup>

DHS issues Notices of Termination of UC Status in some cases where a UC has turned eighteen or has reunified with a parent or legal guardian.<sup>16</sup> Anecdotally, this is a rare occurrence, although practitioners have reported an uptick since DHS’s 2017 memorandum.<sup>17</sup> As discussed above, under the terms of the Kim Memo, these notices are viewed as an “affirmative act” that would preclude the asylum office from automatically adopting a previous UC designation.

### B. Executive Office for Immigration Review (EOIR)

Individual immigration judge practices concerning UC asylum applicants over the age of eighteen have varied in the past. However, following the Kim Memo, many judges would administratively close cases of UCs seeking asylum at the asylum office without any factual inquiry into their continued status as UCs.<sup>18</sup> A minority of immigration judges attempted to take jurisdiction of UC asylum cases once the child turned eighteen or reunified with a parent, but this was not the general practice.<sup>19</sup> On December 20, 2017, the Executive Office for Immigration Review (EOIR) released a memorandum that included new guidance for UC cases.<sup>20</sup> The memorandum describes UC status as “not static” because a minor’s age and accompaniment status may change.<sup>21</sup> It further instructs immigration judges to ensure that a UC remains a UC at the time their case is

<sup>12</sup> Sec. John Kelly, “Implementing the President’s Border Security and Immigration Enforcement Improvements [sic] Policies” (Feb. 20, 2017).

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> See ILRC, Unaccompanied Minors & the New Executive Orders (Mar. 21, 2017) [http://www.ilrc.org/sites/default/files/resources/uacs\\_under\\_trump\\_administration\\_final\\_3.21.17.pdf](http://www.ilrc.org/sites/default/files/resources/uacs_under_trump_administration_final_3.21.17.pdf).

<sup>16</sup> See Catholic Legal Immigration Network, Practice Advisory on Strategies to Combat Government Efforts to Terminate “Unaccompanied Child” Determinations, at 1, 26, 41 (2017) (hereinafter “CLINIC”), [https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-\(May-2017\).pdf](https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-(May-2017).pdf).

<sup>17</sup> See Catholic Legal Immigration Network, Call for examples of termination of “unaccompanied child” designations, <https://cliniclegal.org/resources/call-examples-termination-unaccompanied-child-designations>.

<sup>18</sup> In the wake of the Attorney General’s ruling in *Matter of Castro-Tum*, 27 I & N Dec. 187 (A.G. 2018), administrative closure is currently unavailable in most circuits.

<sup>19</sup> This statement is based on anecdotal evidence only, although one example is the underlying immigration court decision in *Matter of M-A-C-O*.

<sup>20</sup> Mary Beth Keller, Chief Immigration Judge, EOIR, OPM 17-03, Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children, Dec. 20, 2017, <https://www.justice.gov/eoir/file/oppm17-03/download> (hereinafter “OPPM 17-03”).

<sup>21</sup> *Id.* at 7.

adjudicated.<sup>22</sup> This memorandum represents a shift in agency practice away from generally accepting prior UC designation rather than re-assessing UC status.

### III. Summary of *Matter of M-A-C-O-*

#### A. Factual Background

The respondent in *M-A-C-O-* arrived in the United States when he was seventeen.<sup>23</sup> At the border, he was determined to be a UC and placed in removal proceedings.<sup>24</sup> He was unable to file his asylum application before his eighteenth birthday, but was never affirmatively stripped of his UC designation.<sup>25</sup> He filed an asylum application before USCIS after he turned eighteen.<sup>26</sup> At his next Master Calendar hearing, the immigration judge found that she had initial jurisdiction over his asylum claim because he had turned eighteen and had therefore ceased to be a UC before the asylum application was filed.<sup>27</sup> After the immigration judge denied the asylum application, the respondent appealed on the grounds that, because of his UC status, USCIS had initial jurisdiction over his application.<sup>28</sup>

#### B. Decision

The BIA held that the TVPRA does not: 1) prevent immigration judges from determining whether they have initial jurisdiction over an application filed by a UC after they turn eighteen, or 2) require that the DHS and HHS determinations of UC status be binding on immigration judges.<sup>29</sup> It also noted that OPPM 17-03 states that UC status is not static and may change, and that judges should ensure that a UC is a UC when adjudicating a case.<sup>30</sup> The BIA went on to find that the respondent in *Matter of M-A-C-O-* was no longer a UC at the times he filed his asylum applications with USCIS and the immigration court because he was over eighteen years of age. Accordingly, the BIA found that the initial jurisdiction provision of the TVPRA did not apply to his case and affirmed the immigration judge's exercise of initial jurisdiction.

In considering the impact of the Kim Memo, the BIA stated that because the policy set forth in the memo is not embodied in a regulation, it does not have the force of law and therefore is not binding on the immigration judges or the BIA (though it may be relied upon to the extent it is persuasive). It also noted that the Kim Memo does not limit immigration judges' authority to determine UC status or initial jurisdiction.<sup>31</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *M-A-C-O-*, 27 I&N Dec. at 477.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 477-78.

<sup>28</sup> *Id.* at 478.

<sup>29</sup> *Id.* at 479.

<sup>30</sup> OPPM 17-03, at 7-8.

<sup>31</sup> *M-A-C-O-*, 27 I&N Dec. at 479-80.

## C. Initial UC Asylum Jurisdiction Going Forward

### 1. Do Immigration Judges *Have* to Take Jurisdiction?

No. The ruling in *Matter of M-A-C-O-* does not expressly mandate that immigration judges take initial jurisdiction over asylum claims for UCs who are over the age of eighteen. The BIA held that immigration judges have the authority to determine *whether* they have jurisdiction. While finding that immigration judges are not bound by prior UC designations, the BIA did not hold that EOIR jurisdiction is automatic or mandatory in such cases.<sup>32</sup> In practice however, many immigration judges will probably read the decision as mandating them to take jurisdiction in any case where a UC files their asylum application after turning eighteen, so be prepared to make these arguments.

### 2. USCIS and the Lafferty Memo

On May 31, 2019, USCIS issued the “Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children” memorandum (Lafferty Memo).<sup>33</sup> It cites to *Matter of M-A-C-O-*, recognizing that the decision does not strip USCIS of its authority to determine whether an application was filed by a UC, but rather that both USCIS and EOIR have authority to make their own jurisdictional determinations.<sup>34</sup> Nonetheless, the Lafferty Memo uses *Matter of M-A-C-O-* as a basis to change USCIS’s own policies on determining initial jurisdiction of UC asylum cases.

The Lafferty Memo instructs USCIS to return to making “independent factual inquiries in all cases in order to determine whether the individual met the [UC] definition *on the date of filing*,” as it did prior to the Kim Memo.<sup>35</sup> It also instructs USCIS to return to using the asylum interview to assess UC status and to reject jurisdiction after a completed interview if the applicant is found not to be a UC, which the USCIS ombudsman had previously found to be unfair and wasteful of asylum office resources.<sup>36</sup>

In a purported effort to “ensure that USCIS is making these jurisdictional determinations in a manner consistent” with immigration judges under *Matter of M-A-C-O-*, the Lafferty Memo instructs asylum officers to assess whether the applicant was under eighteen years old at the time of filing.<sup>37</sup> Going further than *Matter of M-A-C-O-*, the Lafferty Memo also instructs asylum officers to determine accompaniment status of UC applicants.<sup>38</sup> In particular, where an applicant has a parent or legal guardian in the United States, the applicant

<sup>32</sup> It is also not clear that an immigration judge has the statutory authority to make or change a UC status determination. EOIR is not one of the federal agencies assigned to make UC designations under the TVPRA. In *M-A-C-O-* the BIA relies on provisions of the TVPRA that outline rights of UCs in removal proceedings to support the view that the statute “appears to contemplate that an Immigration Judge can independently evaluate a respondent’s [UC] status to determine his or her eligibility for relief from removal.” *Id.* at 479 n. 2.

<sup>33</sup> See Lafferty Memo.

<sup>34</sup> *Id.* at 2. However, where EOIR asserts jurisdiction, it instructs USCIS to defer to that determination. *Id.* at 4 n. 5.

<sup>35</sup> While the Lafferty Memo is similar to the 2009 memorandum that preceded the Kim Memo, it contains several important differences. Notably, the Lafferty Memo details the criteria for UC designation differently from previous guidance and interpretations of the TVPRA. For instance, the Langlois Memo specifies that the inclusion of the UC Instruction Sheet in the filing constitutes evidence that the applicant has UC status, while the Lafferty Memo is silent as to the probative value of ORR documents. When discussing age, the Langlois Memo states that “[u]nless there is clear, contradictory evidence in the file, jurisdiction should not be refused on the basis of age.” Finally, the Lafferty Memo emphasizes that the applicant bears the burden of proving they meet all of the criteria for UC designation. *Compare* Lafferty Memo to Langlois Memo.

<sup>36</sup> USCIS Ombudsman, at 6.

<sup>37</sup> Lafferty Memo at 3.

<sup>38</sup> *Id.*

“must then establish that the parent or legal guardian was either unwilling or unable to provide...care and physical custody” at the time they first filed their asylum application, either with USCIS or EOIR.<sup>39</sup> The memorandum suggests that in evaluating the evidence of unaccompanied status, officers may need to more closely scrutinize the applicant’s testimony if there are unresolved questions about the applicant’s identity, and reminds officers that they may request documentary evidence when testimony alone does not meet the burden of proof.

Even more troubling, the Lafferty Memo seems to encourage asylum officers to be suspicious of UC claims, stating that an asylum officer may request additional evidence when there are doubts about the applicant’s “real” age or identity, or whether they are unaccompanied or were actually being cared for by a parent or legal guardian. It instructs asylum officers to pay careful attention if the applicant has provided any contradictory evidence such as giving more than one name or nationality, or if the applicant “appears to be over eighteen” at the time of filing.<sup>40</sup> This guidance is squarely at odds with the purpose of the TVPRA. It also contradicts the child-sensitive training guidance in the Asylum Officer’s Basic Training Course, which points out that “children cannot be expected to present testimony with the same degree of consistency or coherency as adults, and asylum officers must consider children’s development levels and emotional states when evaluating their testimony.”<sup>41</sup>

#### IV. *JOP v. DHS*

Shortly after the Lafferty Memo was issued, immigrant youth advocates challenged the policy in federal district court in *JOP v. DHS*.<sup>42</sup> On August 2, 2019, the District Court for the District of Maryland issued an injunction against USCIS following the Lafferty Memo.<sup>43</sup> The injunction has remained in place since then and the litigation remains pending.

According to the injunction, USCIS must continue to apply the Kim Memo to determine initial jurisdiction in UC asylum cases, discussed further in Part I.A.1 of this advisory. Under its terms, USCIS must take jurisdiction in cases in which the applicant has previously been designated a UC and there has not been an affirmative act to terminate that designation. Because the Kim Memo has been reinstated pursuant to the injunction in *JOP*, it is not clear how long it will remain in place and how long advocates will be able to rely on its protections.

Unfortunately, DHS has been undermining the injunction in several important ways. First, USCIS has been deferring to immigration judges’ assertion of jurisdiction in cases of previously designated UCs. Second, in court, Immigration and Customs Enforcement (ICE) attorneys, even though they are within DHS and bound by the injunction, have also been advocating for immigration judges to assert jurisdiction contrary to the Kim Memo. Lastly, USCIS has reinterpreted the “affirmative act” language of the Kim Memo claiming that a broad variety of agency records and documents constitute affirmative acts that terminate the UC finding. On December 21, 2020, the district court in *JOP* amended the preliminary injunction to prevent USCIS’s deference to EOIR jurisdictional determinations and to prevent ICE from advocating against USCIS initial jurisdiction in

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<sup>39</sup> *Id.* at 3-4.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> USCIS Asylum Division, Asylum Officer Basic Training Course, Guidelines for Children’s Asylum Claims, 52 (Mar. 21, 2009).

<sup>42</sup> *JOP v. DHS*, 19-01944 (D. Md.).

<sup>43</sup> Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

court. The district court did not enjoin USCIS’s reinterpretation of the “affirmative act” language of the Kim Memo. These developments in the litigation are explained in more detail below.

### A. USCIS’s “Unwritten” Practice of Deferring to EOIR and ICE Advocacy of EOIR Asserting Jurisdiction

The Lafferty Memo instructs USCIS to defer to the immigration judge if the judge asserts jurisdiction over an asylum claim from a previously designated UC, and therefore to reject USCIS jurisdiction.<sup>44</sup> This marks the first time that USCIS has issued this type of guidance. Although the *JOP* injunction prohibits USCIS from relying on the Lafferty Memo, it has continued to defer to immigration judge assertions of jurisdiction. In spite of scant documentary evidence and several former USCIS asylum officers testifying that this was not USCIS policy before the Lafferty Memo, USCIS insists that the deference is a longstanding policy that it did not formally document previously.<sup>45</sup>

On November 22, 2019, the litigants in *JOP* filed a motion to enforce the preliminary injunction pointing out that USCIS was not complying with the terms of the Kim Memo by continuing its deference policy.<sup>46</sup> On June 3, 2020, the district court in *JOP* rejected the motion. It acknowledged that the record was ambiguous and contained factual conflicts but declined to make a binding determination at that stage of the case.<sup>47</sup> As a result, in spite of the injunction, USCIS was able to continue its Lafferty Memo policy of deferring to immigration judge assertions of jurisdiction. On July 7, 2020, the litigants filed a motion to amend the preliminary injunction once again calling for this practice of deferring to EOIR to be enjoined.<sup>48</sup> On December 21, 2020, the district court in *JOP* granted the motion and amended the preliminary injunction to prevent this practice. The district court strengthened the injunction, clarifying USCIS cannot reject jurisdiction over an asylum application filed by someone whose application would have been accepted under the Kim Memo.<sup>49</sup> USCIS cannot defer to EOIR jurisdictional determinations in determining jurisdiction over asylum applications.<sup>50</sup> The amended preliminary injunction also enjoins DHS from advocating against continuances in removal proceedings in order to await USCIS adjudication of a UC asylum application or requesting that EOIR exercise jurisdiction over the application in cases in which USCIS has initial jurisdiction under the terms of the Kim Memo.<sup>51</sup> Finally, the district court ordered USCIS to retract adverse decisions rendered on or after June 30, 2019, based on deference to EOIR determinations, adherence to the Lafferty Memo, or adverse decisions over anyone whose application would have been accepted under the Kim Memo.<sup>52</sup>

<sup>44</sup> Lafferty Memo at 4 n. 5.

<sup>45</sup> Memorandum Opinion on Mot. to Enforce Preliminary Injunction, \*19-22, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>46</sup> Mot. to Enforce Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>47</sup> Memorandum Opinion on Mot. to Enforce Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>48</sup> Mot. to Amend Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>49</sup> The original injunction had enjoined USCIS from declining jurisdiction over an application which would have been accepted under “USCIS policy predating May 31, 2019.” Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.). Consequently, USCIS initially defended its now-enjoined deference policy as a “policy predating May 31, 2019” even though it was not contained in the Kim Memo. The amended injunction makes it clear that USCIS must use the Kim Memo to determine its exercise of jurisdiction.

<sup>50</sup> Memorandum Opinion on Mot. to Amend Preliminary Injunction, \*54-55, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

## B. USCIS's Expanded Affirmative Act Policy

Another way in which USCIS is undermining the *JOP* injunction is through reinterpreting the Kim Memo's language on "affirmative acts" rescinding UC status. This language was previously understood to refer only to official documents expressly terminating or rescinding UC status. The Kim Memo instructed the asylum office to take jurisdiction for designated UCs "even if there appears to be evidence that the applicant may have turned eighteen years of age or may have been reunited with a parent or legal guardian" since their determination.<sup>53</sup>

Under its new interpretation, USCIS has claimed that routine internal records showing the applicant's age or indicating their release from ORR custody to a parent constitute an "affirmative act" terminating their UC designation. Even in cases in which the immigration court did not assert jurisdiction, the asylum office has been rejecting jurisdiction by pointing to documents that mention that the applicant is over the age of eighteen or indicating that they have been reunited with a parent. In one example that the *JOP* litigants cited, the asylum office rejected jurisdiction over a child's claim based on a notation the ICE officer made into an internal computer system when she was released from detention to her mother.<sup>54</sup>

As discussed above, on July 7, 2020 the plaintiffs in *JOP* filed a motion to amend the preliminary injunction to challenge these practices. The motion pointed out that, being enjoined from using the Lafferty Memo, USCIS has "assiduously explored back doors to effectuate the same policy goal" and undermine the injunction.<sup>55</sup> On December 21, 2020, the district court issued an order in which it declined to enjoin USCIS's reinterpretation of what constitutes an affirmative act of de-designation under the Kim Memo.<sup>56</sup> It gave the parties leave to amend the complaint to demonstrate that USCIS's "dramatic expansion of the 'affirmative act' exception" is effectively an attempt to implement to the same policy as the enjoined Lafferty Memo.<sup>57</sup> As a result, USCIS has not been enjoined from using its expanded definition of an affirmative act of de-designation and may continue to attempt to use routine internal records about a UC's age or reunification with a parent or legal guardian to reject jurisdiction. However, this may change based on future developments in the *JOP* litigation. On January 11, 2021, the *JOP* plaintiffs filed a second amended complaint, which includes a request that USCIS be enjoined from using the "Expanded Affirmative Act Policy"<sup>58</sup>

## V. What to Do Now and Common Scenarios

Although the Lafferty Memo is currently enjoined, practitioners must be ready to demonstrate that their clients meet the UC definition before both the immigration court and asylum office. This is especially important because of the ways in which USCIS has been undermining the injunction in *JOP v. DHS*. When first filing a client's asylum application, include any available evidence that they meet the UC definition. Even if the asylum office schedules an interview, it does not mean that it has accepted jurisdiction. Practitioners must be prepared for the asylum officer to question clients during the interview on their age and accompaniment status at the time they filed their application.

<sup>53</sup> Kim Memo at 2.

<sup>54</sup> Memorandum of Law in Support of Mot. to Amend Preliminary Injunction, \*10, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>55</sup> *Id.* at \*4.

<sup>56</sup> Memorandum Opinion on Mot. to Amend Preliminary Injunction, \*54-55, *JOP v. DHS*, 19-01944 (D. Md.).

<sup>57</sup> *Id.* at \*52-53.

<sup>58</sup> Second Amended Complaint, \*56, *JOP v. DHS*, 19-01944 (D. Md.).

Advocates should be especially mindful of 1) whether their clients who were designated UCs continue to meet the UC definition at the time of filing their asylum application; and 2) the one-year filing deadline, even for clients who were designated as UCs, as they could become subject to it if they are found to no longer be UCs. Whenever possible, advocates should file their UC clients' asylum applications while they continue to meet the legal definition of a UC: being under eighteen years of age and not having a parent or legal guardian in the United States available to provide care and physical custody.<sup>59</sup>

If USCIS rejects jurisdiction or EOIR takes jurisdiction of a UC asylum claim, preserve any arguments that the asylum office has initial jurisdiction under the TVPRA to ensure that they can be raised on appeal.

### A. UCs Under Eighteen Years of Age

*Matter of M-A-C-O-* does not apply to UCs under eighteen years of age. Keep in mind that the time of *filing* of the asylum application determines initial jurisdiction, so clients must file their applications before turning eighteen. However, as discussed below, you must be mindful of your client's accompaniment status regardless of their age. This is especially important given USCIS's reinterpretation of the Kim Memo in which they consider internal government documents indicating that the UC was reunited with a parent as an "affirmative act" of de-designation.

### B. UCs Over Eighteen Years of Age

Whenever possible, file your client's asylum claim before their eighteenth birthday. If your UC client is over eighteen at the time of filing and has not had their UC status officially terminated, they should still be able to have their asylum case heard by USCIS pursuant to the policy set forth in the Kim Memo. Because it is not clear how long the *JOP* injunction reinstating the Kim Memo will remain in effect, applicants who are over the age of eighteen should file their asylum application as soon as possible to benefit from its protections.

However, even though the Kim Memo is in effect, it is possible that the immigration judge could assert jurisdiction pursuant to *Matter of M-A-C-O-*. Even though USCIS is now enjoined from deferring to this assertion of jurisdiction, actions by EOIR are not covered by the *JOP* injunction, which only extends to DHS. Additionally, USCIS may argue under its reinterpretation of the Kim Memo's "affirmative act" language that ORR records or other routine agency documents indicating the applicant's age constitute an "affirmative act" of de-designation and use them as an excuse to deny jurisdiction.

At USCIS, you must be prepared to argue that pursuant to the Kim Memo and the amended injunction in *JOP*, USCIS must not defer to the immigration judge regarding jurisdiction. Further, you must also be prepared to argue that routine administrative records do not constitute an affirmative de-designating act under the Kim Memo and that USCIS has initial jurisdiction. Before the immigration judge, you should be prepared to argue that the immigration court should not take jurisdiction under the TVPRA and that *Matter of M-A-C-O-* does not require the court to take jurisdiction over UC cases.

<sup>59</sup> For additional information and arguments against stripping UC status, see CLINIC, *Practice Advisory on Strategies to Combat Government Efforts to Terminate Unaccompanied Children Determinations* (May 2017), <https://cliniclegal.org/resources/childrens-issues/practice-advisory-strategies-combat-government-efforts-terminate>.

### C. UCs in the Care and Custody of a Parent or Legal Guardian

While *Matter of M-A-C-O-* did not address the accompaniment prong of the UC statute, the decision continues a pattern of troubling language in recent UC rulings and policy memoranda concerning reunification and UC status.<sup>60</sup> In *Matter of M-A-C-O-*, the BIA declined to review the immigration judge’s conclusion that respondent’s reunification with his aunt constituted a release into the custody of a legal guardian.<sup>61</sup> Similarly, in *Matter of Castro-Tum*, the Attorney General suggested that the child’s reunification with his brother-in-law may have ended his UC status if his brother-in-law was his “legal guardian.”<sup>62</sup> As discussed above, the enjoined Lafferty Memo instructs USCIS to reject jurisdiction where there is a parent or legal guardian in the United States available to provide care and physical custody.<sup>63</sup> Even though the Lafferty Memo is enjoined, there is a risk that an immigration judge could assert jurisdiction over a claim in which the UC is in the care and custody of a parent or has been appointed a legal guardian. There is also a risk that USCIS could rely on internal agency notations indicating that the child was reunited with a parent or legal guardian to argue that their UC status has been affirmatively terminated.

Currently, there is no statutory or regulatory definition of what constitutes a “parent or legal guardian in the United States...available to provide care and physical custody.”<sup>64</sup> It is important to note that sponsorship for release from Office of Refugee Resettlement (ORR) custody does not constitute legal guardianship. Rather, ORR sponsors are instructed to seek legal guardianship from the appropriate local court, but this is not required, and sponsors may or may not proceed to do so.<sup>65</sup>

Although not addressed in *Matter of M-A-C-O-*, practitioners should be prepared for immigration judges to question a UC’s accompaniment status as part of their determination of initial jurisdiction. Where the UC has been released from ORR to a sponsor, it is especially important to emphasize that ORR sponsorship does not constitute legal guardianship and should not be used as grounds for finding that a child does not meet the definition of “unaccompanied.”

Even though the Lafferty Memo has been enjoined, and because the law in this area is in flux, you should also be prepared for questions concerning your client’s accompaniment status at the asylum interview. You should provide any documentary evidence available showing that your client is unaccompanied and that any parent or legal guardian in the United States, even if your client does not live with them, was unwilling or unable to provide care and physical custody at the time the asylum application was filed.<sup>66</sup>

If your client is concurrently seeking Special Immigrant Juvenile Status, think strategically about the impact of guardianship on the asylum case. If your client is seeking a legal guardian as part of the predicate state court

<sup>60</sup> *M-A-C-O-*, 27 I&N Dec. at 480 n. 3.

<sup>61</sup> *Id.*

<sup>62</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271, 279 n. 4 (A.G. 2018).

<sup>63</sup> Lafferty Memo at 3-4.

<sup>64</sup> CLINIC at 2.

<sup>65</sup> See Office of Refugee Resettlement, Sponsor Care Agreement; see also 8 U.S.C. § 1232(c)(3); Lafferty Memo at 3 (“legal guardianship refers to a formal (legal/judicial) arrangement”); Langlois Memo at 5 (“if a [UC] is released from ORR custody to a sponsor who is not a parent or legal guardian, the child continues to be unaccompanied”).

<sup>66</sup> See Lafferty Memo at 4. Of course, if your client does not wish for you to argue that their parent or legal guardian is not available, or there are not facts supporting this, you should not make this argument.

proceedings, the appointment of the guardian could affect their UC status.<sup>67</sup> Where possible, file your client's asylum application before the state court appoints a legal guardian.

#### D. Children Not in Removal Proceedings Who Meet the Criteria for UC Status

In cases in which a child asylum applicant is not in removal proceedings, under both the Kim and Lafferty Memos, asylum officers must determine UC status at the time of filing for the purpose of deciding whether the one-year filing deadline applies and whether it must notify HHS that it has discovered a UC.<sup>68</sup> Although USCIS has initial jurisdiction over all affirmative cases, there are strategic reasons why you may want your clients to be afforded UC protections in their affirmative cases, such as the exemption from the one-year filing deadline.<sup>69</sup> If so, you should file your client's asylum application while they meet the criteria for UC designation, and include any evidence of age and accompaniment status at the time of filing.

#### E. UCs Who Have Been Issued an NTA, But Whose NTA Has Not Been Filed

In cases in which a UC has been issued a Notice to Appear (NTA), but the notice has not been filed with the immigration court, USCIS should have initial jurisdiction over the asylum claim as though it were an affirmative application. Even if the UC was apprehended at the border and served with the NTA, jurisdiction does not vest with EOIR until the NTA has been filed with the immigration court.<sup>70</sup> UCs in such circumstances who are over eighteen years of age when they apply should be interviewed by the asylum office as affirmative applicants. USCIS has often rejected these applications and its internal policy directs asylum offices to decline to take jurisdiction.<sup>71</sup> The Lafferty Memo clarified that "if an NTA has been served on the applicant but has not been served on EOIR, then the applicant is not yet in removal proceedings."<sup>72</sup> Although this clarification is no longer in effect while the Lafferty Memo is enjoined, advocates can still point to statutory and regulatory language that states that immigration court jurisdiction does not commence until the NTA is filed with the immigration court.<sup>73</sup>

Remember that once the NTA is filed with the immigration court, EOIR will have exclusive jurisdiction over the asylum application even if a prior application is pending before USCIS.<sup>74</sup> Practically speaking, this means that

<sup>67</sup> There is an argument that Section 235(d)(5) of the TVPRA maintains UC protections for youth even after a legal guardianship has been put in place, but this argument has not been tested. See TVPRA, P.L. 110-457 at § 235(d)(5) ("STATE COURTS ACTING IN LOCO PARENTIS.—A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be considered a legal guardian for purposes of this section or section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279).").

<sup>68</sup> Lafferty Memo at 3; Kim Memo at 2.

<sup>69</sup> 8 U.S.C. § 1158(a)(2)(E).

<sup>70</sup> See 8 C.F.R. §§ 208.2(b) (Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served . . . Form I-862, Notice to Appear, *after the charging document has been filed with the immigration court*) (emphasis added); see also 8 C.F.R. § 1003.14(a) (Jurisdiction vests, and proceedings before an immigration judge commence, when a charging document is filed with the immigration court by the Service).

<sup>71</sup> See American Immigration Council, Dobrin & Han, PC, and Northwest Immigrant Rights Project, USCIS v. EOIR: Jurisdiction over Asylum Applications for Individuals Who Were in Expedited Removal Proceedings or Issued Notices to Appear (Dec. 20, 2017), [https://www.americanimmigrationcouncil.org/practice\\_advisory/uscis-v-eoir-jurisdiction-over-asylum-applications-individuals-who-were-expedited](https://www.americanimmigrationcouncil.org/practice_advisory/uscis-v-eoir-jurisdiction-over-asylum-applications-individuals-who-were-expedited).

<sup>72</sup> Lafferty Memo at 4 n. 4.

<sup>73</sup> See, e.g., 8 C.F.R. § 1239.1(a) ("Every removal proceeding . . . is commenced by the filing of a notice to appear with the immigration court").

<sup>74</sup> See *Matter of P-L-P-*, 21 I&N Dec. 887 (BIA 1997).

if the NTA is filed with the court prior to the asylum office issuing a decision, the immigration judge is likely to exercise jurisdiction and insist on adjudicating the asylum claim.

## VI. Additional Concerns to Keep in Mind

### A. UC Redeterminations Undermine the Intent of the TVPRA

The TVPRA vested initial jurisdiction over UC asylum applications with USCIS in order to provide crucial legal protections to a vulnerable category of immigrant youth.<sup>75</sup> According to a 2012 report by the USCIS ombudsman, the TVPRA's protections were intended to be available to UCs throughout their cases, and subjecting a UC to multiple determinations is at odds with the statute's express purpose of providing "timely, appropriate relief for vulnerable children."<sup>76</sup>

Be prepared to argue that UC protections are enshrined in the TVPRA and that the statutory language clearly envisions these protections being permanent once a UC has been identified and properly designated.<sup>77</sup> The section of the TVPRA mandating regulations for UC asylum applications that take into account their specialized needs is under a statutory subpart titled "*Permanent* Protection for Certain At-Risk Children."<sup>78</sup>

### B. Due Process Concerns for UC De-Designation

According to an article published by the American Immigration Lawyers Association discussing pre-Kim Memo UC status redeterminations, "a child's living circumstances or relationship with his or her family may be dynamic, so the child may fall both within and outside the [UC] definition while present in the United States."<sup>79</sup> This susceptibility to change, coupled with the vulnerability of UCs, underscores the need for permanent protections once a child receives UC designation, as continuous reevaluation and de-designation could deprive vulnerable children of the protections Congress has afforded them.<sup>80</sup>

Instead, *Matter of M-A-C-O*'s reliance on the OPPM's characterization of UC status as "fluid" reflects the view that a number of different adjudicators can strip UC status from a child at any time.<sup>81</sup> While additional guidance may be forthcoming, there is currently no comprehensive instruction as to when UC status can be redetermined, which agencies can do so, how such a re-determination is to be conducted, and what procedural protections, if any, are afforded to UCs when their status is being redetermined.<sup>82</sup> In the interim, many adjudicators who are redetermining a UC's status do not have the expertise to determine whether a child has a parent or legal guardian and what it means for such parent or legal guardian to be "available to provide care and physical custody."<sup>83</sup>

<sup>75</sup> See USCIS Ombudsman, at 2.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> See USCIS Ombudsman, at 4.

<sup>78</sup> 8 U.S.C. § 1232(d)(8) (emphasis added). It is also important to note that these regulations have never been issued.

<sup>79</sup> A. Michelle Abarca et. al., *The ABCs of Representing Unaccompanied Children*, American Immigration Lawyers Association, at 588 (2011).

<sup>80</sup> See *id.*; USCIS Ombudsman at 4-5.

<sup>81</sup> E.g., OPPM 17-03, at 7-8.

<sup>82</sup> CLINIC at 12.

<sup>83</sup> 6 U.S.C. § 279(g)(2)(C)(ii); see also USCIS Ombudsman at 8.

The Catholic Legal Immigration Network has laid out some strategies for practitioners to combat UC status redeterminations in its “Practice Advisory on Strategies to Combat Government Efforts to Terminate ‘Unaccompanied Child’ Determinations.”<sup>84</sup> The termination of UC status without a hearing or any procedural rules for adjudicators carries troubling due process implications.<sup>85</sup> If an immigration judge or other officer seeks to strip your client of the UC designation, you should argue that due process requires an evidentiary hearing regarding UC status.<sup>86</sup>

### C. One-Year Filing Deadline

The TVPRA exempts UCs from the one-year filing deadline for asylum applications.<sup>87</sup> This exemption offers much-needed protection to unaccompanied children who often need more time to find legal assistance in preparing their claims and to articulate their reasons for applying for asylum. Following *Matter of M-A-C-O* and the Lafferty Memo, be mindful that this protection may no longer be available in many UC cases. For more information on the one-year filing deadline as it applies to UCs, see the ILRC’s practice advisory, “Unaccompanied Children and the One-Year Filing Deadline,” Feb. 23, 2020, <https://www.ilrc.org/unaccompanied-children-and-one-year-filing-deadline>.

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<sup>84</sup> See CLINIC, available at [https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-\(May-2017\).pdf](https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-(May-2017).pdf).

<sup>85</sup> See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (Fifth Amendment extends due process to deportation proceedings).

<sup>86</sup> CLINIC at 21.

<sup>87</sup> See TVPRA § 235(d)(7)(A).



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#### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.