



# MATTER OF M-A-C-O- AND JURISDICTION OVER UC ASYLUM CLAIMS

By Andrew Craycroft & Rachel Prandini

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 directs asylum officers to independently determine whether an applicant met the UC definition at the time of filing.<sup>5</sup>

The BIA decision and USCIS policy memo follow several agency policy changes beginning in 2017 that have attempted to recast UC status as fluid and suggest that it should be reassessed throughout the course of a minor’s immigration proceedings. This practice advisory provides an overview of the *Matter of M-A-C-O-* decision 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.

<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.

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

Following the passage of the TVPRA, USCIS began implementation of the initial jurisdiction provision on March 23, 2009.<sup>6</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>7</sup> The USCIS Ombudsman found in 2012 that this process created “delay and confusion.”<sup>8</sup> On May 28, 2013, USCIS issued the “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” memorandum (Kim Memo).<sup>9</sup> Under the Kim Memo, where 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>10</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 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 changes this policy, effective June 30, 2019.

DHS has also more broadly directed changes in the interpretation of UC status in recent years. On February 20, 2017, DHS issued a memorandum announcing (among other things) an upcoming change in the processing of UC cases.<sup>11</sup> The memo departs 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>12</sup> The memo directs USCIS, CBP, and ICE to issue uniform written guidance on UC classification including “standardized review procedures” to confirm UC status after the initial designation.<sup>13</sup> This guidance has not yet been issued.<sup>14</sup>

ICE sometimes issues Notices of Termination of UC Status in cases where a UC has turned eighteen or has reunified with a parent or legal guardian.<sup>15</sup> Anecdotally, this is a rare occurrence, although practitioners have reported an uptick since DHS’s 2017 memorandum.<sup>16</sup> Under the terms of the Kim memo, these notices are viewed as an “affirmative act” that may preclude the asylum office from automatically adopting a previous UC designation.

<sup>6</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>7</sup> *Id.* at 4.

<sup>8</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>9</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>10</sup> *Id.* at 2.

<sup>11</sup> Sec. John Kelly, “Implementing the President’s Border Security and Immigration Enforcement Improvements [sic] Policies” (Feb. 20, 2017).

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.* at 11.

<sup>14</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>15</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>16</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>.

At the Executive Office for Immigration Review (EOIR), individual immigration judge practices concerning UC asylum applicants over the age of eighteen have varied. 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. 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>17</sup> On December 20, 2017, EOIR released a memorandum that included new guidance for UC cases.<sup>18</sup> The memorandum describes UC status as “not static” because a minor’s age and accompaniment status may change.<sup>19</sup> It further instructs immigration judges to ensure that a UC remains a UC at the time their case is adjudicated.<sup>20</sup> This memorandum represents a shift in agency practice away from generally accepting prior UC designation rather than re-assessing UC status, though its implementation varied by judge.

## II. *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>21</sup> At the border, he was determined to be a UC and placed in removal proceedings.<sup>22</sup> He was unable to file his asylum application before his eighteenth birthday, but was never affirmatively stripped of his UC designation.<sup>23</sup> He filed an asylum application before USCIS after he turned eighteen.<sup>24</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>25</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>26</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>27</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>28</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

<sup>17</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>18</sup> Mary Beth Keller, Chief Immigration Judge, EOIR, OPPM 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>19</sup> *Id.* at 7.

<sup>20</sup> *Id.*

<sup>21</sup> *M-A-C-O-*, 27 I&N Dec. at 477.

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.* at 477-78.

<sup>26</sup> *Id.* at 478.

<sup>27</sup> *Id.* at 479.

<sup>28</sup> OPPM 17-03, at 7-8.

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>29</sup>

### III. Initial UC Asylum Jurisdiction Going Forward

#### A. 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>30</sup> In practice however, many immigration judges will likely 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.

#### B. USCIS and Modification of the Kim Memo

On May 31, 2019, USCIS issued the "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children" memorandum (Lafferty Memo).<sup>31</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>32</sup> Nonetheless, the Lafferty Memo uses *Matter of M-A-C-O-* as a basis to change its 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>33</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>34</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>35</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>36</sup> In particular, where an applicant has a parent or legal guardian in the United States, the applicant "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

<sup>29</sup> *M-A-C-O-*, 27 I&N Dec. at 479-80.

<sup>30</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>31</sup> See Lafferty Memo.

<sup>32</sup> *Id.* at 2. However, where EOIR asserts jurisdiction, it instructs USCIS to defer to that determination. *Id.* at 4 n. 5.

<sup>33</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 2009 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>34</sup> USCIS Ombudsman, at 6.

<sup>35</sup> Lafferty Memo at 3.

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

with USCIS or EOIR.<sup>37</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>38</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>39</sup>

The Lafferty Memo states that it will take effect thirty days following its date of issue.<sup>40</sup> It specifies that it will apply to any USCIS *decision* issued on or after that date.<sup>41</sup> There is therefore significant concern that UCSIS will apply it retroactively to cases that have been pending for several months or years, including cases where the interview has already been completed prior to the effective date of the Lafferty Memo.

## IV. What to Do Now and Common Scenarios

In the aftermath of *Matter of M-A-C-O-* and the Lafferty Memo, practitioners must be ready to demonstrate that their clients meet the UC definition before both the immigration court and asylum office. 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.

If USCIS rejects jurisdiction or EOIR takes jurisdiction of a UC asylum claim, preserve any possible 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. (However, as discussed below, you must be mindful of your client’s accompaniment status regardless of their 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.

In some jurisdictions, it may be possible to lodge an asylum application before a UC’s eighteenth birthday solely for the purpose of preserving initial USCIS jurisdiction. This may be appropriate in cases in which it is not possible to file prior to the eighteenth birthday (for example, if a child is *pro se*). It is not yet clear whether lodging will be interpreted to constitute an initial filing by immigration courts or USCIS, so check the local practices at your immigration court and asylum office.

<sup>37</sup> *Id.* at 3-4.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> USCIS Asylum Division, Asylum Officer Basic Training Course, “Guidelines for Children’s Asylum Claims,” 52 (Mar. 21, 2009).

<sup>40</sup> Lafferty Memo, at 1.

<sup>41</sup> *Id.*

## B. UCs Over Eighteen Years of Age

Whenever possible, file your client's asylum claim before their eighteenth birthday. If your client is over eighteen at the time of filing, it appears USCIS will reject jurisdiction following the effective date of the Lafferty Memo. However, it is not yet clear the process that USCIS will follow, or how individual asylum offices will interpret and implement the Lafferty Memo. If USCIS rejects jurisdiction in your case, continue to raise any relevant arguments that USCIS should have initial jurisdiction, including that the TVPRA was intended to provide permanent protection to UCs as discussed in Section V, and that *Matter of M-A-C-O-* does not require immigration judges to take jurisdiction of UC asylum cases filed after the applicant turned 18.

## 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>42</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>43</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>44</sup> As discussed above, the 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>45</sup>

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>46</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>47</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 is not unaccompanied.

Before the asylum office, you should also be prepared for questions concerning your client's accompaniment status during the interview. Following the Lafferty Memo, 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>48</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 proceedings,

<sup>42</sup> *M-A-C-O-*, 27 I&N Dec. at 480 n. 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271, 279 n. 4 (A.G. 2018).

<sup>45</sup> Lafferty Memo at 3-4.

<sup>46</sup> CLINIC at 2.

<sup>47</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>48</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 unavailable, or there are not facts supporting this, you should not make this argument.

the appointment of the guardian could affect their UC status.<sup>49</sup> Where possible, file your client's asylum application before the state court issues a guardianship order.

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

In cases where a child asylum applicant is not in removal proceedings, 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>50</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>51</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 where 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>52</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>53</sup> However, the Lafferty Memo makes clear 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>54</sup> If USCIS attempts to reject jurisdiction based on an NTA that has not been filed with EOIR, argue that the Lafferty Memo clearly states that your client is not in removal proceedings and that the previous internal policy should no longer be followed.<sup>55</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>56</sup> Practically speaking, this means that 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.

<sup>49</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>50</sup> Lafferty Memo at 3.

<sup>51</sup> 8 U.S.C. § 1158(a)(2)(E).

<sup>52</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>53</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>54</sup> Lafferty Memo at 4 n. 4.

<sup>55</sup> *Id.* at 6 ("information provided prior to implementation of these updated procedures should not be relied upon if in conflict with the procedures specified in this memorandum").

<sup>56</sup> See *Matter of P-L-P-*, 21 I&N Dec. 887 (BIA 1997).

## V. 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>57</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>58</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>59</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>60</sup>

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

As pointed out in 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>61</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>62</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>63</sup> While additional guidance is anticipated, 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>64</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>65</sup>

The Catholic Legal Immigration Network has laid out some strategies for practitioners to combat UC status redeterminations in "Practice Advisory on Strategies to Combat Government Efforts to Terminate 'Unaccompanied Child' Determinations."<sup>66</sup> The termination of UC status without a hearing or any procedural rules for adjudicators carries troubling due process implications.<sup>67</sup> If an immigration judge or other officer seeks to strip your client of the UC designation, argue that due process requires an evidentiary hearing regarding UC status.<sup>68</sup>

<sup>57</sup> See USCIS Ombudsman, at 2.

<sup>58</sup> *Id.* at 4.

<sup>59</sup> See USCIS Ombudsman, at 4.

<sup>60</sup> 8 U.S.C. § 1232(d)(8) (emphasis added). It is also important to note that these regulations have never been issued.

<sup>61</sup> A. Michelle Abarca et. al., "The ABCs of Representing Unaccompanied Children," American Immigration Lawyers Association, at 588 (2011).

<sup>62</sup> See *id.*; USCIS Ombudsman at 4-5.

<sup>63</sup> E.g., OPPM 17-03, at 7-8.

<sup>64</sup> CLINIC at 12.

<sup>65</sup> 6 U.S.C. § 279(g)(2)(C)(ii); see also USCIS Ombudsman at 8.

<sup>66</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>67</sup> See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (Fifth Amendment extends due process to deportation proceedings).

<sup>68</sup> CLINIC at 21.



### C. One-Year Filing Deadline

The TVPRA exempts UCs from the one-year filing deadline for asylum applications.<sup>69</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. The ILRC will address the complex issues facing UCs and the one-year bar in a forthcoming advisory.

---

<sup>69</sup> See TVPRA § 235(d)(7)(A).



#### San Francisco

1458 Howard Street  
San Francisco, CA 94103  
t: 415.255.9499 f: 415.255.9792

[ilrc@ilrc.org](mailto:ilrc@ilrc.org) [www.ilrc.org](http://www.ilrc.org)

#### Washington D.C.

1015 15th Street, NW, Suite 600  
Washington, DC 20005  
t: 202.777.8999 f: 202.293.2849

#### 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.