

PART I: INTRODUCTION AND OVERVIEW

CHAPTER 1

INTRODUCTION AND OVERVIEW

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§ 1.1 Introduction and Overview to This Manual

The immigrant population in the United States has grown significantly in the last decade. According to data from the most recent census and the 2012 American Community Survey, the states with the highest number of foreign-born residents are California, New York, Texas, and Florida. However, the growth of the immigrant population is not limited to states with a traditionally large immigrant presence.¹ Between 2000 and 2009, the number of foreign-born individuals increased in 48 of 50 states, and the total foreign-born population of the United States increased by 23.5 percent, or approximately 7.3 million people.² Immigrant youth form no small part of the foreign-born population in the United States. Approximately 23.2 percent of children in the United States are either immigrants or the children of immigrants.³ Many children of immigrants are citizens, having been born in the United States, although their parents may or may not have legal immigration status. Other immigrant children are without legal status, but have grown up almost entirely in the United States and consider this country their only home. Some of these youth do not know the language spoken in their native country and left so long ago that they have no memory of the place. Other children and youth are more recent immigrants who may be completely unfamiliar with the legal system and customs in the United States.

¹ Pew Hispanic Center, *A Statistical Portrait of the Foreign-Born at Mid-Decade*, Table 11: Change in Foreign-Born Population by State, 2000-2005 (2006), available at www.pewhispanic.org/files/2013/09/2005-Foreign-Born.pdf.

² Pew Hispanic Center, *A Statistical Portrait of the Foreign-Born at Mid-Decade*, Table 12: Change in Foreign-Born Population, by State: 2000 and 2009 (2009), available at www.pewhispanic.org/files/2013/09/2009-Statistical-Portrait-Foreign-Born.pdf.

³ Jeffrey S. Passel, *Demography of Immigrant Youth: Past, Present, and Future*, 21 Immigrant Children 1 (Spring 2011), available at www.futureofchildren.org/futureofchildren/publications/docs/21_01_02.pdf.

Immigrant children and youth may travel to the United States with parents, an adult relative or a family friend. Some come to the United States with their parents as infants or young children. Increasingly, children and youth come to the United States unaccompanied, without their parents or a legal guardian, making their way by foot, bus, train, cargo ship, or plane.⁴ These youth have often endured unspeakably traumatic experiences in their countries of origin and come to the United States fleeing violence, persecution, and extreme poverty. A 2013 United Nations High Commissioner for Refugees (UNHCR) study found that many unaccompanied children were motivated to come to the United States by two main factors: violence by gangs and violence in the home.⁵ Some of these youth receive the assistance of smugglers or “coyotes.” Still others are victims of illegal trafficking, and are forced to engage in sex-work or to work in slave-like conditions in factories, as domestic servants, or in restaurants.⁶ Many assume extraordinary debt to come to the United States and in some cases, solely to help their impoverished families. Often, these youth endure dangerous and exploitative work conditions in order to pay off these debts.

Particularly for unaccompanied immigrant youth, the journey to the United States is often extraordinarily arduous and dangerous. Countless youth have been robbed, beaten, or sexually assaulted along the way. Sometimes youth languish for many days without food or water as they cross the desert. Hundreds of youth have lost a limb or sustained other disabling injuries trying to jump on or off trains across Mexico.⁷ Many youth embark on the journey to come to the United States, never to be heard of again; these youth may have been killed, died from an accident along the way or during the trek across the dessert, or kidnapped and trafficked by gangs along the way.

Prior to 2012, an annual average of between 7,000 to 8,000 such unaccompanied children were apprehended at the southern border annually.⁸ In Fiscal Year 2012, the number jumped dramatically to 13,625 children referred to the Office of Refugee Resettlement (ORR), the federal agency charged with custody of unaccompanied children. This number again jumped in Fiscal Year 2013 to 24,668 referrals from the Department of Homeland Security (DHS) to ORR. In Fiscal Year 2014, ORR received an unprecedented number of referrals from DHS, with 57,496 unaccompanied children referred. To address the huge increase in unaccompanied children being placed in ORR custody, the Department of Health and Human Services (under whose umbrella ORR operates) opened two temporary shelters in 2014 to house such children. These were located at the Lackland Air Force base in San Antonio and a naval base in Ventura County in California, and held 1,290 children and 600 children, respectively. These facilities have since

⁴ See ORR, *ACF Fact Sheet, Unaccompanied Alien Children Program* (Nov. 2014), available at https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet.pdf [hereinafter, “UAC Fact Sheet”].

⁵ UNHCR, *Children on the Run* (2013), p. 6, available at www.unhcrwashington.org/children [hereinafter, “Children on the Run”].

⁶ According to a U.S. Department of State estimate, more than 44,000 survivors of trafficking were identified in 2013, but more than 20 million victims of trafficking have not been identified. U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report*, Introduction (June 2014), available at www.state.gov/j/tip/rls/tiprpt/2014/index.htm.

⁷ See Sonia Nazario, *Enrique’s Journey: The Story of a Boy’s Dangerous Odyssey to Reunite with his Mother* (2006).

⁸ UAC Fact Sheet.

been closed, as the need for them no longer exists. The Department of Homeland Security also opened additional family detention centers in response to the sharp increase in the number of family units crossing the southern border, discussed in greater detail in **Chapter 18**.

The sharp increase in arrivals in 2014 was largely due to the migration of children from Guatemala, Honduras, and El Salvador, a region of Central America known as the “Northern Triangle.”⁹ Studies have found that, while there may be multiple reasons that a child leaves her home country, “children from the Northern Triangle consistently cite gang or cartel violence as a prime motivation for migrating.”¹⁰ A 2013 report by the UNHCR found that 48% of unaccompanied children interviewed as part of the study shared experiences of how they had been personally affected by violence in the region by organized armed criminal actors, including gangs and drug cartels, as well as state actors.¹¹

Once children arrive in the United States, however, their struggles are not over. Children and youth without legal immigration status are exceptionally vulnerable in the United States. Many undocumented youth face discrimination and burdensome fears of deportation that drive them, and any family they may be with, into the shadows. The need to remain invisible marginalizes them and their families, and undermines their ability to access basic necessities. As a whole, undocumented youth are more likely to live in poverty,¹² less likely to have health insurance, and more likely to encounter barriers to accessing public benefits and social services than U.S. citizen youth.

Importantly, there are many avenues available for undocumented youth to obtain lawful immigration status in the United States to eliminate their fear of deportation and ensure that they have access to the benefits and services they need. In 2008, Congress, recognizing the unique nature of unaccompanied children and youth, provided broader legal protections and access to services through the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457)(TVPPRA). It was signed into law on December 23, 2008.

This manual seeks to provide background and guidance on the immigration options available to children and youth. It will cover various forms of immigration relief, with a special emphasis on Special Immigrant Juvenile Status (SIJS). While this manual is primarily intended to guide advocates and attorneys representing or working with undocumented youth, this manual is also useful in working with youth who have legal status and face various immigration related issues, whether it be facing removal proceedings, seeking to change status, or applying for citizenship.

⁹ American Immigration Council, *Children in Danger* (July 2014), available at www.immigrationpolicy.org/special-reports/children-danger-guide-humanitarian-challenge-border [hereinafter, “Children in Danger”].

¹⁰ Children in Danger, p. 2.

¹¹ Children on the Run, p. 6.

¹² Jeffrey S. Passel, *Demography of Immigrant Youth: Past, Present and Future*, 21 Immigrant Children 1, p. 33 (Spring 2011), available at www.futureofchildren.org/futureofchildren/publications/journals/journal_details/index.xml?journalid=74.

This manual is divided into four parts as follows:

Part I: Introduction and Overview Is Covered in Chapters 1-2. This chapter provides introductory information on basic terms and principles of immigration law as they apply to children and youth, a summary of youth immigration relief options, and an overview of the immigration process (both affirmative and defensive). **Chapter 2** provides background on particular developmental issues that are unique to children and youth, practice tips for advocates working with these youth to address these issues, and tips for avoiding re-traumatization.

Part II: Special Immigrant Juvenile Status (SIJS), a Form of Immigration Relief for Abused, Neglected, or Abandoned Children, Is Covered in Chapters 3-9. **Chapter 3** provides a basic overview of SIJS. For many children's welfare workers and non-legal advocates it will provide all the information needed. **Chapters 4-6** are designed to answer more specific questions about SIJS eligibility, the adjustment of status portion of the SIJS application, and risks and benefits of applying. **Chapter 7, Part One** is a basic primer on the various state court systems that may play a role in SIJS findings, including dependency, delinquency, guardianship, custody and adoption, and **Part Two** of the chapter provides procedural guidance in obtaining SIJS findings in juvenile courts. **Chapter 8** provides information on the affirmative SIJS application process and how to complete the forms. **Chapter 9** provides information on the defensive SIJS application process for those children and youth who are in removal (or deportation) proceedings.

Part III: Other Forms of Immigration Relief Are Covered in Chapters 10-16. This part of the manual provides information on other potential ways in which children and youth can obtain lawful status including U-Nonimmigrant status (**Chapter 10**), Violence Against Women Act (**Chapter 11**), Asylum (**Chapter 12**), Family Based Immigration (**Chapter 13**), Citizenship and Naturalization for Children (**Chapter 14**), T-Nonimmigrant Status (**Chapter 15**) and other immigration-related laws that may help children, including Temporary Protected Status, Cancellation of Removal, Prosecutorial Discretion, including Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), among others (**Chapter 16**).

Part IV: Special Issues in Representing Children and Youth Is Covered in Chapters 17-18. **Chapter 17** covers the immigration consequences of juvenile delinquency, discusses immigration enforcement in the juvenile justice system, and provides a basic overview of the immigration consequences of criminal conduct. **Chapter 18** covers detention-related issues of immigrant children and youth, including how they are apprehended and the bases for their detention and release.

The **Appendices** to this manual contain many useful items, including quick reference guides, a sample screening intake form, sample motions, court orders and other papers that you can present to a juvenile court judge in SIJS cases or to the immigration court or immigration authorities, practice advisories, a copy of the relevant law, regulations, and U.S. Citizenship and Immigration Services (USCIS) memoranda, and sample completed copies of application forms. See **Appendices**. Note that it is easy to obtain the immigration forms you will need for the

application from the USCIS website (www.uscis.gov), by calling the USCIS toll-free number 1-800-870-3676, or from an immigration practitioner.

§ 1.2 Lawful Immigration Status and Forms of Immigration Relief Available to Children and Youth

A. Lawful Immigration Status: What Is It and Why Is It Important?

“Immigration status” is a term that refers to a person’s classification under U.S. immigration laws. Immigration status determines the rights, privileges, and benefits to which individual children and youth are entitled, and the possible consequences they will face when charged with a violation of law.

Under immigration laws, any person in the United States *who is not a U.S. citizen* (which can be a complex determination) is referred to as an **alien**. An alien who has a **green card** has permanent lawful immigration status and is called a **lawful permanent resident**. An alien can have many different other types of lawful status in the United States as well, such as having asylum, a U visa, a T visa, a visitor’s visa, or Temporary Protected Status. An alien may also have been granted prosecutorial discretion or deferred action (such as pursuant to DACA or DAPA)—which is not lawful status but can provide protection from deportation (and work authorization, for deferred action). These categories are described in more detail below. An alien with no lawful immigration status is said to be **undocumented**.

Life in the United States can be terribly difficult for an undocumented person. He or she might be **deported or removed** (forced to leave the United States) if caught by immigration authorities. Further, the person cannot obtain **employment authorization**, and so cannot work legally. The person is often not eligible for many public benefits. In most states, undocumented young people are not eligible for in-state tuition at state colleges and universities, and therefore usually cannot go to college.¹³

NOTE on U.S. Citizenship: It is important to determine whether the child or youth may be a U.S. citizen. U.S. citizens are not subject to federal immigration laws and therefore, cannot be removed or be refused admission to the United States.

A person can obtain citizenship in a number of different ways. He or she may be born in the United States or apply to become a citizen through the process of naturalization. This is the process by which someone immigrates to the United States, obtains lawful permanent resident status, and then becomes a citizen after a certain period of time; note that children under 18 cannot naturalize. A person can also acquire or derive citizenship. For example, a child will automatically become a citizen if the following occurs: the person is a lawful permanent resident

¹³ Note, however, that some states provide exceptions by allowing undocumented immigrants to attend state colleges at the much lower in-state tuition rate. See www.nilc.org for further information.

under the age of 18 when one of her parents who has legal or physical custody of her becomes a citizen.¹⁴ Under certain circumstances, a person may be able to acquire citizenship if U.S. citizenship can be traced through the lineage of her U.S. citizen parent(s) or even in some instances, grandparent(s) or great grandparent(s), even if the child was born abroad and lived abroad for most of her life. The vast majority of U.S. citizens, however, acquire their citizenship because they are born in the United States.

With the rise in immigration enforcement, more U.S. citizens are mistakenly placed in removal (or deportation) proceedings. In 2007, for example, the Vera Institute of Justice found 322 people with citizenship claims in 13 immigration detention centers, up from 129 the year before. That number did not include possible citizens in the nation's many other immigration detention centers.¹⁵

Noncitizen Categories. A person who is not a U.S. citizen and falls within one of the categories listed below is an “alien” or noncitizen. A noncitizen is *always* subject to the possibility of deportation/removal regardless of his or her circumstances. Most noncitizen children and youth are removable by virtue of lacking lawful immigration status.

The various noncitizen categories that a person can fall into include:

- **Lawful Permanent Resident (“Green Card Holder”).** They are permitted to live and work permanently in the United States and are entitled to the most secure immigration status, short of being a U.S. citizen, as well as many benefits that U.S. citizens hold.
- **Refugee or Asylee.** They are granted refuge and status in the United States based on persecution they faced or will face in their home country or country of origin. They can become lawful permanent residents within a certain period of time.
- **Nonimmigrant Visa Holders.** A nonimmigrant visa holder is a person who obtained a temporary visa allowing her to enter and remain in the United States legally for a specific period of time under specific conditions. Certain visa holders can obtain lawful permanent residency, while others can only be here for a certain period of time. Some common examples of visa holders include tourists, students, temporary workers, diplomats, religious workers, those who are victims of crimes and assisting with an investigation or prosecution of the crime (U visas), informants, and trafficking victims (T visas).

¹⁴ INA § 320.

¹⁵ See, e.g., Newsweek, *Why Did Immigration and Customs Enforcement Detain a U.S. Citizen for Three and a Half Years?* (Nov. 6, 2014), available at www.newsweek.com/why-did-immigration-and-customs-enforcement-detain-us-citizen-3-and-half-years-282509; Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, (Mar. 2009), available at www.amnestyusa.org/immigrant-rights/immigrant-detention-report/page.do?id=1641033.

Nonimmigrant visa holders who violate the terms of their visa (e.g., students who drop out of school or tourists who stay longer than permitted) become “undocumented,” meaning they no longer have lawful status in the United States and are subject to apprehension by immigration authorities and removal from the country.

- **Undocumented Person (aka, “Undocumented Resident” or “Illegal Alien”).** This is someone who does not have legal status under the immigration laws. Contrary to public perception, undocumented persons are not just those who crossed the border unlawfully, but also include persons whose visas have expired.

Just because a person is undocumented, however, does not mean that he or she will be removed from the United States. Many undocumented people and children are eligible to apply for lawful immigration status through one of the avenues available under the immigration laws. However, undocumented persons are always at risk of apprehension, detention and initiation of removal proceedings by immigration authorities. Crossing the border unlawfully or having contact with the juvenile justice system are common avenues by which undocumented youth are apprehended by immigration authorities.

- **DACA Recipient.** Deferred Action for Childhood Arrivals provides a work permit and relief from removal for three years to certain eligible undocumented people who came to the United States when they were under the age of 16 and meet certain other eligibility requirements. DACA is not an immigration status, nor does it lead to U.S. citizenship, but it does provide temporary protection from deportation. Further, DACA was not created by federal immigration law the way that many other forms of immigration relief were created. Rather, it is a use of prosecutorial discretion by the executive branch to provide protection from removal from the United States for a certain period of time.
- **DAPA Recipient.** Deferred Action for Parents of Americans and Lawful Permanent Residents is also a form of prosecutorial discretion that provides a work permit and relief from removal for three years to certain eligible undocumented people who have U.S. citizen or lawful permanent resident children born on or before November 20, 2014 and who meet certain other eligibility requirements. DAPA is a new program that at the time of this manual’s publication is not yet available due to a pending lawsuit. See **Chapter 16**. If and when it goes into effect, like DACA, DAPA will not be an immigration status, nor will it lead to U.S. citizenship. Rather it will simply provide temporary relief from deportation and work authorization.
- **Those in the Process of Obtaining Legal Status.** Many persons present in the United States do not have lawful status, but are in the process of obtaining lawful status, which often takes many years. Immigration authorities are aware of their presence in the United States and generally defer their removal pending the outcome of their application. Depending upon the lawful status applied for, a person may receive a work permit or

employment authorization document (EAD), to work lawfully for a specified period of time while her application is pending.

B. Forms of Immigration Relief Available to Children and Youth

There are many avenues within the categories discussed above available for undocumented youth to obtain lawful immigration status in the United States. The avenues for obtaining legal status are not only broader for children and youth compared to adults, but the standards for obtaining these forms of relief may be lower and take into account their unique status as minors. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457) (TVPRA) (discussed at § 1.4(C)) made important procedural and substantive changes to broaden eligibility for immigration legal relief for youth and provides more child-sensitive procedures for those youth in immigration custody and at imminent risk of removal.

Some of the avenues of relief available to children and youth, which are discussed in greater detail throughout this manual, are:

- **Special Immigrant Juvenile Status (SIJS).** A youth can obtain lawful permanent residence if she is under 21 years old, not married, under the jurisdiction of a juvenile court (which may differ based on the state, but typically includes dependency, delinquency, probate, or family court) or committed to the custody of state agencies or departments or to court-appointed individuals or entities, the court has made a finding that the child cannot be reunified with one or both parents due to abuse, neglect or abandonment or a similar basis under law, and it is not in the minor’s best interest to be returned to her home country. To obtain this form of relief, an order from the juvenile court making the above findings is required. See **Chapters 3–9**.
- **Violence Against Women Act (VAWA).** A youth is eligible for lawful permanent residence if she has been “battered or subject to extreme cruelty” (including purely emotional abuse) by a *U.S. citizen or permanent resident spouse, parent, or step-parent*. The youth may also qualify if her parent was a victim of domestic violence. See **Chapter 11**.
- **U and T Nonimmigrant Status for Victims of Serious Crimes and Trafficking.** If the noncitizen child or youth or her parent is a victim of a serious crime or of trafficking, she can obtain a nonimmigrant visa that will put her on a path to permanent residence.

The “U” nonimmigrant visa is available to noncitizens who suffer substantial physical or mental abuse resulting from a wide range of criminal activity, possess information concerning the activity, and are helpful to the investigation and prosecution of the criminal activity.¹⁶ In order to qualify for U nonimmigrant status, a judge, prosecutor,

¹⁶ INA § 101(a)(15)(U).

investigator (for example, police agency) or similar official must sign a certification regarding this requirement. See **Chapter 10**.

The “T” nonimmigrant visa is available to victims of severe forms of trafficking in persons,¹⁷ including sex or labor work, who must comply with reasonable requests for assistance in investigation or prosecution of the offense (unless they are under the age of 18), and must show they will suffer extreme hardship if removed from the United States. See **Chapter 15**.

- **Asylum.** Youth who fear return to their home country because of an individualized fear of persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group may be able to apply for asylum. If youth express fear of return, they are generally subject to specialized guidelines and procedures for youth in determining whether they have a valid asylum claim. See **Chapter 12**.
- **Cancellation of Removal for Non-Permanent Residents.** Noncitizens who have lived in the United States unlawfully for ten years or more and can show that they have a parent, spouse or child who is a U.S. citizen or permanent resident who would suffer exceptional and extremely unusual hardship if the person were deported can qualify for this relief and obtain lawful permanent residence. See **Chapter 16**.
- **Deferred Action for Childhood Arrivals.** Undocumented youth who are at least 15 years old, under the age of 31 as of June 15, 2012, came to the United States before their 16th birthday, have continuously resided in the United States since June 15, 2007 up to the present time, were physically present in the United States on June 15, 2012 and at the time of filing for DACA, and are currently in school or have graduated high school or obtained a GED may be eligible for DACA. The Obama Administration has announced that the requirements for DACA will be expanded to eliminate the “age cap” and allow people to apply who have been in the United States since January 1, 2010 (rather than June 15, 2007). However, due to a pending lawsuit, at the time of this manual’s publication this expansion has not gone into effect. See **Chapter 16** for additional information.
- **Deferred Action for Parents of Americans and Lawful Permanent Residents.** On November 20, 2014, President Obama announced the new DAPA program. The program was originally intended to begin in approximately May 2015. However, due to a pending lawsuit, at the time of this manual’s publication it is currently unknown when the program will be implemented. See **Chapter 16** for additional information. If and when the DAPA program goes into effect, undocumented immigrants who are parents of U.S. citizens or lawful permanent residents born on or before November 20, 2014 who have been living in the United States since January 1, 2010 and who were physically present on November 20, 2014 and on the date they request DAPA may be eligible for DAPA. Neither DACA nor DAPA provide lawful immigration status. Rather, they provide

¹⁷ INA § 101(a)(15)(T).

temporary protection from removal and work authorization. Further, neither leads to U.S. citizenship. See **Chapter 16**.

- **U.S. Citizenship and Family Immigration.** Some youth may be U.S. citizens without knowing their status based on U.S. citizenship of parents and in some cases, grandparents. See **Chapter 14**. Additionally, some youth may have U.S. citizen or lawful permanent resident family members in the U.S. who can help them become a lawful permanent resident. See **Chapter 13**.

WARNING! Immigrant children and youth can be eligible for more than one type of immigration relief. To ensure that youth have the best chance of obtaining lawful immigration status, advocates should carefully screen youth for all forms of relief. A sample screening questionnaire to assist in flagging eligibility is provided at **Appendix A**.

§ 1.3 Immigration System Actors

Immigration laws are made by Congress and enforced by administrative agencies in the executive branch of the federal government. As part of the executive branch's function as enforcer of immigration laws, it may also decide to exercise prosecutorial discretion favorably, and not remove (deport) certain people, for example, as it has done with the DACA program and as it promises to do with the DAPA program. Practically every immigrant child or youth will come into contact with at least one (and usually several) federal agencies if he or she decides to apply affirmatively for immigration relief or he or she is placed in removal proceedings (both discussed in § 1.6). These agencies and actors fall under three different federal departments: the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), and the Department of Justice (DOJ). Each of these departments serves a different purpose within the immigration system, which can be analogized as the enforcer, the caretaker, and the adjudicator or decision maker. It is important to know that they often have conflicting perspectives as to how immigrant children and youth should be treated and thus, the actions of the federal agencies cannot always be easily reconciled.

A. Department of Homeland Security (DHS)

As a result of the Homeland Security Act of 2002, introduced in the aftermath of the September 11th attacks, the former Immigration and Naturalization Service (INS) ceased to exist as an independent agency within the Department of Justice and its functions were transferred to various agencies within the newly formed Department of Homeland Security (DHS).¹⁸ The DHS now has primary responsibility for administering and enforcing immigration laws. Three agencies within the DHS handle these responsibilities: U.S. Citizenship and Immigration Services

¹⁸ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in pertinent part in scattered sections of 6 and 8 USC); see H.R. Rep. No. 107-609, pt. 1, at 64 (2002).

(USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP).¹⁹

1. USCIS

U.S. Citizenship and Immigration Services (USCIS). USCIS is responsible for processing and making decisions on all applications for immigration benefits, many of which are filed affirmatively. These include applications for Special Immigrant Juvenile status, asylum, lawful permanent residency, and citizenship. Although USCIS can initiate deportation proceedings, they can and commonly refer certain cases that are denied to Immigration and Customs Enforcement, the interior enforcement arm of DHS, to do so.

2. Enforcement

Immigration and Customs Enforcement (ICE). ICE is the “interior” enforcement arm of the DHS (i.e., not at the border) and has a goal of identifying and removing all removable persons located within the United States. One of its primary targets is “criminal aliens.” It therefore has a strong presence in the criminal and juvenile justice systems especially in jails, prisons, and increasingly, in youth detention centers. ICE has the authority to arrest, transport, and/or detain (except for certain juveniles) individuals in violation of immigration laws. Not only do ICE attorneys represent the government in removal proceedings, but ICE also coordinates the actual removal of noncitizens who are ordered deported.

It is important to emphasize that ICE’s goal is to enforce immigration laws and not to look out for the best interests of children or youth or ensure that they receive due process. Once ICE picks up a youth, it will not tell the youth about his or her immigration relief options; advocates have also reported that ICE may even dissuade youth from pursuing options available to them and encourage them to accept voluntary removal (deportation without a hearing). This is particularly critical as many children and youth have trouble distinguishing the roles of various persons in the immigration system, e.g., whether a person is their attorney or works for the government, and as such may confide and trust in ICE before realizing ICE’s intentions.

There is also a misconception that ICE always has a primary role in the deportation process of minors. In reality, ICE’s role with juveniles may be limited where the child is considered “unaccompanied,” meaning that there is no parent or legal guardian able or willing to provide for his or her care and custody. In these cases, ICE will handle the initial stages of deportation and detention by identifying and arresting juveniles for removal, but then will transfer these juveniles to the custody of the Office of Refugee Resettlement (ORR, described below). ICE usually only steps into the process again once the youth has accepted deportation or been ordered deported by a court by coordinating his or her physical removal from the United States. The vast majority of youth apprehended by ICE are deemed “unaccompanied” and are thus detained by ORR. Where the minor is deemed “accompanied,” ICE will take a greater role in the deportation process and may detain the minor pending the outcome of removal proceedings.

¹⁹ See DHS, *Department Components*, available at www.dhs.gov/department-components.

Little is known about how many accompanied juveniles are detained by ICE and who they are. See **Chapter 18** on detention.

U.S. Customs and Border Protection (CBP). CBP is responsible for inspecting visitors and cargo at ports of entry and tries to secure the borders at the U.S. land, sea, and air ports of entry. CBP is also given the authority to arrest, transport, and detain noncitizens, but unlike ICE, it focuses on those who are caught in violation of immigration laws at the border and ports of entry. Note that CBP has authority to operate within 100 miles of any land or sea border, so many parts of the United States (such as Los Angeles, New York City, Houston, and all of Florida) are within CBP's jurisdiction.

Statistics show that in Fiscal Year 2014 alone, over 68,000 unaccompanied children were apprehended by CBP crossing the Mexico-U.S. border.²⁰ If these minors are from a bordering country, e.g., Mexico, and there are no red flags as to trafficking or persecution, they will generally be sent back in a process called "voluntary return," and will never see a judge or an attorney. CBP is also the agency that juvenile justice systems near the border interface with most often. They play a role that is similar to ICE by initially detaining and effectuating the removal of minors.

B. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR)

On March 1, 2003, DHS established that custody of "unaccompanied" alien children would be placed with the Office of Refugee Resettlement (ORR). ORR, which is a division of the U.S. Department of Health and Human Services, created "DCS"—the Division of Children's Services—to provide care and services to this population pending the conclusion of the immigration case.²¹ However, DHS through ICE continued to retain control and oversight of "accompanied" alien children. No definition of accompanied is provided by immigration law; there is only a definition of the term "unaccompanied." See **Chapter 18** for discussion on this classification.

ORR's philosophy towards minors is very different than that of ICE—its mission is grounded in child welfare principles, so it is specifically concerned with the well-being of a child and his or her particular vulnerabilities. Its work and programs take into account the unique nature of each child's situation in making placement and release decisions. The agency is mandated to develop a plan to ensure timely appointment of legal representation for children in its custody²² (although in practice many children do not receive legal representation in their removal proceedings). It also works towards reunifying all children in their custody with family members or other close friends where possible.

²⁰ United States Border Patrol, Southwest Border Sectors, *Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 compared to FY 13*, available at www.cbp.gov/border-security/along-us-borders/operations.

²¹ Women's Refugee Commission, Orrick Herrington and Sutcliffe, LLP, *Halfway Home: Unaccompanied Children in Immigration Custody*, p. 1 (Feb. 2009) [hereinafter "Halfway Home"].

²² Halfway Home, p. 14.

ORR, like ICE, also has a role working with referring agencies such as the juvenile justice system, however, with different goals in mind. Although minors from the juvenile justice system are often detained upon arrest by ICE or CBP, ORR's priority is to reunify all children with family members where possible, regardless of their record. In order to get reunification approved, social workers working with the minor must ensure that she will comply with her probation terms, participate in rehabilitative and other support programs when released into the community, and not re-offend. This requires working with probation officers to ensure that they know and are cooperating in the minor's re-entry into the community. ORR's role at this point is driven by rehabilitation not enforcement.

Tension between DHS (ICE) and HHS (ORR): Conflicting Federal Directives. As noted above, the missions of DHS and ORR are fundamentally at odds with one another and dictate the level of attention paid to the safety and well-being of immigrant children and youth in each agency's respective custody. DHS's mission (through its divisions of ICE and CBP) is to enforce immigration laws to ensure the departure from the United States of all removable aliens, including unaccompanied youth. For that reason, DHS, at the front end, often encourages the reporting of noncitizen minors for deportation. On the other hand, ORR's mission is to care for and protect youth and to reunify them with their families where possible. Therefore, ORR, even during the deportation process, often facilitates integration of the minor back into the community.

This division is due to the divided structure of the immigration system for children and youth as well as conflicting laws and policies. DHS exerts significant influence over the treatment of undocumented children who arrive or are initially arrested in the United States. Because DHS is the "gatekeeper," it has the power to exercise its authority in ways that are not always in the child's best interest. For example, even though the Homeland Security Act clearly intended that ORR become the legal custodian for "unaccompanied" children, in some instances, DHS has continued to retain custody of this category of children. See **Chapter 18** on detention. Only once DHS decides to transfer custody to ORR will its more child-friendly approach govern.

To compound this problem, there are conflicting directives from Congress and the Administration. The immigration laws for children and youth passed by Congress, such as the TVPRA, have been more encompassing and protective of children's rights as compared to adults. At the same time, the Administration has taken conflicting stances on its approach to unaccompanied children. In response to the unprecedented numbers of unaccompanied children arriving at the United States' southern border in 2014, President Obama initially declared the influx of children a humanitarian crisis.²³ However, in the months that followed this pronouncement, the Administration through DHS has taken a hard line enforcement approach to this population, including expediting court hearings, discouraging youth from applying for relief, building more detention facilities and processing centers, increasing border security and urging

²³ Jerry Markon, The Washington Post, *Influx of unaccompanied immigrant children slowed again in September* (Oct. 9, 2014), available at www.washingtonpost.com/blogs/federal-eye/wp/2014/10/09/influx-of-unaccompanied-immigrant-children-slowed-again-in-september/ [hereinafter "Influx of Unaccompanied Immigrant Children"].

Central American leaders to discourage people from journeying north, all in an effort to stem the flow of migration,²⁴ despite ample evidence that a majority of children arriving unaccompanied to the United States are in need of international protection.²⁵

C. Department of Justice, Federal Circuit Court of Appeals, and the U.S. Supreme Court²⁶

Although the Homeland Security Act transferred many of the Attorney General's (AG) immigration functions to the Department of Homeland Security, the AG still retains the power to make definitive determinations on questions of law and to review many of the DHS decisions. More importantly, the Executive Office for Immigration Review (EOIR), which consists of the immigration courts and the Board of Immigration Appeals (BIA), remains under the jurisdiction of the U.S. Department of Justice, headed by the AG. EOIR has the authority to review many DHS decisions, but the AG has the power to overrule decisions made by EOIR.

EOIR is composed of the immigration courts and the BIA, the appellate body that reviews the decisions of these immigration courts. While USCIS oversees the paper process (i.e., applications), the immigration courts oversee judicial decisions regarding the immigration process as well as applications filed in court. ICE, USCIS, or the CBP arrest an individual and initiate formal "removal" (deportation) proceedings. These proceedings occur in immigration court and are presided over by an immigration judge (IJ). This judge determines whether the noncitizen should be ordered removed from the United States or, if he or she qualifies, be granted "relief from removal" and permitted to remain.

All noncitizens, as well as the government, have the right to appeal decisions of the IJ to the BIA. The BIA is located in Falls Church, Virginia, and is comprised of 15 Board Members, including a Chairman and Vice Chairman, who have the power to issue decisions that are binding on all immigration judges, as well as ICE, USCIS, and CBP throughout the country. Information on EOIR and the BIA can be found online at www.usdoj.gov/eoir.

The federal circuit courts of appeal (federal appellate courts) have the power to review decisions made by the BIA. The federal circuit wherein the case arose (i.e., where removal proceedings were concluded) will have the power to review the BIA decision (regardless of the physical location of the noncitizen at the time the appeal is filed).²⁷ Federal legislation passed in 1996 placed significant limitations on the powers of the appellate courts in relation to immigration appeals. However, despite these limitations, immigration appeals remain the largest category of cases in many federal appellate courts. Decisions of the federal circuit courts of appeal are binding on the BIA, the immigration judges, ICE, USCIS, and CBP within that circuit.

²⁴ Influx of Unaccompanied Immigrant Children.

²⁵ Children on the Run, p. 6.

²⁶ Thanks to Ann Benson for providing much of the original material in this section.

²⁷ 8 USC § 1252(b)(2).

Either party (the government or the noncitizen) can file a petition requesting the U.S. Supreme Court to review a decision by the federal appellate court. However, unlike the BIA or the federal appellate court, this is not an “appeal of right” (i.e., one that the court is required to hear), but rather is discretionary. The Supreme Court only agrees to review a fraction of the cases it is requested to hear. However, decisions issued by the Supreme Court are binding on every court and every agency.

Special Note on USCIS Administrative Appeals Office (AAO) Decisions. When an application is denied by USCIS, there is an administrative appeals process. The body which handles these appeals is the Administrative Appeals Office (AAO). Often, decisions regarding children and youth will appear as AAO decisions. See example at **Appendix E**.

D. United States Consulates

U.S. consulates are part of the Department of State and at least one U.S. consular office exists in most foreign countries. U.S. consulates play a primary role in the processing and issuance of U.S. visas to foreign nationals who wish to come to the United States and qualify under some type of legal avenue to do so, such as student visas, tourist visas, employment visas, or refugee visas. Family members who are immigrating to the United States and foreign workers coming to work for companies in the United States all must have their visas issued by a U.S. consulate in their home country (or the closest U.S. consulate).

§ 1.4 Immigration Legal Provisions

A. Immigration and Nationality Act and Accompanying Regulations and Memoranda

Immigration law is controlled by a federal law—the Immigration and Nationality Act (INA). The INA appears at Title 8 of the United States Code, 8 USC § 1101 *et seq.* The INA is the subject of constant revision. The INA can be accessed on USCIS’s website at www.uscis.gov under “Laws.”

Corresponding regulations to the INA are contained in 8 CFR § 1.1 *et seq.* These regulations interpret the meaning of the INA and are written by the governmental agency involved in their implementation. The purpose of the regulations is to clarify the laws and set procedures for implementation. Whereas the INA says what the law is, the regulations fill in a lot of details about how the DHS immigration agencies are going to apply the laws. You can access the 8 CFR, immigration regulations, on USCIS’s website at www.uscis.gov under “Laws.”

Finally, there are memoranda or internal operation instructions written and issued by the various federal agencies who work with immigrants. These are internal instructions to the employees of the agency. Their purpose is to instruct the agency employees on agency protocol and practice. Some are numbered and put out in a collection in books, for example, the Foreign Affairs Manual of the Department of State (which can be accessed online at www.state.gov) and the USCIS Policy Manual (which can be accessed on the USCIS website at www.uscis.gov).

Other times they are issued through policy memoranda authored by a government agency, which also can be accessed on the USCIS website at www.uscis.gov under “Laws.”

B. Cases

The case law governing immigration includes decisions written by various courts, from the BIA to the federal appellate courts to the U.S. Supreme Court. For better or worse, there are not many published cases regarding immigration issues for children and youth from the BIA or federal courts. The cases that do exist carry equal legal weight to statutes and regulations. In fact, cases can sometimes be more powerful than statutes and regulations because the cases can define and even overturn statutes and regulations. One such case relevant to children is *Perez-Olano v. Gonzalez*, a case that brought claims against USCIS for overstepping its authority by imposing additional SIJS requirements in regulations that were not stated in the statute. This case was resolved via settlement agreement in late 2010²⁸ and supersedes all “practices, policies, procedures and federal regulations to the extent they are inconsistent with the [Settlement] Agreement.”²⁹ See discussion in **Chapter 4**.

C. Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) passed the House and Senate on December 10, 2008 and was signed into law by the president on December 23, 2008. This legislation was designed to bolster federal efforts to combat trafficking and, in the process, to provide critical protections for the tens of thousands of unaccompanied minors who come to the United States each year. The law seeks to create better screening of unaccompanied minors who may be the victims of trafficking or who may fear return to their home country, safer repatriation of any youth removed from the United States, more compassionate environments for children in immigration custody, and broader legal protections and access to services for these youth.

Of the thousands of children who enter the United States every year without a parent or guardian, many are victims of trafficking, persecution, or other abuse and violence. Some are fleeing wars and armed conflicts, gang recruitment, domestic violence and slavery. In the past, these youth were detained in overly secure facilities in immigration custody, afforded little legal representation in immigration proceedings, and often returned to their home countries with virtually no safeguards. The TVPRA created a multi-agency response to address these problems by recognizing the enormous vulnerability of these youth and providing special services tailored to their needs. A core tenet of the TVPRA’s changes to the treatment of unaccompanied minors is its emphasis on the child welfare principle of the “best interests of the child.”

²⁸ Settlement Agreement in *Perez-Olano, et al. v. Holder, et al.*, No. CV 05-3604, (C.D. Cal. Dec. 14, 2010) p. 7, ¶ 19, available at www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf [hereinafter “Perez-Olano Settlement Agreement”].

²⁹ *Perez-Olano* Settlement Agreement, pp. 5-6.

Screening and Repatriation. The TVPRA creates mandatory screening of children brought into federal custody at the border to determine whether they are victims of trafficking or fear persecution. In the case that the child is to be repatriated, the law provides a pilot repatriation program that works with Health and Human Services, the Department of State (DOS), and the Department of Homeland Security to develop and implement best practices for safe-repatriation and reintegration of youth to their home countries.³⁰ The agencies are required to report to Congress with data on minors removed from the United States—including age, gender, country of origin, and types of immigration relief requested.

Detention. The TVPRA also provides that children be placed in the least restrictive setting that is in “the best interest of the child” and prohibits children from being placed in secure facilities unless a determination has been made that the child poses a danger to herself or others or has been charged with having committed a criminal offense. For children ultimately placed in secure detention facilities, HHS must review such placement on a monthly basis.

Legal Access. The TVPRA expands legal access for unaccompanied minors by requiring “to the greatest extent practicable” that these children have legal representation and authorizing HHS to appoint independent child advocates for trafficking victims and other vulnerable unaccompanied children.³¹ For years following the implementation of the TVPRA, this was limited to the provision of pro bono legal representation for a small number of children, but did not result in representation in the vast majority of unaccompanied minor cases. More recently, ORR began pilot programs in Houston, Texas and Los Angeles, California to provide legal representation for a limited number of unaccompanied children after they were released from detention. In 2014, ORR announced a program expansion to provide legal representation for approximately 2,600 unaccompanied children by awarding additional funds to two existing grantees to hire attorneys to provide full-scope legal representation. These funds will allow for the provision of legal services to children in Miami, Florida; Houston, Texas; and Los Angeles, California.

The TVPRA also expanded the category of children eligible to apply for Special Juvenile Immigrant Status, a form of legal status for abused, neglected, or abandoned undocumented children. The legislation also exempted unaccompanied minors from the one-year filing deadline for asylum applications and allowed them to apply for asylum with USCIS in a non-adversarial system, rather than in front of an immigration judge in a courtroom. Further, the TVPRA provides no-cost voluntary departure for unaccompanied minors.

While many advocates feel that the TVPRA still falls short of offering the types of legal protections that immigrant children need, the importance of the TVPRA cannot be understated. However, in order to have access to its protections, children need to be identified as children. If you have a client who is a child or youth who has been mistakenly identified as an adult, correct this classification with the appropriate agency (DHS if the child is in custody, EOIR if the child is in court) as soon as possible.

³⁰ TVPRA § 235(a)(5).

³¹ TVPRA § 235(c)(5)–(6).

Determining If and When a Child Is “Unaccompanied,” for Purposes of Obtaining TVPRA Protections. The TVPRA’s critical protections described above apply to “unaccompanied” minors in the United States. The term “unaccompanied alien child” is defined as a child who has no lawful status in the United States, is under the age of 18 and has no parent or guardian in the United States or no parent or legal guardian in the United States who is available to provide care and physical custody.³²

Jurisdiction and Interpretation of the Term “Unaccompanied.” While both the TVPRA and Homeland Security Act of 2002 are ambiguous as to who has jurisdiction to make the “unaccompanied” child determination, in practice, it has been made principally by CBP and ICE, and to a lesser extent ORR, EOIR and USCIS. Because children may come before all of these agencies, these agencies should all have authority to make such determinations. Unfortunately, interpretation of the term “unaccompanied,” has varied amongst these agencies and consequently, has led to inconsistent determinations. This confusion has sometimes resulted from the various shifts of a child’s physical custodial status (for example, release from ORR custody into the custody of a parent or non-parent sponsor). Additional issues around the unaccompanied child determination can also arise from the interpretation of a parent or legal guardian “available to provide care and custody.” For example, a child may have parents in the United States who may not want to live with the child because the parent and the child are estranged. Further, many children living with their parents are apprehended in the United States without their parents and their parents do not come forward out of fear for their own deportation. However, many of these parents are able and willing to provide care and custody. Nonetheless, many of these children are classified as “unaccompanied.”

While the unaccompanied minor classification may be inconsistent, the initial decision is not completely unreviewable. A child who is not classified as “unaccompanied,” by the initial government agency and who is later placed in removal proceedings has the right to ask the immigration court to review the initial determination. See **Appendix RR**. The federal government also has the right to ask the court to review an unaccompanied determination that it believes was wrongly made at the time.

For many years, the “unaccompanied” determination was particularly problematic for advocates, immigration judges, and USCIS officers trying to re-determine who was “unaccompanied” for purposes of the initial jurisdiction of USCIS over UAC asylum applications. Thankfully, in 2013, USCIS issued guidance on its jurisdiction over UAC asylum claims. As of June 10, 2013, asylum offices will rely on the previous determination by CBP or ICE that an applicant is an UAC, without making a separate factual inquiry into the applicant’s age or unaccompanied status (for example, whether the child is still under 18 or remains “unaccompanied” at the time he or she files the asylum application), and take jurisdiction over the asylum application.³³ The one exception to this policy is where there has been an affirmative act

³² 6 USC § 279(g)(2), as amended by the Homeland Security Act of 2002.

³³ USCIS Memorandum, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013), available at www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves; USCIS Memorandum, *Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien*

to terminate the UAC status by the HHS, ICE, or CBP before the filing of the asylum application (for example, when the child is transferred into ICE custody upon her 18th birthday).

Timing. The unaccompanied determination can be made at any time in the process of a child’s case, but in the vast majority of cases, it is made during the initial apprehension by DHS because the TVPRA requires that DHS refer an unaccompanied minor to HHS custody within 72 hours of apprehension. If a previous determination of unaccompanied status has not been made, asylum offices will make determinations at the time the child files his or her asylum application.³⁴

Rescission of TVPRA Protections Based on Change of Unaccompanied Minor Classification. The protections of the TVPRA, once triggered, cannot be taken away from a child. The TVPRA’s retroactivity and effective date support this assertion by providing that the statute shall apply “to all aliens in the United States in pending proceedings” before DHS or EOIR or administrative or federal appeals, “on the date of the enactment of this Act.” With this language, Congress provided TVPRA protections to all persons who have cases still pending regardless of whether they still meet the definition of an unaccompanied minor. The BIA has agreed with this interpretation as it has remanded many cases where the child may have been an unaccompanied minor at some point in the proceedings, so that such cases can be adjudicated in accordance with the TVPRA. Further, USCIS’s policy guidance on unaccompanied minor asylum claims, discussed above, also supports the proposition that once a child has been classified as unaccompanied, that classification will stay with the child despite changes in age or custody, unless it is affirmatively terminated by ORR, ICE, or CBP.

§ 1.5 Grounds of Inadmissibility and Deportability and Waivers

A. Grounds of Inadmissibility (Formerly Grounds of Exclusion)

Since 1798, Congress has used its plenary power to deal with foreign “undesirables.” Grounds of inadmissibility, found in INA § 212(a), were developed to identify the kinds of persons whom Congress did not want to admit to the United States. Whenever any non-citizen attempts to enter the United States, he or she is subject to being barred from admission based on these categories. Until April 1, 1997 the grounds of inadmissibility were referred to as the grounds of exclusion.

Example: Jaime is attempting to enter the United States from Mexico. DHS determines that Jaime does not possess a valid unexpired immigrant visa, reentry permit, border crossing identification, or other valid entry document. Jaime may be found inadmissible and refused admission, unless it determines that he is a victim of trafficking or has a credible fear of persecution.

Children (June 4, 2013), available at www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves [hereinafter “June 2013 Memorandum”].

³⁴ June 2013 Memorandum.

The grounds of inadmissibility do not only apply at the border. Non-citizens already in the United States must prove that they are not inadmissible in order to qualify for many immigration benefits, including Special Immigrant Juvenile Status, immigration through a family visa petition, the U or T Nonimmigrant status, and Temporary Protected Status. Fortunately, some immigration options for children and youth provide exemptions from certain grounds of inadmissibility. The exemptions depend upon the form of relief for which the child is applying. Even if the child is inadmissible, there are often broad waivers for inadmissibility available to them.

Example: Tariq, who is 16-years-old, has lived in the United States for five years with no lawful status. He was abused by his mother and abandoned by his father and consequently, he entered the child welfare system as a dependent. Despite the fact that Tariq falls within several grounds of inadmissibility including being likely to become a public charge and being present in the United States without being admitted, he is still eligible to apply for Special Immigrant Juvenile Status because these grounds are automatically exempted for SIJS applicants.

Chapters 5 and 17 provide a more thorough discussion of some of the grounds of inadmissibility.

PRACTICE TIP: Many children and youth are exempt from certain grounds of inadmissibility, depending upon the relief for which they are applying. You should check the requirements for each form of immigration relief carefully.

B. Grounds of Deportation

The grounds of deportation provide bases for expelling persons from the United States once they have been admitted. Some grounds of deportation are similar, although not identical, to corresponding grounds of inadmissibility. The grounds of deportation are found in INA § 237(a).

Example: Monique is a lawful permanent resident (“green card” holder). At the age of 19 she becomes deportable after she is convicted in adult criminal court of domestic violence. If Monique is brought under removal proceedings, an immigration judge can find her deportable and order her removal. She would lose her permanent resident status and be forced to leave the United States. (Note: If Monique’s case was handled in juvenile court proceedings, she would not be deportable under this ground because it requires a conviction, and juvenile delinquency adjudications are not considered convictions for immigration purposes. See **Chapter 17**.)

A discussion of some of the grounds of deportability is in **Chapter 17**.

C. Waivers of Inadmissibility and Deportability

Some grounds of inadmissibility and deportability can be waived under certain circumstances, at the discretion of an immigration judge, USCIS, or consular officials. Children and youth may have special waivers available to them depending upon the form of immigration relief for which they are applying and the act that they committed. Waivers are granted as a matter of discretion.

The law governing which grounds may be waived and what standards apply may be located in the same sections of the Immigration and Nationality Act as the grounds of inadmissibility or deportability. Other waivers may be set forth in the law governing the specific form of immigration relief for which the person is applying. Waivers for each form of relief are discussed in their respective chapters.

D. When Do the Inadmissibility and Deportability Grounds Apply?

While this area is complex, and each case must be individually researched and analyzed, there is a fairly simple way to visualize which grounds might apply in which circumstances. A noncitizen who wants to get something from the immigration authorities generally must be admissible. For example, if a child wants to be admitted at the border or obtain legal status, i.e., a green card, she generally will need to overcome the grounds of inadmissibility. *Issues about the grounds of inadmissibility are usually what will affect undocumented children and youth the most.*

In contrast, a noncitizen child or youth who has some lawful immigration status and is trying not to lose it will immediately face the grounds of deportation. A lawful permanent resident who is deportable can be brought into removal proceedings and removed, at which time she will lose permanent resident status. In contrast, a permanent resident who is inadmissible but not deportable can afford to sit tight. As long as she does not leave the country (and therefore might have to apply to re-enter) and does not want to apply for any new benefit, such as U.S. citizenship, the fact that she has committed some act causing her to be inadmissible (but not deportable), will not cause her to lose the immigration status that she has: it may just block her from getting anything new.

Analogy: The Family Dinner. Think of the United States as a family having dinner, when a stranger comes to the door claiming to be a long-lost cousin. The many questions that would be asked and strict standards that would be applied to the stranger before he or she is admitted to the house are like the grounds of inadmissibility. Once the stranger has been admitted to dinner, he or she probably would not be told to leave unless he or she behaved very badly (or it was discovered that he or she committed fraud to get in). This somewhat more generous standard represents the grounds of deportability.

WARNING! It is important that advocates individually analyze each case. Some immigration applications have requirements beyond not being deportable or inadmissible. For example, an

application for Violence Against Women Act (VAWA) or citizenship requires that the person possess good moral character. Some other immigration applications, such as DACA and DAPA, do not necessarily require that the client not be deportable or inadmissible, but have entirely separate criteria.

§ 1.6 Overview of the Immigration Process for Children and Youth

A. The Affirmative Immigration Process

The affirmative immigration process generally involves an application for an immigration benefit, i.e., Special Immigrant Juvenile Status, asylum, and/or lawful permanent residence, for which a person may be eligible. Many immigration applications are submitted to U.S. Citizenship & Immigration Services (USCIS). The process generally involves submitting an application packet to USCIS, attending a biometrics appointment for children over a certain age (a background check), attending an interview if scheduled, possibly submitting any additional documentation needed by USCIS, and then issuance of a decision by USCIS. The processes for applying for the different forms of relief covered in this manual are provided in their respective chapters.

Applying affirmatively for an immigration benefit is the best way for children and youth to obtain legal status in the United States. It confers several benefits including providing enough time to develop a strong case, allowing the youth to have their application adjudicated in a non-adversarial setting, and having control over the case overall, i.e., the information submitted and considered. The risk of submitting an affirmative application (that is, for a child or youth who is not in removal proceedings), however, is that if it is denied and the child has no other way to immigrate, ICE could place the child in removal proceedings and try to deport him or her. This may be unlikely in many children's cases, but it is always a possibility. It must be considered and factored into the decision whether or not to submit an immigration application. By applying for any form of immigration relief affirmatively, the child is making himself or herself known to the Department of Homeland Security.

Note that the only downside for immigrant children not in removal proceedings is that they may not realize that they need to apply for immigration relief until they are already too old for some of the relief options specifically for youth. Remember to tell your clients that any undocumented younger siblings or family members will also need immigration relief, and could benefit by applying sooner rather than later.

B. Removal (or Deportation) Proceedings

1. Overview

Immigrant children and youth in the deportation process face overwhelming obstacles. They are held to the same standard of proof as adults in fighting their deportation. They are

provided with very little information about their legal rights, such as viable defenses against deportation, for which many of them are eligible. They often do not understand the nature of the proceedings due to age, language and cultural barriers, and importantly, may lack access to counsel.

Improvements have been made, however, to these processes for children and youth. Unaccompanied children and youth in ORR custody are significantly more likely to receive representation due in part to ORR efforts to increase representation of unaccompanied children. ORR has recently provided government-funded representation for a limited number of unaccompanied children who have been released from detention and reunified with a family member or other adult. There is also a program in a limited number of jurisdictions, run by the Young Center for Immigrant Children's Rights, to provide child advocates, similar to guardians *ad litem*, to particularly vulnerable youth in custody. The TVPRA also promotes greater access to legal counsel for unaccompanied immigrant children, encourages the appointment of child advocates for trafficking victims and other vulnerable children, and requires more expansive training of federal officials who work with unaccompanied immigrant youth.³⁵

Ultimately, what happens to a child or youth in removal proceedings will depend on various factors including: whether she is considered accompanied or unaccompanied as defined by immigration laws, where she is apprehended by immigration authorities, and the individual circumstances of her situation, including her prior immigration and delinquency history, if any. This section will provide the authority for and standards governing removal proceedings and describe generally what happens to a minor in the removal (or deportation) process once she has been apprehended. A map of the deportation process for children and youth is provided at **Appendix B**. An in-depth discussion of the apprehension/arrest phase and detention process is covered in **Chapter 18**.

2. *Removal proceedings: Admission and the burden of proof*

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 created removal proceedings. A removal proceeding is the court process that determines whether someone will be removed (also called deported) from the United States. Removal proceedings apply to cases commenced by the filing of a Notice to Appear on or after April 1, 1997.³⁶ In removal proceedings, the DHS may charge noncitizens with being inadmissible³⁷ or deportable.³⁸ Generally only those noncitizens who have been “admitted” to the United States will face the grounds of deportability in removal proceedings. Those who entered without inspection will face the grounds of inadmissibility.

³⁵ TVPRA § 235(c)(5)–(6); TVPRA § 235(e).

³⁶ IIRIRA § 309(c)(1).

³⁷ INA § 212(a). IIRIRA renamed the former grounds of “exclusion” the grounds of “inadmissibility.”

³⁸ INA § 237(a). Under IIRIRA INA § 237 replaced former INA § 241 grounds of deportation.

Thus, a key question in removal proceedings is whether the person has been **admitted** into the United States. To be considered admitted, a person must have made a “**lawful entry ... after inspection**” by a DHS officer.³⁹

Noncitizens who entered the United States with inspection, pursuant to a visa of some kind, have been **admitted**. If the DHS brings them into removal proceedings, *the DHS has the burden of proving that the individual comes within a **ground of deportability***.

Noncitizens who have not been lawfully admitted into the United States are **seeking admission**. If challenged and placed in removal proceedings, *these people have the burden of proving that they do not come within one of the **grounds of inadmissibility***. In some cases the persons simply have no immigration documents and are removed for being inadmissible on that basis. In other cases they may be inadmissible for other reasons.

Who has not been admitted, and therefore is still seeking admission and is subject to the grounds of inadmissibility? Noncitizens who:

- Entered the United States without inspection—for example, avoided a DHS checkpoint by wading across the Rio Grande River from Mexico with a smuggler or coyote;
- Arrived at the border or a port of entry hoping to be admitted but who are stopped and challenged by the DHS;
- Are applicants for adjustment of status;
- Are parolees—see INA § 101(a)(13)(B); or
- Are alien crewmen—see INA § 101(a)(13)(B).

A different rule applies to lawful permanent residents who travel abroad and return to the United States. A returning permanent resident is presumed *not* to be seeking admission, *unless* he or she comes within certain exceptions set out in the statute.⁴⁰

There are a few types of removal proceedings. For purposes of children and youth, there are two removal procedures with which advocates should be primarily familiar. A non-citizen can be ordered removed by an immigration judge as described in **Subsection 3** below. A person can also be removed through voluntary removal by agreeing to withdraw his or her application for admission. This often occurs at the border, although unaccompanied youth, under the TVPRA, should not be voluntarily removed unless they are from a contiguous country and there are no trafficking concerns or fear of return. Voluntary removal should not be confused with voluntary departure, which is a formal order granted by ICE or EOIR only to qualifying immigrants in lieu of a removal order. See **Chapter 15**.

³⁹ INA § 101(a)(13).

⁴⁰ See INA § 101(a)(13)(C).

3. *The removal process*

Removal proceedings against an individual start when an immigration official issues a document called a Notice to Appear (NTA), files it with the immigration court, and gives a copy to the individual.⁴¹ Often the person is arrested first and then receives the NTA. The person against whom the NTA is issued is called the **respondent** (the person who responds to the charges). The regulations implementing the removal procedures are found at 8 CFR § 239, § 240, § 1239 & § 1240.

Generally the process for removal proceedings is as follows:

1. **Arrest and Detention.** A person can be **arrested and detained** by an immigration official (usually a CBP or ICE official) on suspicion of not having lawful immigration status, or of having received a conviction that makes the person deportable. After the arrest, the official will interview the person. DHS is required by law to provide a notice of rights to children and youth. Nevertheless, few children understand what this interview is about, and information they give is often used against them. See **Chapter 18** on apprehension/arrest.
2. **The Notice to Appear.** The Notice to Appear is the formal legal document that charges the person with being a removable alien. In the NTA, the government must state specific facts that show (1) the person is not a U.S. citizen and what her country of citizenship is, (2) the acts or conduct that are in violation of the law, (3) the legal authority under which the government is conducting the proceedings, and (4) the provisions of the law that the person violated.

Example: In Gabriela's case, the Notice to Appear will state that Gabriela is a citizen of Mexico and not a U.S. citizen. It will state that Gabriela entered the United States without inspection in June 2014 near Calexico, California. (Gabriela herself gave the immigration officer all of this information when she was arrested.) Based on these allegations, it will charge Gabriela with being present in the United States in violation of the Immigration and Nationality Act and thus removable.

The government must **serve** the person with a copy of the Notice to Appear (give the person a copy). If the person is detained it may simply hand her the Notice to Appear. If the person is not in detention, it may serve the NTA by mail.⁴²

3. **The Bond Hearing.** Bond hearings are not common for children and youth. Children and youth who are deemed "unaccompanied" (under the age of 18 and who do not have a parent or legal guardian who is willing or able to provide for their care and custody), will be in the custody of ORR. For these youth, there is no bond, but instead a reunification

⁴¹ Certain designated officials of USCIS, CBP, and ICE have the authority to issue a Notice to Appear. See 8 CFR § 239.1.

⁴² INA § 239(a)(1).

process facilitated by ORR with family members, or a transfer to long-term foster care. See **Chapter 18**. On the other hand, if the child or youth has been arrested and is considered “accompanied,” ICE Enforcement and Removal Operations may set an **immigration appearance bond** that the person (or a family member or friend) must post to secure the youth’s release from custody. ICE may also just release the youth on his or her own recognizance, or subject to an ankle-bracelet monitoring program called Intensive Supervision Appearance Program (ISAP). If a bond is issued, it is supposed to guarantee that the person will come to future hearings and interviews. If the person does not show up, she will lose the bond money. More information on the bond and release process for accompanied youth is in **Chapter 18**.

4. **The Master Calendar Hearing.** The next stage in removal proceedings is called the **master calendar** hearing. At this hearing, the person must respond to the charges on the Notice to Appear. The judge will most often rule on two questions:
 - a. Is the person really a removable alien, as charged on the NTA? In other words, can ICE prove that the NTA charges are correct?
 - b. If so, should the person be removed, or can the person apply for some kind of **relief from removal** or **means of immigrating**?

Priority Scheduling of Unaccompanied Minor Cases. In July of 2014, as part of the Administration’s attempts to dissuade the tide of unaccompanied children arriving to the United States, EOIR began expediting the cases of some children classified as Unaccompanied Alien Children. If EOIR puts your client’s case on one of these “rocket” dockets, it may be helpful to observe hearings on that docket before your client’s hearing. On an expedited docket, be prepared to experience push-back from the judge when you request continuances. But per EOIR policy guidance, the judges on rocket dockets still have the authority to grant continuances. The EOIR memos states that “nothing in the priority scheduling of U[naccompanied] M[inor] cases for the first master calendar should inhibit a judge’s discretion to appropriately reset the case for other reasons supported by good cause.”⁴³ The policy memo specifically addresses SIJS: “[f]or example, if a[n] U[naccompanied] M[inor] is applying for Special Immigrant Juvenile (SIJ) status, the case must be administratively closed or reset for that process to occur in the appropriate state or juvenile court.”⁴⁴ This means that you should request and obtain appropriate continuances during the representation of an unaccompanied child.

⁴³ EOIR Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities* (Sept. 10, 2014), p. 2, available at www.justice.gov/eoir/statpub/Docketing-Practices-Related-to-UACs-Sept2014.pdf.

⁴⁴ EOIR Memorandum, *Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities* (Sept. 10, 2014), p. 2, available at www.justice.gov/eoir/statpub/Docketing-Practices-Related-to-UACs-Sept2014.pdf.

If the child can apply for some relief (for example, Special Immigrant Juvenile Status, or adjustment of status), the judge may schedule another longer hearing to decide if the youth is eligible for the relief. In some cases, however, the judge may terminate (or end) proceedings for the youth to proceed with an immigration application before USCIS; this happens in some jurisdictions, for example, for Special Immigrant Juvenile Status applications. The immigration judge may also administratively close proceedings while the youth is proceeding with an immigration application with USCIS; this may happen, for example, when an unaccompanied minor's asylum application is being adjudicated by USCIS. When proceedings are administratively closed, the person is still technically in removal proceedings, and the government could open up the case at any time. If removal proceedings are not terminated, the longer hearing is called the **merits hearing** or "individual hearing." The judge will also schedule a merits hearing if the person argues that he or she is not removable and attacks the government's evidence as being insufficient.

If the person cannot apply for any relief, and does not qualify for or fight for **voluntary departure** instead of removal, the judge will issue a **final order of removal**. If the person does not challenge the removal order, ICE will remove the person to his or her country of origin. While the TVPRA provided for a pilot program for the safe repatriation of children, it is unclear to what extent any of these practices have been implemented.

Note on Voluntary Departure. Voluntary departure is a form of discretionary relief that allows a person to depart the United States, instead of undergoing deportation or removal. The INA provides for a grant of voluntary departure at two distinct times. First, immigration authorities may grant voluntary departure prior to the conclusion of removal proceedings.⁴⁵ Second, the immigration judge may grant voluntary departure instead of removal at the conclusion of removal proceedings.⁴⁶ It is easier for the applicant to qualify for the type of voluntary departure that comes prior to conclusion of proceedings. This fact unfortunately penalizes applicants who pursue relief.

Legally, departing voluntarily is different from and better than having an order of removal on one's record. A person who accepts it is not subject to certain bars to re-entry and therefore, may be able to return to the United States if she qualifies for immigration relief in the future. If the child or youth qualifies and is classified as an unaccompanied minor, then voluntary departure is available to her at no cost.⁴⁷ If a child is considering voluntary departure in lieu of removal, it should only be requested if the child is actually going to leave the United States and/or the immigration judge denies relief and all appeals fail. Otherwise, the voluntary departure order will convert into a removal order if the child fails to depart and she will be subject to *additional* penalties that can bar immigration relief in the future.⁴⁸ Voluntary departure is discussed in greater detail in **Chapter 16**.

⁴⁵ INA § 240B(a)(1).

⁴⁶ INA § 240B(b)(1).

⁴⁷ TVPRA § 235(a)(5)(D)(ii).

⁴⁸ INA § 240B(d).

5. **“Merits Hearings” for Relief.** If the person has a defense to removal, the judge may set the case over for another hearing on that defense, called a “merits hearing,” or “individual hearing.” The defense could be an attack on the facts or law set out in the Notice to Appear, or it could be an application for relief. At the conclusion of the merits hearing the judge may either issue a decision in court or “reserve” the decision to give herself time to prepare a decision. If the person is ordered removed, she may appeal the decision to the Board of Immigration Appeals.

6. **Expedited Removal Process.** Under the TVPRA, unaccompanied children must be placed in removal proceedings under INA § 240 and therefore, should not be subject to expedited removal proceedings.⁴⁹ Only in certain cases, such as when the youth is from a neighboring country and has been properly screened in accordance with the TVPRA, may the child be subject to voluntary removal (withdrawal of his or her application for admission)—but even here, the child is not subject to expedited removal proceedings.⁵⁰ A youth over 18 years old, however, could be subject to expedited removal.

After Deportation. Once youth are deported, the government provides little to no resources to facilitate reunification with family members. Advocates have found that youth are often dropped off at the border, in the country’s capital or with the country’s child welfare agency. The TVPRA attempted to change these practices and provided a pilot repatriation program that worked with several federal agencies to develop and implement best practices for safe-repatriation and reintegration of youth to their home countries. However, on the ground, not much appears to have changed. Many children are dropped off far from home, and their relatives in the home country are often not alerted to when, how, where, or even that the children are returning home. The best time to address what will happen to your client after she is deported is before she actually leaves the United States. Try to identify and contact family members before your client is deported, and prepare a plan with your client for what to do upon her arrival.

PRACTICE TIP: Before you practice in any immigration court, read the regulations governing such practice and the Immigration Court Practice Manual (ICPM). The ICPM may be found on the EOIR website at www.usdoj.gov/eoir. The ICPM contains the rules that the EOIR has made for practice in the local courts. They supplement the general regulations concerning practice in immigration courts, and include important filing deadlines. You must follow the general regulations and the ICPM rules or you may have procedural problems—including missed filing deadlines—that injure your case.

Immigration judges do still retain some discretion regarding setting and extending filing deadlines and other issues that may arise. If you have questions about local practice, you can speak with an experienced local practitioner. You can also call the immigration court clerk and/or the clerk of the immigration judge before whom your case is pending to clarify how the ICPM is being implemented locally or inquire about your case. If you have filed a motion that is time-sensitive,

⁴⁹ TVPRA § 235(a)(5)(D).

⁵⁰ TVPRA § 235(a)(2)(B)(i).

you can follow-up on the motion with a call to the judge's clerk to ask about the timing on the decision.
