



CURRENT STATUS OF UC ASYLUM JURISDICTION AND JOP V. DHS

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I. Introduction

This alert provides an overview of the current state of practice regarding initial asylum office jurisdiction for asylum applicants who were designated as unaccompanied children (UCs).¹ Although UCs are entitled to statutory protections, including U.S. Citizenship and Immigration Services (USCIS) having initial jurisdiction over UC asylum applications despite their being in removal proceedings, the Trump administration eroded these protections. Following the Board of Immigration Appeals ruling in *Matter of M-A-C-O-*, USCIS issued a new policy memo in May 2019, known as the Lafferty Memo, that sought to limit the number of UCs able to benefit from initial asylum office jurisdiction.² The Lafferty Memo required USCIS to reassess whether each previously designated UC continued to meet the legal definition of UC at the time they filed their asylum application.

UC advocates challenged this policy in federal district court in *JOP v. DHS*, which issued a temporary restraining order in August 2019, later converted to a preliminary injunction, enjoining the Lafferty Memo and preventing USCIS from applying it. As a result, USCIS was ordered to continue using the prior policy memo on UC asylum jurisdiction, the Kim Memo.³ This practice alert gives a brief overview of the latest developments in this area for practitioners already familiar with UC asylum. For a more detailed overview of UC asylum jurisdiction, see the full practice advisory Initial Jurisdiction over UC Asylum Claims.

II. Previously Designated UCs who Met the UC Definition at the Time of Filing

Under the statute, *Matter of M-A-C-O-*, and USCIS's policy memoranda, USCIS has initial jurisdiction over the asylum application of someone who met the statutory definition of a UC at the time of filing.⁴ There is no legal basis for the immigration judge to assert jurisdiction over these cases or for USCIS to reject jurisdiction. If possible, practitioners should file a UC asylum application while the child still meets the UC definition.

III. Previously Designated UCs who Did Not Meet the UC Definition at the Time of Filing

Currently, under the injunction in *JOP v. DHS*, USCIS must use the 2013 Kim Memo to determine whether it has jurisdiction.⁵ Under the Kim Memo, the asylum office must take jurisdiction over an I-589 filed by someone who was previously designated as a UC even if they are in removal proceedings, whether or not they continued to meet the definition of a UC at the time of filing.⁶ The only exception is if there has been an affirmative act terminating the UC designation. Only USCIS and other agencies within DHS are bound by the Kim Memo. Immigration courts, which are under the Department of Justice, are not bound by the *JOP* injunction and continue to be bound by *Matter of M-A-C-O-*, which permits immigration judges to make their own jurisdictional determinations.⁷

The Department of Homeland Security (DHS) has undermined the injunction in *JOP* in several ways. First, USCIS has deferred to immigration judges' assertions of jurisdiction and rejected jurisdiction in such cases even where it was instructed to take jurisdiction under the Kim Memo.⁸ Second, USCIS has reinterpreted the meaning of an "affirmative act" terminating UC designation to include routine internal records and notations showing the child's age or reunification with a parent or legal guardian to argue that they no longer fall under the Kim Memo.⁹ Immigration and Customs Enforcement, which is part of DHS and subject to the *JOP* injunction, has also undermined the injunction by advocating in court for immigration judges to assert jurisdiction or deny continuances in cases that should be heard before the asylum office under the Kim Memo.

On December 21, 2020, the district court in *JOP v. DHS* amended the preliminary injunction to stop USCIS's practice of deferring to immigration judge assertions of jurisdiction.¹⁰ Under the amended injunction, USCIS must take jurisdiction in cases that fall under the Kim Memo. The court also enjoined DHS from asking immigration judges to assert jurisdiction or deny continuances in cases that should go before the asylum office under the Kim Memo.

However, the district court has not enjoined USCIS's reinterpretation of the "affirmative act" language, which remains in effect. This means that although the Kim Memo is now fully restored, USCIS may still use a UC's records and documents to attempt to argue that they were de-designated as UCs and are no longer covered by the Kim Memo. On January 11, 2021, the plaintiffs in *JOP* filed an amended complaint seeking to have this reinterpretation enjoined.

IV. UC Asylum Jurisdiction Practices Currently Being Challenged

Below is a chart summarizing recent USCIS practices and legal interpretations concerning UC asylum jurisdiction that are covered by the *JOP v. DHS* injunction:

USCIS Practice	Permitted Under <i>JOP</i> Injunction	Date Enjoined	Prior Decisions Based on Practice
Lafferty Memo	No	Aug. 2, 2019	USCIS must retract adverse decision and reinstate consideration of the case under the Kim Memo
Rejecting jurisdiction over the application of UC whose application would have been accepted under the Kim Memo	No	Aug. 2, 2019, clarified on Dec. 21, 2020	USCIS must retract adverse decision and reinstate consideration of the case under the Kim Memo
Deferring to immigration judge determinations in assessing jurisdiction	No	Dec. 21 2020	USCIS must retract adverse decision rendered on or after Jun. 30, 2019
DHS asking immigration court to deny continuances where application filed with USCIS or asking immigration court to assert jurisdiction in cases that should be heard by the asylum office under the Kim Memo	No	Dec. 21, 2020	Not listed as grounds to retract prior decisions
Reinterpreting the Kim Memo's "affirmative act" language to include internal records and routine documents as de-designation of UC status	Yes	Currently in effect	N/A

End Notes

¹ 6 U.S.C. § 279(g)(2) defines a UC as a child who (1) has no lawful immigration status in the United States, (2) has not attained eighteen years of age, and (3) with respect to whom there is no parent or legal guardian in the United States available to provide care and physical custody.

² See *Matter of M-A-C-O*, 27 I & N Dec. 477 (BIA 2018); John Lafferty, Chief, USCIS Asylum Division, Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019) (hereinafter “Lafferty Memo”).

³ Ted Kim, Acting Chief, Asylum Division, “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children” (May 28, 2013) (hereinafter “Kim Memo”).

³ Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

⁴ INA § 208(a)(2)(E).

⁵ Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

⁶ Kim Memo at 2.

⁷ *M-A-C-O*, 27 I & N Dec. at 479.

⁸ Mot. to Amend Preliminary Injunction, *JOP v. DHS*, 19-01944 (D. Md.).

⁹ Memorandum of Law in Support of Mot. to Amend Preliminary Injunction, *4, *JOP v. DHS*, 19-01944 (D. Md.).

¹⁰ Memorandum Opinion on Mot. to Amend Preliminary Injunction, *54-55, *JOP v. DHS*, 19-01944 (D. Md.).



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