IMMIGRANT CHILDREN'S RIGHTS MANUAL

June 2016
Working Edition

Excerpted Sections on
Special Immigrant Juvenile Status
and Refugees and Asylum

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I. Special Immigrant Juvenile Status

The Special Immigrant Juvenile Status (SIJS) law permits undocumented children who have come under the jurisdiction of a juvenile court and meet other requirements to become lawful permanent residents.

a. What is Special Immigrant Juvenile Status

Persons under the jurisdiction of a juvenile court who are "deemed eligible for long term foster care" may be able to obtain SIJS[1] and eventually apply for lawful permanent residency. First, the minor needs to apply for SIJS and then for permanent residency. These applications are usually filed at the same time, although in some circumstances the SIJS petition might be submitted first.

"[A]n immigrant who is present in the [U.S. and] has been declared dependent on a juvenile court located in the U.S. or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the U.S., and whose reunification with one or both of the [child's] parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law[,] for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's parents or previous country of nationality or country of last habitual residence[.]" INA section 101(a)(15)(J)(i)-(ii).

If an immigrant child is afforded SIJS, no parent, whether adoptive or natural, can later because of family relation receive any immigration benefit. INA section 101(a)(15)(J)(iii).

The most important benefit of applying for SIJS is obtaining lawful permanent resident status (i.e. a green card). Special immigrant juvenile status might be the only route for an undocumented child to gain lawful permanent immigration status in the U.S..

b. Who is eligible?

8 USC § 1101(a)(27)(J) states, in part, that a special immigrant juvenile is:

> (J) an immigrant who is present in the U.S. –
> (i) who has been declared dependent on a juvenile court located in the U.S. or whom such a court has legally

[1] " Special immigrant juvenile" is defined in INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J). This section was added by § 153 of the Immigration Act of 1990 (IA90).

committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the U.S., and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment,

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence, and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.

8 CFR § 204.11(c) lists all the requirements for eligibility:

> [an immigrant] is eligible for classification as a special immigrant … if the [immigrant]:
>
> (1) Is under twenty-one years of age;
>
> (2) Is unmarried;
>
> (3) Has been declared dependent upon a juvenile court located in the U.S. in accordance with state law governing such declarations of dependency, while the alien was in the U.S. and under the jurisdiction of the court;
>
> (4) Has been deemed eligible by the juvenile court for long-term foster care;
>
> (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and
>
> (6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

i. Dependency, Delinquency, or Other Juvenile Court Proceedings

The applicant must be under the jurisdiction of a juvenile court, the immigrant child must have "been declared dependent on a juvenile court located in the U.S. or whom such court has legally committed to, or placed under the custody of, an agency or department of a state." [2] In either delinquency or dependency proceedings, the child applicant must meet all of the requirements for SIJS, including the requirement discussed below that she is "deemed eligible" for long term foster care.

Example: Samy is a dependent of a juvenile court due to neglect by his parents. Rose is in delinquency proceedings for auto theft, and the court has found that it can't return her to her parents' custody on probation due to their abuse. Both children may be eligible for SIJS.

The Trafficking Victims Protection Reauthorization Act of 2008 amended the definition of a "Special Immigrant Juvenile" at section 101(a)(27)(J) of the INA in two ways. First, it expanded the group of aliens eligible for SIJ status.

An eligible SIJ alien now includes an alien:

- who has been declared dependent on a juvenile court;
- whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or
- who has been placed under the custody of *an individual or entity appointed by a State or juvenile court.*

Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. In addition, section 235(d)(5) of the TVPRA 2008 specifies that, if a state or an individual appointed by the state is acting *in loco parentis*, such a state or individual is not considered a legal guardian for purposes of SIJ eligibility.

[2] 8 USC § 1101(a)(27)(J)(i)

ii. A determination must be made that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment."

In addition to being declared a dependent, 8 USC § 1101(a)(27)(J)(i) mandates that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law…"

In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable. If a juvenile court order includes a finding that reunification with one or both parents is not viable due to a similar basis under State law, the petitioner must establish that such a basis bears a similarity to a finding of "abuse, neglect, or abandonment." Officers should ensure that juvenile court orders submitted as evidence with an SIJ petition filed on or after March 23, 2009, include this new language as quoted above in 8 USC § 1101(a)(27)(J)(i).

Where the Abuse Occurred: There is no requirement in the statute, regulation, or the DHS memoranda that the abuse, neglect, or abandonment occur in the U.S. In fact, many immigrant children lost parents or escaped abusive parents in the country of origin and came alone to the U.S. Many U.S. juvenile courts are open to accepting these unaccompanied or abandoned children in the same way they are open to accepting U.S. citizen children who are living on the street (in contrast to children directly removed from families). The only legal issue is whether the juvenile court has made its determinations based on abuse, neglect or abandonment of the child as defined under state law.

Evidence and Documentation Regarding Abuse, Neglect and Abandonment: In some areas of the country, there has been controversy and confusion regarding what kind of evidence the USCIS can require about abuse, neglect, and abandonment of the child. *We feel that the best course is to provide only the judge's order, with the minimum amount of information needed to meet the legal elements of SIJS,* and not to supply a lot of details about abuse, family, living situation, etc. The statute provides that the DHS should be given *proof that judges have made certain findings*, not proof that children actually were abused. The reason for this is simple: the DHS officers are in no way trained to evaluate or interpret whether a child has been abused, is telling the truth, whether the abuse should be considered to have ended, state law definitions of children's terms, psychologist's reports, etc. Moreover, giving the information to the DHS may violate legal and ethical rules regarding confidentiality.

However, some advocates are in a position where the DHS has said that without this evidence, it will not approve the case. Additionally, the statute relating to the INS "consent" to accept the judge's order is vague and could be read to support some DHS inquiry. Hopefully in the future the DHS will centralize its decision-

making on this question, so that reasonable and consistent rules are applied. Until then, advocates need to decide how hard to fight and how to fight most efficiently if the DHS requires inappropriate information or documents. We recommend having a meeting with higher-up DHS officials and personnel from the juvenile system, such as judges, court staff, directors of social work, or children's attorneys.

What evidence must the juvenile court include in its order to establish that it made the order due to abuse, neglect or abandonment?

Many advocates feel a legal and/or ethical obligation to disclose only the legal basis for the dependency and not to give further factual information. For example, a court order could state "the minor was made a dependent of this court and deemed eligible for long term foster care under Calif. W&I Code § 300(a) (physical abuse) and § 300(d) (sexual abuse)." This is evidence that the juvenile court deemed the juvenile eligible for long-term foster care due to abuse, neglect or abandonment.

Other advocates provide more factual information depending upon privacy rules in their courts, in response to DHS threats to deny the SIJS application. Some USCIS offices routinely demand to obtain a copy, or review a copy, of the entire juvenile court file on the applicant. If the USCIS requests information that you believe is illegal or unethical to provide, we recommend that the advocate speak with other groups in his/her area (including the Bar Association) and ask to meet with local USCIS about the issue, rather than simply give over confidential information for review by USCIS officers who, after all, have no training to evaluate the information.

Regarding documents filed with the court, USCIS recognizes that while such documents would be the most reliable evidence of the elements to be proved, in many States documents submitted to or issued by the juvenile court in dependency or delinquency proceedings may be subject to privacy restrictions. *Advocates who demonstrate that juvenile court proceedings are protected by state privacy laws should be able to avoid giving USCIS documents filed with court.*

It appears that sworn statements by court or state department or agency are a safety device provided in case the juvenile court judge is unable or willing to provide sufficient information. According to the former:

> *If* a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to USCIS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement

should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.[3]

Thus when all else fails a social worker, department attorney, or other responsible party from court or state agency or department can submit a sworn statement. Immigration proceedings regularly accept un-notarized sworn statements with the following signature statement: "I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief." Again, the person providing the sworn statement must consider legal and ethical confidentiality concerns when deciding what information to include.

iii. A court or an administrative agency must rule that it is not in the child's best interest to be returned to his or her home country.

Generally the juvenile court will include in its SIJS order (discussed below) that it is not in the child's best interest to be returned to the home country. The evidence for this finding may range from a home study conducted by a foreign social service agency to determine that a grandparent's home is not appropriate, to simply interviewing the child to learn that there is no known appropriate family in the home country.

iv. The court should make it clear that it made its findings and orders based on abuse, neglect or abandonment of the child, rather than to get the child immigration status.

The requirement of a specific finding about "abuse, neglect and abandonment" was added to the SIJS law in 1997. The juvenile court judge's order should specifically identify whether abuse, neglect or abandonment was the basis for the dependency or placement order, and for "deeming the child eligible for long term foster care" (i.e., determining that reunion with the parents was not viable). For example, the judge's order could state, "the minor is deemed eligible by this Court for long term foster care, based on abuse" or "the above orders and findings were made due to abandonment and neglect of the minor." See sample judge's order in Appendix C.

v. The juvenile court judge should sign an order making the above findings.

[3] July 9, 1999 "Memorandum #2" issued by Thomas E. Cook, Acting Assistant Commissioner. p. 3, in

The juvenile court judge will sign a special order, usually prepared by the child's attorney or other advocate, stating that all the findings required for SIJS have been made. The child will submit this order to USCIS as part of the child's application for special immigrant juvenile status.

vi. The Immigration Judge should close or continue any pending removal proceedings to allow for the juvenile court process to be completed.

Immigration Judges have received official guidance stating that if an unaccompanied child is seeking SIJ status, "the case must be administratively closed or reset for that process to occur in state or juvenile court." Memorandum from Brian M. O'Leary, Chief Immigration Judge, to Immigration Judges (Mar. 24, 2015) (Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities).

The Board of Immigration Appeals, in an unpublished decision, granted the appeal of a respondent who had indicated intent to seek SIJ status but been denied a continuance and ordered removed. The Board found that the Immigration Judge failed to consider the respondent's argument regarding her eligibility for a custody petition pending in state court, and held that "absent evidence of an alien's ineligibility for SIJ status, an Immigration Judge should, as a general practice, continue or administratively close proceedings to await adjudication of a pending state proceeding that could serve as a predicate order for SIJ status." (Unpublished BIA Decision, June 1, 2015).

vii. Other Requirements: Juvenile Court Must Retain Jurisdiction, Applicant Must be Under Age 21 and Unmarried

The former-INS added some requirements of its own, that were not written in the federal law.

Some of the ad hoc requirements might be dropped in the future, but they apply to all applications now. The juvenile court must retain jurisdiction. Current DHS regulation requires that the applicant remain under juvenile court jurisdiction until the immigration application is finally decided and the applicant is a lawful permanent resident.[4] *Juvenile court lawyers must ensure that judges retain jurisdiction over the applicant until USCIS grants the SIJS application after the interview. The USCIS interview may take place from six to thirty-six months, or even longer, after the SIJS application is filed.*

[4] 8 CFR § 204.11(c)(5), reprinted in Appendix G

Some juvenile court judges will want to, or must under state law, terminate dependency proceedings when the child reaches a certain age. Children's advocates need to fight to keep the child under juvenile court jurisdiction. Note that immigration attorneys may be able to persuade the USCIS to speed up ("expedite") the interview if the child is about to age out of the juvenile court system. When the child goes to the USCIS interview, s/he should have a copy of the minutes from his/her most recent court hearing to establish that s/he remains under juvenile court jurisdiction. The USCIS regulation creates a difficult situation and needlessly costs juvenile systems time and energy by requiring children to stay in longer in the juvenile court system than they otherwise would. It is possible that better rules will appear in the future.

The USCIS was considering regulations that would offer relief to persons who age out of juvenile court jurisdiction before the USCIS makes its final decision. Advocates should keep abreast of developments. State laws generally require that a youth be under 18 years old at the time he/she is first is declared a juvenile court dependent. State laws vary as to how long a child can remain a juvenile court dependent once declared a dependent. Some states end dependency at age 18, others extend it to age 19 (especially if the child must complete high school), and others can potentially extend the age to 21. Similarly, different states have different laws for how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

Under USCIS regulations, any person under 21 who meets the SIJS requirements can apply for SIJS. With respect to the USCIS a 19 year old could file a SIJS application and attend the USCIS interview -- *so long as s/he remains under the jurisdiction of a juvenile court, is eligible for long term foster care*, and obtains a court order declaring that it is not in his or her best interest to return to the home country.

Section 235(d)(6) of the TVPRA 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, if an SIJ petitioner was a "child" on the date on which an SIJ petition was properly filed, U.S. Citizenship and Immigration Services (USCIS) cannot deny SIJ status to the petitioner, regardless of the petitioner's age at the time of adjudication. *Officers must consider the petitioner's age at the time of filing to determine whether the petitioner has met the age requirement.* Officers must not deny or revoke SIJ status based on age if the alien was a child on the date the SIJ petition was properly filed (if it was filed on or after December 23, 2008, or if it was pending as of December 23, 2008). USCIS uses the definition of child found at section INA § 101(b)(1) to interpret the use of the term "child" in TVPRA 2008 § 235(d)(6). Section 101(b)(1) states that a child is an unmarried person under 21 years of age. The SIJ definition found at section 101(a)(27)(J) of the INA does not use the term "child," but USCIS had previously incorporated the child definition of the INA § 101(b)(1) into the regulation governing SIJ petitions.

Marriage. Under USCIS regulations, applicants for SIJS must remain unmarried until the entire process is completed and the USCIS grants permanent residency.

"Not married" includes a child whose marriage ended because of:

- Annulment
- Divorce
- Death

[http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=28f308d1c67e0310VgnVCM100000082ca60aRCRD&vgnextchannel=28f308d1c67e0310VgnVCM100000082ca60aRCRD]

c. Risks in Applying

The greatest risk to the child is that, if the application is turned down, the USCIS might attempt to "remove" (deport) the child from the U.S. When a child files a petition for SIJS, the child is alerting the USCIS to the fact that he/she is in the U.S. Since these petitions are not confidential, the USCIS has the right to use that information to place the child into removal proceedings for deportation if the SIJS and adjustment of status applications are denied. It is crucial to make sure that the child is likely to win the status before submitting an application, so that the child is not unintentionally deported. Note that children who are not eligible for SIJS may still be eligible to get lawful status in some other way (ex. - through adoptive parents, or through abusive U.S. citizen or permanent resident parents even if the child does not come or remain under juvenile court jurisdiction).

d. How to Apply

The child must file two applications, one for special immigrant juvenile status and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the U.S., but can apply locally.[5] Currently, both the SIJS and the adjustment of status applications are filed at the same time at the local USCIS district office with jurisdiction over the child's residence.[6] Besides the

[5] Immigration practitioners should see INA § 245(h), which provides that SIJS applicants are deemed paroled in and therefore eligible for adjustment even if they entered without inspection. They do not have to qualify under § 245(i) or another special program, or pay a penalty fee: they are entitled to adjustment by virtue of their SIJS petition. Otherwise, immigration attorneys should note that an SIJS adjustment procedure is like that of a 245(a) adjustment for an immediate relative.

[6] In the future, it is possible that USCIS will change the procedure and have the applicant mail the petition for SIJS to a regional USCIS office, and once that is approved have the applicant file the application for adjustment of status in person at a local USCIS office. Counsel should stay alert for new filing rules.

forms, the applicant must submit the results of a set medical exam conducted by an USCIS-approved doctor (which includes a test for HIV and tests for the presence of some illegal drugs), various filing fees unless they are waived, and some proof of age (ex. - birth certificate).

Generally, applicants are required to have a photo-identification at the interview. As soon as the application is filed with the USCIS, the applicant can obtain employment authorization. The USCIS will schedule an appointment for the applicant to get fingerprinted for an FBI check of any criminal or delinquency record or prior deportation. The wait for the interview itself can be long – depending on the USCIS office, it may be from six months to three years, or even longer. When the applicant finally gets to the interview, he or she often can have a social worker, and certainly an attorney, attend if desired. The USCIS might approve the case right at the interview, or might request further information. If the USCIS denies the case, it might or might not refer the child to a judge for deportation ("removal") proceedings. The applicant can apply again in front of the judge, and can appeal denials at any stage.

"An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant…. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the U.S.." 8 CFR § Sec. 204.11(b).

i. Form I-360 and I-485

Currently, in almost all cases the petition for special immigrant juvenile status and supporting documentation (Form I-360 packet) and the adjustment of status application and supporting documentation (Form I-485 packet) should be submitted to USCIS together as one packet. (There are some exceptions to this for persons already in removal proceedings.)

CAUTION: You are completing several forms that ask for much of the same information. Make sure that the information on all the forms is consistent, e.g., list of addressees, birth date, and etc.

NOTE: You do not need to submit a fingerprint card to the local USCIS office with your I- 485 packet. USCIS will give you instructions on submitting that at a later date. For information about the medical exam and fingerprinting.

Be sure to answer all questions on the form, using a black pen or typewriter. If an item is not applicable, write "N/A". If an answer is none, write "none." If extra space is needed to answer any item, attach a sheet of paper with the applicant's name and USCIS alien registration number (if any) and indicate the item number

that you are answering.

A. Form I-360

Form I-360 and instructions are available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95be2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

The I-360 petition must be filed with evidence of the child's eligibility for special immigrant juvenile status. This includes a court order, signed by the juvenile court judge, which specifically sets out all of the requirements for special immigrant juvenile status. In other words, the judge should sign one order, which you will prepare, identifying the child and stating that s/he is under the jurisdiction of a juvenile court, eligible for long term foster care, and it is in his or her best interest not to be returned to the country of origin, due to abuse, neglect or abandonment.

A Form G-28 “Notice Of Appearance” of attorney should also be attached to the I-360 if an attorney is representing the child in the immigration process. There is no fee for this form. If neither an attorney nor a BIA-accredited representative (paralegal who has been certified by the government to handle immigration matters) is representing the child – for example, if a social worker is handling the application -- do not file the form G-28.

B. Form I-485

Form I-485 and instructions are available at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3faf2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD

An application for adjustment of status must contain the following completed forms and documents. Note that multiple copies are required in some cases; follow the instructions on the form.

* Form I-485/Application for Permanent Residence (adjustment of status application);

* Form G-325A/Biographical Information (in quadruplicate), if the applicant is 14 years or older;

* 3 "green card" size photographs that meet specified requirements;

* I-485 Filing fees or request for waiver of fees;

* Fingerprinting fee (only children 14 years old or older need to be fingerprinted);

* Birth certificate or other proof of age (translation into English is required)

* Form I-693 medical exam completed by USCIS -approved doctor (while the I-485 instruction sheet directs applicants to wait until after filing the I-485 form before getting a medical exam, apparently some USCIS offices want the medical exam at the time of the I-485 filing);
* Form I-765/Request for Work Authorization, if desired (for current fee see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=7d316c0b4c3bf110VgnVCM1000004718190aRCRD)

* A passport, Form I-94, or I-186 card showing lawful entry into the U.S., if any exist (in many cases, children will have entered the U.S. without papers, won't have these documents, and don't need to show them);

* "Adit" sheet -- Some USCIS offices have an administrative sheet they ask applicants to complete. Talk with local practitioners to see if your office has such a form.

ii. Initial documents needed in support of petition

8 CFR § Sec. 204.11 (d) lists the initial documents that need to be submitted in support of the petition:

"(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

> (i) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary to be dependent upon that court;
>
> (ii) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary eligible for long-term foster care; and
>
> (iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be

in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents."

Proving Age: The USCIS regulation requires every applicant for special immigrant juvenile status to submit some documentary proof of age. The evidence can take the form of a "birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age..."32 Immigration practitioners should note that the requirement is for some proof of *age*, a much looser standard than the usual proof of birth. There is no requirement that the person submit a birth certificate. Children have been granted SIJS who did not even know what country they were born in, and did not personally know their year of birth. The statute recognizes that these children come from abusive, chaotic, or interrupted homes, and does not impose the strict requirements of proof of birth that appear in regular family immigration.

Obtaining Documentation to Prove Age. The following practice tips may help you to obtain documents. Because the search for documents can be time consuming (for example, it might take several weeks to hear back from a foreign registry), it is critical to start as soon as the application for SIJS becomes a possibility. For example, if a social worker or probation officer identifies that the child is undocumented and is waiting to transfer the matter to another part of the agency for handling, that person could do the child a tremendous service by immediately beginning the search for documents.

Foreign birth certificates, if you can obtain them, are the ideal proof of age.

(1) The easiest way to obtain a foreign birth certificate is to contact helpful family or friends in the home country who will travel to the local or national registry to obtain a certified copy. Unfortunately, abused children often lack these connections.
(2) Send away for the birth certificate yourself. You will need a letter written in the language of the country and addressed to the registrar in the town where the child was born (or, more importantly, where she believes her birth was registered) or to national registry. You will need an international money order. The letter should state the name, birth date and birthplace of the child and if possible the names of both parents. There are relatively inexpensive "express mail" services to Mexico and Central America in most large cities.

The Foreign Affairs Manual (FAM) of the Department of State is an important resource. The FAM provides information on how to how to obtain foreign birth certificates from various countries. If birth certificates

from a particular country appear in a different form, such as family registration certificates, or if they are generally unavailable and therefore not required, the FAM will state this. To find the FAM, go to a local law library or contact a local immigration agency or attorney. If you are in northern California, you may contact the Immigrant Legal Resource Center, Attorney of the Day at (415) 255-9499, ext. 6263. The Attorney of the Day will send you copies of the pages from the FAM that relate to the country you're dealing with. (3) Contact the local consulate from the child's country and ask for their assistance. Foreign identity documents: Any foreign identity document, including a military document and perhaps a school identity card, should be accepted as proof of age. Other substitute documents: If you cannot obtain a birth certificate, the regulation provides that the applicant can submit any "other document which in the discretion of the [USCIS district director] establishes the person's age." The regulation creates a generous standard because it is well known that some of these children will not have necessary information or will have a hard time obtaining documents.

One good guide for what definitely must be acceptable substitute documents is the USCIS regulation defining substitute documents for birth certificates in family visa petitions. See 8 CFR § 204.1(f) and (g)(2). This is a fairly strict standard for substitute documents that is imposed in regular family immigration cases. Substitute documents may include (1) a baptismal certificate with the seal of the church, showing date and place of birth and date of baptism; (2) affidavits from people who are personally aware of the birth; (3) early school records showing date of admission to the school, the child's date and place of birth, and the name and place of birth of the parent or parents. You must also describe the efforts you made to locate the birth certificate. The best proof is a statement from the registrar explaining that the child's birth certificate cannot be found there.[7] But that guide is not a requirement for SIJS. The USCIS District Director can accept *any* document in his or her discretion to prove age in an SIJS case. If you have nothing else, offer a state court order on the child's age. Regular civil courts can make all kinds of findings, including age. For example, under California Welf. & USCIS t. Code § 362, a juvenile court can make any and all reasonable orders for the care of a minor.

When submitting foreign documents, be sure to demonstrate that you diligently searched for original documents and were unable to find them. This is required. Be prepared to show correspondence with a registrar in

[7] These are the "secondary evidence" acceptable under federal regulation to prove birth in the U.S. in
family visa cases when "primary evidence" (birth certificate, etc.) is not available. See 8 CFR § 204.1(f),
(g)(2).

the home country, and/or a declaration by the worker of the steps taken to locate documents or information.

Must submit proof of age with initial filing? USCIS regulation lists proof of age under "Initial documents which must be submitted in support of the petition." While you should be able to file without a birth certificate, it is possible that a local USCIS will refuse to accept the application without some evidence. If possible, present proof that the birth certificate is not available – such as a letter from a registrar or other in the home country saying it is not available – and/or proof that you are pursuing other means. If nothing else, include a sworn statement by the child or social worker and cite the regulation stating that the USCIS District Director has discretion to accept any document. With that, the USCIS should accept the papers for filing and leave it to the interview officer to decide whether the document is sufficient, and hopefully by the interview you will have something more.

iii. Retaining Juvenile Court Jurisdiction

The USCIS regulation states that the person applying for special immigrant status must remain under juvenile court jurisdiction throughout the entire application process, i.e. until USCIS approves the applications for special immigrant juvenile status and adjustment to permanent residency. Thus, if an applicant is under juvenile court jurisdiction when he or she files the SIJS and adjustment applications with USCIS, but leaves court jurisdiction during the several month long wait for the USCIS interview, the USCIS will deny the application. This regulation has caused tremendous problems by requiring juvenile courts to retain jurisdiction over older youth longer than the courts normally would. Hopefully a new statute or regulation will change the rule, so that the applicant only needs to be under juvenile court jurisdiction at the time she files the application with USCIS, not all the way until the USCIS gets around to deciding the application. But until the rule is changed, you must attempt to comply. Advocates who are running out of time should pursue two strategies simultaneously:

1) **Ask the juvenile court judge to retain jurisdiction** over the child and schedule last hearing a few weeks after the interview date. Some courts have taken an affirmative stand on this issue. In Los Angeles, the presiding judge of juvenile court, Jaime R. Corral, distributed a memorandum to all juvenile court judges requesting that they maintain jurisdiction past the age of 18 for juveniles who may qualify for this relief; this may be of use in informing or convincing other judges. Advocates report that in some instances, judges have agreed to retain the children as dependents while stopping other forms of foster care support.

2) **Ask the** USCIS **to expedite the application** (give a quicker date for the interview). This is a discretionary decision. In some areas of the country, the USCIS has agreed to move up the SIJS adjustment interview if the applicant is about to age out of juvenile court.

Find out from local immigration practitioners if the USCIS has a history of doing this in other time-urgent cases, to use as a precedent (for example, family immigration cases in which a child is about to turn 21 and go into a less advantageous immigration category.) If you believe that the USCIS may not immediately be open to your request, it may be helpful to ask civic organizations such as the local bar association volunteer services program to join in the request and ask for a meeting, ask a respected local immigration lawyer, who may have good contacts in the USCIS, to take on the case and make the request, or ask the member of the U.S. Congress that represents the district where your client lives to intervene on your client's behalf with the USCIS.

In some areas, immigration and children's agencies and civic organizations have formed an ongoing local **Task Force on SIJS**. In San Francisco, children's and immigration law staff, county workers, city attorneys, probation officers, the Bar Association and other civic groups formed a Bay Area Task Force to exchange information and discuss problems. This became useful in policy work, as both the USCIS and the local county systems were responsive to considering concerns raised by the Task Force.

When the applicant goes to the USCIS adjustment interview, s/he **bring a copy of the minutes from his or her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.**

Mandatory injunction and/or writ of mandamus: If the applicant can establish that USCIS has taken an unreasonable amount of time to process the application, a lawyer acting on behalf of the client may ask a federal court to order a mandatory injunction and/or writ of mandamus to force USCIS to act on the case. Whether USCIS has taken an unreasonable time in processing an application will depend on the facts of the particular case. It will be the court's discretion to decide if the agency delay is unreasonable.

In the case of *Yu v. Brown*, the plaintiff filed an application for SIJS and adjustment to legal permanent resident. USCIS had taken no action on the application for more than a year. As a result, the plaintiff alleged that the USCIS had unreasonably delayed the processing of the SIJS application and sought a writ of mandamus/injunction to compel the USCIS to act on

the application. The court in this case found that the delay was unreasonable. Further, the court determined that whether a delay is unreasonable will depend on the facts of the particular case. However, a writ of mandamus/injunction was determined to be an appropriate remedy for the unreasonable delay.

iv. Adjustment Interview

When the interview finally arrives, the child will meet at the USCIS office with the USCIS officer. An attorney can be present, and it is almost never a problem for the social worker or "next friend" to be present as well. If the officer attempts to bar a non-attorney from accompanying the interview with the child, ask to see a supervisor.

During the interview the USCIS officer will ask routine questions about the adjustment application. He may go through each question on the I-360 and I-485 forms. Practice all of these questions with the child in a role-play beforehand. Some of the questions are quite strange ("Are you a Communist? A drug dealer?") and the child should be prepared. The USCIS officer already will have received the report from the FBI describing any criminal or juvenile delinquency record the person may have. The officer also will have the medical exam, which will tell if the person is HIV positive or has venereal disease or tuberculosis, or had illegal drugs in her system.

Hopefully the interview will be short and courteous, and just cover basic information on the form. In some cases, however, over-zealous USCIS officers have tried to ask about the details of abuse or abandonment, or other family issues such as when the father last visited. While we hope that this does not occur, you should be prepared just in case, in order to avoid possibly retraumatizing the child at the USCIS interview. Our position is that such questioning is not appropriate, and isn't legally relevant. First, the USCIS does not need the details, but only needs to know that the juvenile court made certain findings. Second, even if it did need details, it should not get them from interviewing the child. If you do decide to provide the USCIS with more details about the child's difficult situation, tell the USCIS officer that you will provide these in writing or with your own statements, so that the officer does not question the child. This is the USCIS' own policy, and in its "Memorandum #2" it sets out a procedure for how a social worker or other agency employee should give written information.57 The child should not be present for these discussions.

Again, bad interviews are relatively rare, and most USCIS officers understand the need not to interrogate the child. To prevent bad USCIS interviews, your office may wish to establish a relationship with the local

USCIS office and discuss what the interview will be like. Most importantly, make sure that a lawyer or other advocate attends the interview with the child. If the interviewer insists on asking the child about sensitive subjects, insist on speaking with a supervisor and if needed, end the interview (especially if you are not in a very bad time crunch). It can be rescheduled. If needed, you can request a meeting with a higher-level USCIS officer to work out a system for these interviews. If you do this, it is a good idea to get children's and/or immigrants' rights organizations, the bar association, local officials, member of congress, etc. on your side to meet with USCIS.

e. Perez-Olano v. Holder

Perez-Olano v. Holder is a class-action lawsuit filed on behalf of juvenile aliens who may have been eligible for SIJ status or SIJ-based adjustment of status because they were abused, abandoned, or neglected. The *Perez-Olano* Settlement Agreement took effect December 14, 2010 and expires December 13, 2016, while a subsequent stipulation was entered March 27, 2015 and expires June 15, 2018. The Settlement Agreement defines class members as all juveniles, "including, but not limited to, SIJ applicants, who, on or after May 13, 2005, apply or applied for SIJ status or SIJ-based adjustment of status based upon their alleged SIJ eligibility." Settlement Agreement at ¶ 3. The Settlement confers rights on three sub-groups of actual or potential SIJ applicants:

1) Youth required to obtain "specific consent" to invoke the jurisdiction of a state juvenile court.

The Settlement provides that the federal government shall not require a youth in federal custody by reason of his or her immigration status to seek or obtain specific consent to a state court's exercising jurisdiction over such minor except where the state court exercises jurisdiction to determine his or her custody status or placement.

The Settlement further prescribes procedures the Department of Health and Human Services will follow in deciding requests for specific consent in those cases where such consent may still be required.

2) Youth "aging-out" of SIJ eligibility.

Federal regulations provide that a SIJ must remain under 21, dependent upon a state juvenile court, and eligible for long-term foster care at the time CIS grants him or her lawful permanent residence.

Under the Settlement CIS may not deny SIJ applications or revoke SIJ classification on account of age, dependency status, or ineligibility for long-term foster care so long the applicant *files* for SIJ classification while he or she is still *either* a dependent of a juvenile court or under 21 years of age.

The Settlement confers benefits retroactively to persons whose SIJ applications CIS denied on or after May 13, 2005, on the ground they were no longer dependent on state juvenile courts or eligible for long-term foster care. The Settlement provides that CIS will re-open their SIJ applications and adjudicate their eligibility for SIJ benefits under the same standards the agreement prescribes for future SIJ applicants.

3) Youth ordered removed and denied adjudication of eligibility for SIJ-based adjustment of status.

Under current regulations, youth in removal proceedings who are classified as SIJs must apply to an immigration judge to adjust their status to that of a lawful permanent resident. Persons classified as SIJs more than 90 days after being ordered removed are barred from asking that their removal hearings be reopened—and thus receiving an adjudication of their eligibility for lawful permanent residence—unless ICE joins in moving to reopen.

Under the Settlement ICE must join motions to reopen removal proceedings filed by youth granted SIJ status even if they have been under final order of removal for 90 days or more, provided only that such youth are *prima facie* eligible to adjust their status to that of a lawful permanent resident.

Juveniles whose applications for SIJ status or SIJ-based adjustment of status were denied or revoked since May 13, 2005, may be eligible to file a motion to reopen. The class-specific standard for eligibility to file motions to reopen, particularly with regard to timeliness, is distinct from the general standards for eligibility to file motions to reopen under 8 CFR 103.5. These are excerpts from the April 4, 2011 policy memorandum issued by USCIS.

> For the entire memorandum see:
> http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf.[8]

In accordance with the Settlement Agreement, USCIS will not, based on age or dependency status, deny or revoke any SIJ petition if, at the time the class member files or filed the petition, the class member was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age. Similarly, USCIS may not, based on age or dependency status, deny an (sic) SIJ-based application for adjustment of status if, the class member files or filed the application when he or she was under 21 and was the subject of a valid dependency order.

[8] For the entire settlement from Perez-Olano please see:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bba3a56b8613c210VgnVCM100000082ca60aRCRD&vgnextchannel=2492db65022ee010VgnVCM1000000ecd190aRCRD

In addition, to comply with the Settlement Agreement, this guidance applies to all SIJ petitions and SIJ-based applications for adjustment of status that are filed while the Settlement Agreement is in effect. USCIS will not, based on age or dependency status, deny or revoke any new, pending, or reopened SIJ petition if, at the time of filing, the petitioner was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age. Similarly, USCIS may not, based on age or dependency status, deny any new, pending, or reopened SIJ-based application for adjustment of status if, the class member filed the application when he or she was under 21 and was the subject of a valid dependency order.[9]

i. Filing Requirements

Class members filing a motion to reopen under the Settlement Agreement will file Form I-290B, *Notice of Appeal or Motion*, with the appropriate fee or Form I-912, *Request for Fee Waiver,* if desired, at:

U.S. Postal Service (USPS): **or** *Courier/ Express (non-USPS) Deliveries*:
USCIS P.O. Box 5510
USCIS Attn: Perez-Olano Settlement Agreement
Chicago, IL 60680-5510
or
"POSA" 131 S. Dearborn – 3rd Floor
131 S. Dearborn – 3rd Floor
Chicago, IL 60603-5517

When filing a Form I-290B, class members are instructed to:

· Check "box F" in "Part 2," *Information about the Appeal or Motion*, and
· Write "Perez-Olano Settlement Agreement" or "POSA" in Part 3, *Basis for the Appeal or Motion*.

These specific Settlement Agreement filing instructions are posted on the landing page of the Form I-290B at www.uscis.gov.

The Lockbox will forward the Forms I-290B to the National Benefits Center (NBC) for standard pre-processing. The NBC will then route the Form I-290B and the underlying Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant,* and, if applicable, the Form I-485, *Application to*

[9] These are excerpts from the April 4, 2011 policy memorandum issued by USCIS. For the entire memorandum see: http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf.

Register Permanent Residence or Adjust Status, to the appropriate field office for adjudication, along with an appropriate cover sheet identifying it as a Settlement Agreement case. It is the responsibility of the NBC to forward the A-file to the proper field office if the juvenile has moved jurisdictions.

[From 4/4/2011 policy memorandum]

ii. Adjudication

The field office that denied the underlying Form I-360 and, if applicable, the Form I-485 has jurisdiction over each Motion to Reopen filed under the Settlement Agreement, as stated in 8 CFR 103.5(a)(1)(ii). If the applicant has moved to the geographical jurisdiction of a different field office, that field office assumes jurisdiction.

The immigration service officers (ISOs) will grant the Motion to Reopen if the case meets *all four* prongs of the following test:

1. The applicant applied for SIJ status or SIJ-based adjustment of status on or after May 13, 2005.
2. The applicant filed a complete Form I-360 for SIJ classification before his or her 21st birthday.
3. At the time of filing the Form I-360, the applicant was the subject of a valid order(s) issued by a state juvenile court within the U.S. that:
   - Made a finding of abuse, abandonment or neglect, or a similar basis found under state law (see Juvenile Court Orders below for more information); *and*
   - Determined that it would not be in the applicant's best interest to be returned to the applicant's or parent's previous country of nationality or country of last habitual residence; *and*
   - Did *one* of the following:
     - Declared the applicant dependent on the court, *or*
     - Legally committed the applicant to or placed the applicant under the custody of a state agency or department, *or*
     - Placed the applicant under the custody of an individual or entity appointed by a guardianship.
4. The Form I-360 was denied or revoked *solely* because of *one* of the three following reasons:
   - The applicant, who was under 21 years of age at the time of filing, turned 21 years of age after filing the Form I-360 but before adjudication of the Form I-360 or Form I-485 (age-out); *or*
   - The applicant's dependency order, which was valid and in effect at the time of filing the Form I-360, was terminated based on age after filing the Form I-360 but before adjudication of the Form I-360 or Form I-485 (dependency age-out); *or*

- The applicant did not receive a grant of specific consent *before* invoking the jurisdiction of the state juvenile court and the juvenile court order did *not* determine or alter the applicant's custody status or placement. As a reminder, specific consent from the Department of Health and Human Services (and, before December 23, 2008, U.S. Immigration and Customs Enforcement) is needed only if the applicant was in federal custody at the time the juvenile court issued the order and the juvenile court order altered or determined custody status or placement. (Such an order is more than a restatement of current placement; it requires a change to the applicant's placement.) If the Motion to Reopen is granted, the ISO will adjudicate the Form I-360 in accordance with INA § 101(a)(27)(J), as amended by the TVPRA 2008, and in accordance with the Settlement Agreement. Denials of a Motion to Reopen and of a reopened Form I-360 can be appealed to the Administrative Appeals Office. 8 CFR 103.5(a)(6).

iii. Juvenile Court Orders

Before enactment of the TVPRA 2008, INA § 101(a)(27)(J) required SIJ applicants to have been deemed eligible by a juvenile court for long-term foster care due to abuse, neglect, or abandonment. USCIS will not deny or revoke an SIJ petition or SIJ-based adjustment application on account of ineligibility for long-term foster care, as this is no longer a statutory requirement. But where a class member files a Motion to Reopen and the juvenile court order submitted in support of the original Form I-360 contains the outdated statutory language of eligibility for long-term foster care, adjudicators do not need to request an updated juvenile court order. Some Motions to Reopen will be from applicants who, due to their age, will no longer be able to invoke the jurisdiction of the juvenile court to obtain an updated order. In those cases, adjudicators can rely on the original juvenile court order to establish the current statutory requirement of non-viability of reunification with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law.

iv. Stipulation - 2015

On March 27, 2015 USCIS agreed to a stipulation in the Perez-Olano case applying to "cases in which Special Immigrant Juvenile (SIJ) petitions or SIJ-based applications for adjustment of status were denied, terminated or revoked on or after December 15, 2010 because the applicant's state court dependency order had expired at the time of the filing. USCIS will not deny, revoke, or terminate an SIJ petition (Form I-360) or SIJ-based adjustment of status (Form I-485) if, at the time of filing the SIJ petition (1) the applicant is or was under 21 years of age, unmarried, and otherwise eligible, and (2) the applicant either is the subject of a valid dependency

order or was the subject of a valid dependency order that was terminated based on age prior to filing"

According to its own notification of the Stipulation, "[u]nder the settlement USCIS agrees that it will not deny, revoke, or terminate a SIJ application (Form I-360) or SIJ-based adjustment of status if, at the time of filing a SIJ application (1) the applicant is or was under 21 years of age, unmarried, and otherwise eligible, and (2) the applicant either is the subject of a valid dependency order or was the subject of a valid dependency order that was terminated based on age prior to filing."

Under the stipulation, USCIS further committed to, "without additional fee, reopen applications for SIJ classification or SIJ-based adjustment of status it has denied, revoked or terminated on or after December 15, 2010, on the ground, in whole or in part, that the class member's valid dependency order had been terminated, in whole or in part, based on age prior to filing Form I-360 with USCIS, provided that at the time of filing Form I-360 the class member was under 21 years of age and unmarried. USCIS will, without additional fee, re-adjudicate such reopened applications for SIJ classification and/or SIJ-based adjustment of status" consistent with the requirements described above. "Except for criminal activity that would disqualify an applicant for adjustment of status, such re-adjudication shall proceed on the basis of the facts, law, and regulations extant at the time USCIS initially denied, revoked, or terminated the SIJ application or SIJ-based adjustment of status" on the grounds stated above. "USCIS will make good faith efforts to re-adjudicate such reopened applications before later-filed applications for SIJ classification or SIJ-based adjustment of status."

"USCIS will send letters to all persons whose SIJ applications or SIJ-based applications for adjustment of status were denied, terminated, or revoked on or after December 15, 2010, except where denied solely for fraud, explaining the terms of the Stipulation and describing the process by which they or their counsel may request reopening and re-adjudication of their SIJ applications or SIJ-based applications for adjustment of status."

"Upon reopening, USCIS will approve those applications for SIJ classification or SIJ-based adjustment of status that are approvable on the basis of the existing administrative record. If an applicant's reopened application for SIJ classification or SIJ-based adjustment of status is not adjudicable on the basis of the existing record, USCIS shall notify the class member, and his or her counsel of record, if any, that his or her application for SIJ classification and/or SIJ-based adjustment of status has been

reopened and issue him or her a request for evidence or a notice of intent to deny. The applicant shall thereafter be permitted 180 days to provide USCIS such additional evidence or response to the notice of intent to deny. Denials of applications for SIJ classification or SIJ-based adjustment of status shall be in writing and explain the reasons for the denial"

"Applicants or counsel acting on behalf of applicants shall have until June 15, 2018, to advise USCIS by correspondence postmarked on or before such date, that they request USCIS to reopen and re-adjudicate applications for SIJ classification and/or SIJ-based adjustment of status pursuant to the Stipulation."

f. Issues Pending Resolution

As of June 2016, USCIS acknowledged that "[s]takeholders report and the Ombudsman has observed that the Special Immigrant Juvenile (SIJ) visa program continues to suffer from inconsistent adjudication and overreaching requests for evidence that burden petitioners and service providers. USCIS has announced its intention to centralize the adjudication of these petitions, and improvements to processing will promote greater consistency and create a more predictable and equitable program."

Specifically, in November 2015 the USCIS Ombudsman issued a series of recommendations, which can be categorized as follows:

(1) Centralize SIJ adjudications in a facility whose personnel are familiar with the sensitivities surrounding the adjudication of humanitarian benefits for vulnerable populations;
(2) Take into account the best interests of the child when applying criteria for interview waivers;
(3) Issue final SIJ regulations that fully incorporate all statutory amendments; and
(4) Interpret the consent function consistently with the statute by according greater deference to State court findings.

Additionally, in April 2016, the Department of State announced that there are no available visas for children from El Salvador, Guatemala, Honduras, and Mexico who qualify for SIJ status due to visas being oversubscribed for those countries. As of May 2016, applicants for SIJ status from those countries who filed Form I-360 on or after January 1, 2010 will not be able to obtain an immigrant visa or adjust status until new visas become available.

II. Asylum and Refugees

a. Overview:

In order to properly and comprehensively discuss the status, rights and obligations of refugees, there are two major underlying concepts that must be understood: 1) non-refoulement and 2) asylum.

b. Non-refoulement

Refugee status in the U.S. is a basic human right first guarded under the general legal principle of **non-refoulement**.

i. Definition of Non-refoulement

As recognized by the UN High Commissioner for Refugees the essence of the principle of non-refoulement is "that a State may not oblige a person to return to a territory where he may be exposed to persecution". (U.N. High Comm'ner on Refugees *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 Bv R 1954/93*, ¶ 1

This doctrine was then further clarified in the Convention on the Status of Refugees July 29, 1951, 189 U.N.T.S. 150), which not only created the UN High Commission on Refugees, but reinforced the international concept of non-refoulement.

As stated in Article 33(1): "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion" (Convention Article 33(1))

As defined under the Convention, a refugee is one who: ". . . **owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it**" (Convention on the Status of Refugees, Art. 1).

This Convention was then quickly followed by the Protocol Relating to the Status of Refugees, January 31 1967, 660 U.N.T.S. 267, 19 U.S.T.S. 6223, It is worth noting that two major distinguishing aspects of the Protocol were 1) the U.S. consented to become a party and 2) the Protocol widened the definition of

refugee.

While not changing the wording, the Protocol allowed all persons falling under the definition to be considered refugees, regardless of the date or origin of their flight. Prior to this, the Convention had only permitted Europeans who had fled their home countries prior to January 1st, 1951 to be so considered.

Along with the Convention and later Protocol, non-refoulement is a key provision of several other widely recognized international conventions. These include the freedom to seek asylum guaranteed by articles 13(2) and 14(1) of the Universal Declaration on Human Rights and the freedom of intra-country movement codified in Article 12(1) of the ICCPR and reproduced in Article 22(1) of the American Convention on Human Rights. Finally, the Convention Against Torture and other Cruel and Inhumane Treatment (CAT) specifically requires that a State Party's duty to guard against torture includes ensuring that a person will not be returned or transferred to any country where such harm is likely to occur.

ii. Jurisdiction and Venue

The Jurisdiction or scope of persons protected by the doctrine of non-refoulement has been a source of tension for international law. ;The UN High Commissioner has stated that "…the principle of non-refoulement has become a rule of international customary law… Since the purpose of the principle is to ensure that refugees are protected against such forcible return, it applies both to persons within a State's territory and to rejection at its borders" (The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR ¶ 2

c. Asylum

Although less defined as a concept than non-refoulement, asylum is certainly of greater significance to refugees. While non-refoulement requires countries to refrain from sending back foreign nationals to countries where they may face persecution, asylum generally is understood to mean refugees are given the right to lawfully reside in their destination country. As such, it obliges to the host country not only to abstain from removing said refugee, but also to permit them similar freedoms granted to the country's own citizens. These freedoms include the right to seek work, take part in government and enjoy public benefits. However, asylum rights are generally only permitted for refugees who are considered lawfully in the host country when the petition for this status.

The major provisions of the Refugee Convention, Protocol and related international agreements asserted a protection akin to non-refoulement by requiring States to abstain from forcibly returning asylum-seekers to countries where they would face persecution.

Nonetheless, many of the remaining articles of these documents are focused on reserving asylum rights for refugees. These include Article 17 of the Convention which extends work authorizations to refugees. Likewise, the Convention's Articles 23 and 24 focus on providing social security benefits.

While the asylum provisions are not as obligatory as the nonrefoulier provisions, they are still generally observed by most developed countries. Furthermore, as many asylum-seekers are able to meet the nonrefoulement requirements of having a well-founded fear of persecution, most States are unlikely to seek removal As such, States will normally will afford these individuals proper legal status through asylum so that they can become a productive and incentivized member of the new host country.

d. History of Refugee Status in U.S. Law

> Before 1965 the U.S. immigration laws made no specific provisions for admitting refugees. This is not to say that immigrants did not obtain sanctuary in the U.S., they usually came to the U.S. and then were admitted under the general authorizations of the immigration laws.

Immigration opportunities for refugees suffered a setback with the enactment of numerical limitations which came about in 1921. The first legislative enactment regarding refugees was the Displaced Persons Act of 1948.[10] This act and its subsequent amendments allowed for the immigration of 400,000 refugees over the next four years. Eventually, the quotas and the time limitations allowing for greater refugee protection.

e. Refugees

The major statute that defined the rules and admission of refugees is the Refugee Act of 1980. That act also made the provision for the grant of refugee status designated as asylum. There is no prescribed limit to the number of aliens who may be granted asylum status. The grant of asylum may allow the asylee to apply for permanent residence after a year of asylum status.

Today, asylum and refugee protection in the U.S. are governed by three major provisions. First 1) is S.101(a)42 of the INA which sets forth the definition for a refugee. Second is 2) the 1980 Refugee Act that established asylum and refugee classification as a separate immigration status in US immigration law. Finally 3), S.207-208 of the INA covers both the process and eligibility requirements for seeking asylum.

In keeping with the Protocol on the Status of Refugees, to qualify as an asylum seeker/refugee under S.101(a)42, it must be shown that you have suffered

[10] Act of June 25, 1948, 62 Stat. 1009.

persecution or face a "well-founded fear" (discussed below) that you will suffer persecution due to: race, religion, nationality, membership in a particular social group or political opinion.[11]

The persecution must be of an individualized nature regarding an immutable characteristic that makes you part of a particular social group so targeted for violence and oppression (*Matter of Kasinga* 21 I&N Dec. 357 (BIA 1996)). While a political opinion is not necessarily immutable, persecution for a political belief or the refusal to support a belief (for reasons other than the fear of harm) are nonetheless valid grounds for asylum (*INS v. Elias Zacarias* (302 U.S. 478 (1992), INS v. Cardozo-Fonseca, 480 U.S. 421 (1987))

Furthermore, this persecution cannot be part of a legitimated government policy or punishment, but must come from actions that the person's home government is unable or simply unwilling to suppress (*Matter of O-Z and I-Z*, 22 *I&N Dec*. 23 (BIA 1998), *Singh v. INS*, 315 F.3d. 1186 (9th Cir. 2003)).

In order to be considered for asylum in the U.S., you must meet three provisions of the INA: (1) the definition of a refugee Section 101(a)42 (2) the definition and eligibility requirements for asylum under Section 208 and (3) the annual admission quotas for refugees and asylum seekers under Section 207.

Finally, asylum determinations are discretionary and handled by the Office of the U.S. Attorney General under S.208(b)1(A). As such, unlike other immigration matters, such as removal or deportation, asylum cases are not heard by an immigration judge, but by this office. In the alternate, these claims may also be heard by the Director for Homeland Security.

i. Withholding of Removal for Refugees

The 1980 act is also responsible for granting refugee status in the form of withholding deportation. This form of refugee protection is found under S.241(b)(3) and is essentially the basic protection of non-refoulement insofar as it only affords the successful refugee from being returned to their home country for fear of persecution

Unfortunately, in order to qualify for this protection, U.S. courts have held that a petitioner cannot show proof merely of a well-founded fear. Instead, they must demonstrate that, in keeping with the general withholding of removal standard,

[11] [USCIS website at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD]

there is a “clear probability of harm” should removal to his home country be permitted. (See INS v. Cardoza-Fonseca)

Furthermore, not only does it require a higher standard of proof to be met, it also only a temporary measure that provides far less protection than a S.101(a)42 refugee status arising out of a S.208 grant of asylum

However, unlike the 208 asylum petition, withholding of removal under 241(b)3 is not subject to the discretion of the Attorney General but will be granted once the standard of proof is met that there exists a “clear probability of persecution”.

ii. Refugee defined – INA § 101(a)(42)

“The term "refugee" means (A) any person who is outside any country of such person's nationality … and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances… any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.”

iii. Elements of Refugee definition

The elements of refugee requires that the applicant prove that s/he has a well-founded fear of persecution in the future, or has suffered persecution in the past, on account of race, religion, nationality, membership in a particular social group, or political opinion.[12] The Board of Immigration Appeals[13] (BIA) has listed the following four elements to satisfy the definition:

[12] INA § 101(a)(42)
[13] *Matter of Sanchez and Escobar*, 19 I&N Dec. 276.

- Fear of persecution
- The fear must be well-founded
- The persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion
- An inability to return to the country of nationality or last residence because of persecution or a well-founded fear of persecution.

A. Persecution

The statute does not define persecution, although the courts have provided some guidance . The 7th Circuit defined it as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."[it]

The Ninth Circuit defined it as, "[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive."[14]

It further added "Discrimination on the basis of race or religion . . . does not ordinarily amount to persecution within the meaning of the [Refugee] Act [of 1980'. The Board [of Immigration Appeals] has held that discrimination can, in extraordinary cases, be so severe as to constitute 'persecution'. (Ghaly at 1431).

The closest, or at least most succinct, definition came from Judge Posner in *Osaghae v. INS* ([15]when he stated: "'Persecution' means, in immigration law, punishment for political, religious or other reasons our country does not recognize as legitimate" (*Osaghae* at 1163).

The overall issue with asylum applications is that they fail to meet the standard of persecution by claiming general bad treatment or discrimination instead of asserting oppressive treatment or discrimination for belonging to a specific group.

Some forms of harm that do not necessarily qualify as persecution for adults may nonetheless constitute persecution for a child. The government has issued multiple guidelines on adjudicating children's asylum claims providing that factors such as a child's age and mental development should be taken into account when determining whether a particular form of harm qualifies as persecution. The persecution of family members is also important in determining whether a minor applicant has a well-founded fear.

[it] *Mitev v. INS*, 67 F.3d 1325, 1300 (7th Cir. 1995).
[14] *Ghaly v. INS*, 58 F. 3d 1425, 1431 (9th Cir. 1995).
[15] 942 F.2d. 1160 (7th Cir. 1991)

The level of harm required to constitute persecution is reduced in children's cases. According to the UNHCR and U.S. Guidelines, and as upheld by several U.S. Courts of Appeals, "[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." U.S. Guidelines at 19; UNHCR 2009 Guidelines at ¶ 10; see also Hernandez-Ortiz, 496 F.3d 1042 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006); Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); Abay v. Ashcroft, 369 F.3d 634, 640 (6th Cir. 2004) The applicable question is whether the harmful act(s) constitute persecution when considered from the perspective of a child. See, e.g., Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2nd Cir. 2006). This is the case even if the applicant is no longer a child at the time of applying for asylum; the age of the applicant at the time the persecution occurred is what matters. Whether harm suffered or feared by the child constitutes persecution should be assessed with regard to the "individual circumstances of the child," including age, developmental stage, vulnerability, psychological factors, for example, inappropriate sexual touching, not involving rape, of an eight-year-old girl should rise to the level of persecution given her young age and any lasting psychological impact, even though such acts might not constitute persecution in the case of an adult. See UNHCR 2009 Guidelines at ¶ 15–16.

B. Well-Founded Fear

Again, like, "persecution," "well-founded fear" is not defined within the statute. While the Supreme Court has held that an application for withholding removal under S.241 must establish a there is a clear probability that s/he would be singled out for persecution, this is not the case for seeking asylum as a refugee under S.207.[16]

In *INS v. Cardoza-Fonseca*, the Supreme Court held that "well-founded fear" in asylum cases is more generous that than the clear probability standard that governs restriction on removal.

"There is obviously some ambiguity in a term like well-founded fear, which can only be given concrete meaning through a process of case-by-case adjudication."[17]

This standard requires both ~~the~~ subjective and objective parts. The applicant has to prove not only that s/he is subjectively fearful of persecution should they return to their country but that the fear is objectively well-founded.

This standard therefore requires considering both 1) the applicant's state of mind and 2) whether a reasonable person would believe there is a possibility of

[16] *INS v. Stevic*, 467 U.S. 407 (1984).
[17] 480 U.S 421(1987).

persecution.

EXAMPLE:

Thomas is seeking an asylum claim based on the fact that he is fearful of persecution for voting against an incumbent in a past election. Even if Thomas is genuinely fearful of persecution, he still has to prove that the fear is well founded. He would fail to meet this standard if there was no evidence that the incumbent was persecuting people who voted against him.

Evidence of oppressive conditions will not be sufficient. Conversely, even If subjective fear is established, it must have some objective basis for the claim to be valid.

EXAMPLE:

Joe is seeking an asylum claim, unlike Thomas above, there is proof that the incumbent is persecuting people who voted against him. If Joe did not vote against the incumbent then his claim will fail. He will be able to show that a fear of persecution is well founded, but he will not be able to show that he has a genuine fear of persecution.

To meet the objective requirement, the applicant must show that:

- The applicant possess a characteristic or belief that a persecutor seeks to overcome in others by means of punishment
- The persecutor is already aware, or could become aware that the applicant possesses this belief or characteristic
- The persecutor has the capability of punishing the applicant
- The persecutor has the inclination to punish the applicant.[18]

It is not necessary for the applicant to show that s/he has actually been persecuted; s/he must only show that s/he is similarly situated to persons being persecuted.[19] The following approach has be codified in the regulations to prove

[18] Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987).

[19]

> "Since objective, corroborative evidence often is unavailable, it may be unnecessary for the asylum applicant to prove that he would be singled out for persecution, if he can 'adduce objective evidence that members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution."

well-founded fear:

> (1) there is a pattern or practice in the applicant's country of origin to persecute groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group or political opinion
>
> (2) the applicant is included in, and identifies with such groups such that his or her fear is reasonable[20]

C. Past Persecution

If the child has already suffered persecution that is an independent ground for asylum eligibility because it is presumed that the child has a well-founded fear of future persecution.[21] However, if there is fundamental change in circumstance such that a well-founded fear would no longer be logical then there will be no presumption of a well-founded fear of persecution.

Even if there is a fundamental change a child can still be granted asylum based on the adjudicators exercise of discretion.[22] The basis for such discretion is either because the applicant has compelling reasons for not wanting to return to his or her country of origin or if the applicant can show that s/he would suffer severe harm if returned.

The presumption of well-founded persecution can also be rebutted if it is found that the applicant/child could return to his/her country of origin safely.[23]

M.A. v. USINS, 858 F.2d 210, 6 Immigr. Rep. A2-45 (4th Cir. 1988), *rev'd on other grounds*.

[20] 8 C.F.R. § 208.13(b)(2)(iii)

[21] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 208.13(b)(1).

[22] 8 C.F.R.§ 208.13(b)(1)(iii)

> "Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if: (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." *Id.*

[23] 8 C.F.R. § 208.13(b)(1)(i)(B).

Practice Tip

If the applicant has suffered past persecution on one ground, it will not establish a presumption of fear on a different ground under a new regime in one's home country.

Matter of N-M-A, 22 I. & N. Dec. 312 (BIA 1998).

Note: Government Role in Persecution

Generally, asylum claims are required to demonstrate that the persecution in question of the person or their particular group is being perpetrated by the government of their home country. (See e.g. *Tagaga v. INS*, 217 F.3d. 646 (9th Cir. 2000), *INS v. Elias Zacarias*, *Chen v. Gonzales* 490 F.3d. 180 (2nd Cir. 2007)). However, while this broad rule is logical in most cases, its practical application can lead to various geopolitical issues.

Issue 1: Uniform National Policies
This dynamic was well documented in the BIA case *Matter of Cheng*, 20 I&N Dec. 38 (BIA 1989). This 1989 case dealt with the controversial One Child Policy of the People's Republic of China. The petitioner sought asylum arguing that the forced sterilization the PRC required of persons opposing the policy constituted persecution. As Cheng was a vocal opponent of the One Child program, he submitted that he therefore had a well-founded fear of the forced sterilization process.

Despite the controversial nature of the policy, the Board refused asylum. Instead, they asserted that as this was a uniform national policy that was done in a

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> "Discretionary referral or denial…. an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence… The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so."

practical, if somewhat severe, effort by the government to secure provisions and general population control that had come last in a long line of less stringent efforts. As such, the Board stated that the policy was legitimate and could not be grounds for seeking asylum.

In order to bolster this ruling, the Board further asserted that Cheng had not submitted any evidence beyond witness testimony of the mandatory nature of the sterilization program.

Nevertheless, due to the domestic outcry caused by the Board's position as well as the underlying policy, in 1996 Congress retroactively legislated that any population control programs enacted by foreign government would be valid ground for seeking asylum.

Issue 2: Non-governmental actors
While persecution typically requires government involvement, there are two major exceptions to this rule. These are 1) when the home government is unwilling to take action stem persecution by private parties and 2) when the home government is unable to take such action.

The Ninth Circuit referenced this in asserting: "….persecution, within the meaning of the {the INA} includes persecution by non-government groups . . . where it is shown that the government of the proposed country of deportation is either unable or unwilling to act." (*McMullen v. INS*, 656 F.2d. 1312, 1315 n.8 (9th Cir. 1991).

The most notorious instance in which an asylum claim was heard due to a government unwilling to take action against a prevailing social norm was in the Kasinga case that has been referenced earlier. The refusal of the government to take any action against the widespread custom of female genital mutilation constituted sufficient basis for the Board to overlook the non-governmental nature of the practice.

Unwillingness or inability to act by the government, specifically the state police fore forces was central to the cases *Matter of O-Z and I-Z* 22 I&N 23 (BIA 1998) as well as *Singh v. INS* 94 F.3d. 1353 (9th Cir. 1996). In the Matter of O-Z and I-Z, the police's ignorance, refusal or simple inability to aid a Jewish man who had been subjected to numerous attacks by anti-Semitic groups was clear enough grounds of religious violence to constitute persecution.

Similarly, in *Singh v. INS*, the 9th Circuit asserted that the ubiquitous acts of violence by Native Fijians against Indians residing in Fiji was tantamount to persecution as the government seemed either unwilling or wholly incapable of maintaining order or even a sufficient police presence.

D. On the Basis of Race, Religion, Nationality, Membership in a Particular Social Group or Political Opinion.

An application for asylum will be successful, only if the persecution is based on one of these five grounds: race, religion, nationality, membership in a particular social group or political opinion.

Mixed Motives

The REAL ID Act of 2005 requires the applicant for asylum to establish that a protected ground was or will be at least one central reason for persecution. The Ninth Circuit has interpreted a "central reason" as "a reason of primary importance to the persecutors, one that is essential to their decision to act." *Parussimova v. Mukasey,* 533 F.3d at 1134 (9th Cir. 2008). The fact that persecutors have a personal or criminal motive does not preclude nexus to a protected ground. *Tapia-Madrigal v. Holder*, 2013 WL 1983882 (9th Cir. May 15, 2013).

Race

In order to meet the requirement of persecution on the basis of race, the applicant must be able to show that the government, of the applicant's country of origin, has in some manner participated in conduct that would cause the applicant to fear persecution because of his/her race.

This requirement can also be met by a showing that the government allowed others to engage in threatening actions on the basis of race.[24]

In *Tagaga v. INS*, 217 F.3d. 646 (9th Cir. 2000), the 9th Circuit further extended racial discrimination based protection for refugees. Tagaga was a Fijian colonel who sought asylum because of his refusal to persecute the Indo-Fijian minority in his home country. Over the opposition and initial refusal of the INS, the 9th Circuit found that this constituted valid grounds to seek asylum on the basis of race.

Religion

Applicants must show that they fear persecution because of their religious beliefs. However, this requirement includes several things, for example it could also be met if there is a restriction on a religious practice.[25]

[24] Note: meeting the asylum requirement on the basis of race is extremely difficult and rare.

[25] "There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished and is even

The International Religious Freedom Act of 1998 does not provide additional rights to refugees but it allowed for immigration officials to be more thoroughly trained on religious persecution issues.

Nationality

In order for an applicant to be able to successful prove that they have a fear of persecution based on nationality, they must show that the government has participated in hostile conduct against members of a certain nationality. It is not sufficient that there is violence against members of a nationality. The government must have participated in that violence.

Practice Tip

Discrimination based on nationality will not necessarily be persecution.

Membership in a Particular Social Group

There have been many different definitions for a social group.[26] The BIA has defined it as "persecution that is directed toward an individual who is a member of a group of persons all whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership."[27]

A social group will rarely be found when it is applicable to a large section of the nation.

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allowed to attend school, does not mean that he is not a victim of religious persecution. If a government as part of an official campaign against some religious sect closed all the sect's schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think, although we need not decided, a form of religious persecution."
Bucur v. INS, 109 F. 3d 399, 405 (7th Cir. 1997).

[26] The 7th Circuit has defined social groups as, "discrete, homogenous groups targeted for persecution because of assumed disloyalty to the regime." *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992). The 1st Circuit states that it is, "a characteristic that either is beyond the power of an individual to change or that it ought not be required to be changed." *Ananeh-Firempong v. INS*, 766 F.2d 621, 626, 2 Immigr. Rep. (1st Cir. 1985).

[27]

EXAMPLE:

The Board of Immigration Appeals denied an asylum application based on violence in El Salvador directed against the social group of working-class males of military age who had not demonstrated support for the government.

Practice Tip

To be able to meet the asylum requirements for persecution for membership in a social group the application should show the follow:

- That it a social group

- The applicant has membership in the group

- The group has been targeted for persecution on account of the characteristics of its members

- If there are special circumstances present to warrant regarding mere membership in the group as per se eligibility for asylum.

Children

Children are considered a social group under immigration law, and their youth maybe helpful in the application process. However, case law in this area has been mixed.

EXAMPLE:

In *Matter of Kasinga*, the BIA found that the child had a well-founded fear of persecution because of the threat of female genital mutilation.[28] The social group was found to be, young women of the tribe who had not under gone the mutilation and opposed the practice.

In M*atter of Luna-Lorezano*, the court found that there was an identifiable social group of underage males forcibly recruited and illegally placed into the military

[28] 21 I. & N. 357, 365 16 Immigr. Rep. A2-366 (2d Cir. 1991).

who have been subjected to physical, social and emotional abuse.

Political Opinion

Persecution because of political opinion has been defined as, "the particular belief or characteristic a persecutor seeks to overcome in an individual is his political opinion. Thus [it] refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to the object of persecution."

Furthermore, political opinion has been considered valid grounds for obtaining asylum even when it is not the beliefs of the petitioner, but those of a family member, that make them likely targets for persecution. In *INS v. Cardozo-Fonseca*, the Supreme Court held that although the petitioner was not a political activist in her home country of Nicaragua, the knowledge that her brother was an activist would make her a target for the Sandinistas. As such, she could establish a well-founded fear of persecution on these grounds.

In addition to persecution for a particular political opinion or belief, case law has also asserted that political neutrality or refusal to follow a political belief can also be grounds for seeking asylum if will lead or has led to similar persecution.

However, the major ruling in this area, *INS v. Elias Zacarias,* 502 U.S. 478 (1992), made particular effort to note that political neutrality will not be considered viable grounds for persecution if it is being used as a means to avoid danger.

Practice Tip

To meet the requirement for asylum on the basis of political opinion the applicant must satisfy the following:

- The victim must have been the subject of persecution

- The victim must have a political opinion

- The victim must show that his or her political opinion

- The persecution was on account of the opinion

Emerging Case Law on Political Social Group

On February 7, 2014, the Board of Immigration Appeals (BIA) issued two precedential decisions pertaining to the "particular social group" ground for asylum. Both cases – Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014) and Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) – were presented by Central American applicants articulating their fear of gangs in their respective countries. Generally, such gang-based asylum cases have fared poorly in asylum offices and immigration courts nationwide, particularly following a pair of 2008 BIA decisions announcing additional requirements in order for a particular social group to be legally cognizable. While case law prior to 2008 required only that a particular social group be based on a common immutable characteristic, the publication of Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008) and Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) required applicants to demonstrate the "particularity" and "social visibility" of their claimed social groups. These further requirements, as interpreted by the BIA, led to the denial of many social group claims, including a large number of gang-based cases, on grounds that the applicant was not part of a sufficiently well-defined group within society or that the group in which he claimed membership was not generally recognizable as a group by others in the community. The imposition of these additional requirements was met with criticism from much of the advocacy community as well as from some circuit courts of appeal. Indeed, the BIA issued its decision in Matter of M-E-V-G- following a second remand from the Third Circuit directing the BIA to provide a principled reason for the adoption of the new requirements.

Through its decisions in Matter of W-G-R- and Matter of M-E-V-G-, the BIA purports to have provided its reasoning and to have clarified the requirements for a particular social group, including specifically the contentious requirement of "social visibility." The BIA explains that a particular social group need not have literal, ocular visibility, but rather must be recognized within the relevant society as a distinct entity. Consequently, the BIA renamed the requirement "social distinction," directing that in order to establish a particular social group, the record must contain evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Thus, according to the BIA, following these recent decisions, an applicant for asylum or withholding of removal seeking relief based on his or her membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.

Notably, in Matter of W-G-R-, the BIA held that "former members of the Mara 18 gang in El Salvador who have renounced their gang members" do not constitute a particular social group for the lack of particularity. Since these 2014 cases, the BIA has continued to reject claims of resistance to gang recruitment, applying its ruling in S-E-G- that Salvadoran youth subjected to recruitment by the MS 13

who have rejected or resisted membership our of personal, moral and religious opposition do not constitute a particular social group for lack of visibility and particularity. The Ninth Circuit, in *Pirir-Boc v. Holder*, 750 F. 3d 1077 (9th Cir. 2014) accepted the BIA's 2014 decisions as consistent with its own interpretation of the relevant standards in *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013). In *Henriquez*, the Ninth Circuit held that witnesses who had testified in open court against murderous gang members could be considered members of particular social groups, clarifying the social visibility requires that groups be "understood by others to constitute social groups" while particularity demands that a group "can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." In *Pirir*, the Ninth Circuit noted the qualification that the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. It explained that the persecutor's perspective is one factor among others to be considered in determining a group's social visibility. In particular, the panel at the Ninth Circuit noted that the distinction and particularity of a proposed group will vary according to the society in which the respondent claims to have suffered persecution or fear persecution. Accordingly, each claim must be assessed based on the relevant social context.

f. Credibility

Credibility of a child's asylum claim should also take into account the age of the child. As USCIS notes in the 2009 Asylum Office Basic Training Course: Guidelines for Children's Asylum Claims:

> "A child, like an adult, may rely solely on testimony to meet his or her burden of proof when that "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." Certain elements of a child's claim, however, such as easily verifiable facts that are central to the child's claim, may require corroborating evidence. A child, through his or her advocate or support person, is expected to either produce such documentation or offer a reasonable explanation as to why those documents cannot be obtained. What is reasonable will depend on the child's individual circumstances, including whether or not the child is represented. Additionally, a child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members."

III. Applying for Asylum

To apply for asylum the child must be physically present in the U.S. Applying for asylum is free and but must be done within one year from the date of arrival to the U.S. In order to apply the child must file Form I-589, Application for Asylum

and for Withholding of Removal.[29]

To obtain asylum through the affirmative asylum process the child must be physically present in the U.S. Immigrants can apply for asylum status regardless of how they arrived in the U.S. or his/her current immigration status. During this time Asylum officers will decide the case if the immigrant is in immigration court proceedings or s/he filed an application with an asylum office. You must attend your immigration court hearings and should follow the Immigration Judge's instructions.

INA § 208. (a) Authority to Apply for Asylum

(1) In general. - Any alien who is physically present in the U.S. or who arrives in the U.S. . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the U.S.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the U.S.

[**NOTE**: The one-year rule does not apply to unaccompanied immigrant children, see p. 74 above.]

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) . . ., if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or

[29] For this form and further instructions please see appendix A or visit the USCIS website at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=de9814836a14d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=6ca66d26d17df110VgnVCM1000004718190aRCRD.

extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(E) APPLICABILITY- Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))).

(b) Conditions for Granting Asylum. -

(1) In general. - (A) ELIGIBILITY- The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security.

1. Present in the U.S.

An immigrant can apply for asylum even if s/he is present in the U.S. illegally, temporarily or on parole, even if s/he is at a port of entry.

It will be remembered from the beginning of this chapter that physical presence is not a requirement for non-refoulement nor is it a qualification under the Convention on the Status of Refugees, its subsequent Protocol, or any of the other relevant international legal provisions regarding refugees. In fact as the UN High Commissioner on Refugees asserted: "The principle of non-refoulement…applies both to persons within a State's territory and to rejection at its borders" (The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR ¶ 2

The obligation of a country regarding non-refoulement therefore not only extends to those refugees within its territory, but also those who have come to its borders. As such, the U.S. requirement of physical presence markedly contradicts the jurisdictional mandate set by international law for non-refoulement.

This issue came to the fore in *Sale v. Haitian Centers Council*[30]. The case revolved around an executive order by President George H.W. Bush requiring the Coast Guard to send back a group of Hatian refugees who had sought sanctuary in the U.S. and were attempting to enter the country illegally. In ruling in support of the President, the Supreme Court asserted the U.S. had a sovereign right to reject persons seeking to enter its territory, regardless of their political status.

This ruling was and continues to be widely condemned by the international community. In fact both the Inter-American Court of Human Rights (IACHR) and the UN High Commission on Refugees have formally denounced this decision as

[30] . 509 U.S. 155 (1993)

contrary to international law and a direct violation of Article 33(1) of the Refugee Convention regarding the U.S' jurisdictional non-refoulement obligations.

2. One Year

An applicant for asylum must show through clear and convincing evidence that s/he applied for asylum within one year of arriving in the U.S. There is an exception for extraordinary circumstances.

3. Minors applying through their Parents

A spouse or child present in the U.S. may be included on the application at the time of filing or until a final decision is made on the case. Any child included on the petition as a derivative must be under 21 and unmarried.

4. Minors applying on their own

There are two ways a minor can apply for asylum, (1) individually when their parents have a case, or (2) as an unaccompanied minor.

Individual application

In order for a minor to apply for asylum individually, s/he must be under 18 years of age and want to have a case separate from his/her parents or spouse.

Unaccompanied Minor

In order for a minor to apply for asylum as an unaccompanied minor s/he must be (1) under 18 years of age, (2) have no parent or legal guardian in the U.S who can provide care, (3) separated from his/her parents or legal guardians, (4) Entered the U.S. with a parent or adult guardian but left that person's care, or (5) have a deceased parent(s) and there is no legal guardianship arrangement.

Unaccompanied Children Seeking Asylum May Begin Process In Non-Adversarial Setting

On March 23, 2009, the provisions of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) applicable to unaccompanied alien children took effect. In a "Questions and Answers" memorandum dated March 25, 2009, the USCIS, Office of Communications, published the following information, in relevant part,

> U.S. Citizenship and Immigration Services (USCIS) are now responsible for initial adjudication of applications for asylum from Unaccompanied Alien Children, (UAC). The new procedures were created to carry out the William Wilberforce Trafficking Victims Protection Reauthorization Act of

2008 (TVPRA). The TVPRA provides USCIS with initial jurisdiction over any asylum applications filed by unaccompanied children.

On Dec. 23, 2008, former President Bush signed into law TVPRA, Public Law 110-457. The provisions of the TVPRA that apply to unaccompanied alien children took effect on March 23, 2009. Under one of these provisions, unaccompanied alien children who have been issued a *Notice to Appear* in immigration court will now file their initial application for asylum with USCIS. The TVPRA also provides an opportunity for unaccompanied alien children, who did not previously file for asylum with USCIS and who have a pending claim in immigration court, on appeal to the Board of Immigration Appeals, or in federal court, to have their asylum claim heard and adjudicated by a USCIS Asylum Officer in a non-adversarial setting.

(Questions and Answers, USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum, March 25, 2009 at http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf.)

NOTE: The TVPRA amended the INA so that one-year filing deadline does not apply to UACs.

In addition, the TVPRA makes the following changes that affect UACs applying for asylum:

1. The Immigration and Nationality Act (INA) is amended so that the one-year filing deadline and any safe third country agreements do not apply to UACs.
2. The Department of Health and Human Services (HHS) shall ensure pro bono counsel, to the greatest extent practicable and consistent with section 292 of the INA, for all UACs who either are or have been in its custody or in DHS custody.
3. HHS is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children.

A. Interviewing Procedures for Minor Applicants

According to the USCIS, “Asylum officers’ conduct child appropriate interviews taking into account age, stage of language development, background, and level of sophistication.” The USCIS website provides a link to “Guidelines for Children’s Asylum Claims.” For a link to this publication and further information about the interviewing procedures, please visit the following website http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=21bf011522a9c110VgnVCM1000004718190aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD.

B. Social Security Card

Once you are granted asylee status, you may apply for an unrestricted Social Security card a Social Security Office. In order to get a Social Security Card, you must contact the Social Security Administration. For more information, please visit their website at https://www.socialsecurity.gov/ssnumber/.

C. Working in the U.S.

You have authorization to work in the U.S. once you are granted asylum, even if you do not have an Employment Authorization Document (EAD). If you do not receive an EAD after being granted asylum, you should contact the asylum office that granted your case. The EAD may be used as a List A document on the Form I-9, Employment Eligibility Verification Form. In addition, you are also eligible to use employment services from One-Stop Career Centers. Please call (877) 872-5627 for more information.

D. Permanent Residence (Green Card)

By law, you are required to apply for permanent residence (a green card) one year after being admitted to the U.S. as a refugee. If you were admitted to the U.S. as a refugee, you are required by law to apply

You must file a Form I-485, Application to Register Permanent Residence or Adjust Status, for yourself and each qualifying family member who wants to become permanent residents.

E. Traveling

If you intend on leaving the U.S., you must obtain a Refugee Travel Document prior to leaving. Please visit USCIS website for more information at http://www.uscis.gov/USCIS/Resources/D4en.pdf.

F. Eligibility Determination

A specially trained USCIS officer will interview the applicant and determine whether she/he will have refugee status. The interview is non-adversarial and the decision is made on a case-by-case basis.

G. Process Priorities

According to the USCIS, the following are priorities currently in use:

Priority 1: Cases that are identified and referred to the program by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or a designated non-governmental organization (NGO).

Priority 2: Groups of special humanitarian concern identified by the U.S.

refugee program.

Priority 3: Family reunification cases (spouses, unmarried children under 21, and parents of persons lawfully admitted to the U.S. as refugees or asylees or permanent residents (green card holders) or U.S. citizens who previously had refugee or asylum status). For information on the current nationalities eligible for Priority 3 processing, see the "U.S. Department of State" link to the right.

NOTE: The information above came directly from the USCIS website, specifically the U.S. Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities, which can be viewed in full at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD&vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD.

H. Coming to the U.S.

After approval as a refugee, you will receive all of the following:

- a medical exam
- a cultural orientation
- help with your travel plans
- a loan for your journey to the U.S.

c. Limits on Eligibility

There are three limitations to an immigrant's ability to apply for asylum.[31]

[31] INA § 208(a)(2)(A)-(C)

"(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

First, if the immigrant can move to another country based on an agreement. Before an immigrant can be denied asylum because of this limitation the Attorney General must determine that the immigrant will have access to procedures for or an equivalent asylum program.

Second, the alien must show by clear and convincing evidence that the application was filed within one year of arriving in the U.S., as discussed above.

Third, an immigrant who has previously applied for asylum and been denied cannot re-apply.

d. Changed Conditions

e. Eligibility for Restriction on Removal

If an illegal immigrant is in removal proceedings the immigration laws may protect him/her from being removed from the U.S. because his/her life would be threatened.

"Restriction on removal to a country where alien's life or freedom would be threatened [ ] the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[32]

The well-founded fear requirement of a proactive asylum application is not incorporated into this section. Instead, to qualify for restriction on removal, the immigrant child must show that there is a clear probability of persecution.

This determination is mandatory, meaning, if the immigrant can show that his or her life will be threatened then s/he cannot be removed.

NOTE: The mandatory nature of this determination is only if the immigrant's life is threatened because of his/her race, religion, nationality, membership in a particular social group, or political opinion.

> (C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied."

[32] INA § 241(b)(3)

Practice Tip

To establish that the immigrant faces a clear probability of persecution s/he must show that s/he is at a greater risk than the general population, and that the threat is a serious one. The claim must be supported by specific or concrete, factual evidence that the immigrant is more

The following immigrants are ineligible for restriction on removal:
- Persecutors
- Aliens convicted of serious crimes
- Reasons to believe alien committed a serous nonpolitical crime
- Reasonable grounds to believe alien is a danger to the security of the U.S.[33]

a. Persecution Bar

Under S.208(b)2(A), any immigrant who has participated in the persecution of another person because of race, religion, nationality, membership in a particular social group or political opinion is not eligible for the restriction on removal.

The ineligibility for asylum status based on persecution was originally extended to persons such as petitioner Majano who was in danger of being forced to participate in persecution of a particular group as they had previously participated in such actions In the Matter of Rodriguez Majano, (19 I&N Dec. 811 (BIA 1988),. Despite the petitioner's apparent unwillingness and fear of likely being required to once again take part in such actions, the Board held that his previous commission of persecution made him ineligible to claim asylum under S.208 or withholding of removal under S. 241.

However, in its recent decision in *Negusie v. Holder*, the U.S. Supreme Court has found that, when considering a petitioner's eligibility for asylum, the BIA is in fact permitted to take into account whether a petitioner was coerced into committing persecutory acts. (*Negusie v. Holder* 555 U.S. 511 (2009)) According to the Court

[33] INA § 241(b)(3)(B)(i)-(iii)

> "Exception.-Subparagraph (A) does not apply to an alien deportable…or if the Attorney General decides that- (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States."

"[t]he BIA and Fifth Circuit [erred in] mandating that whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes". (*Id.*) As such, a petitioner's forced participation in persecutory acts no longer requires a mandatory refusal of asylum status. Instead, such a situation is left to the discretion of the BIA. (*Id.*)

b. Committed a serious crime

A serious crime is defined as an aggravated felony and the immigrant must have been sentenced to a prison term of longer than five years.

Prior political crimes have also been considered grounds for denying asylum. However, case law has asserted that if the crime was committed as part of a political statement or movement, it can be excused. However, in order for such an exemption, the petitioner must have clearly had a justifiable political motive in undertaking the apparently illegal action.

In the case *INS v. Aguire-Aguire*, 526 U.S. 415 (1999) the Supreme Court held that petitioner Aguire was ineligible for the commission of a serious crime despite his contention that the underlying action was part of a political uprising. In so ruling, the Court held that the criminal action Mr. Aguire was charged with; the burning of several buses and charges of assault, could not be considered in any way proportional or justifiable as part of a political revolt.

c. Security Threat or Possible Danger to the U.S.

General Prohibition
The INA asserts that if a petitioner is deemed a threat to national security because of prior or possible involvement with terrorist groups, they will not be able to seek S.208 asylum pursuant to 208(h)2(A)v.

In addition, aliens who are found to be a possible security threat to the U.S. will not only be denied asylum but are expressly not permitted to exercise the non-refoulement exception to withhold S. 241 removal under INA S.241(h)3(B)iv.

These measures are intimately tied to the inadmissibility provisions of S. 212(a)3(B). Under this provision persons deemed to pose such a threat are also considered inadmissible and will even be refused entry at the U.S. border, despite any claims of asylum or non-refoulement.

Given the international outcry to the Supreme Court ruling in *Sale v. Haitian Centers Council* (supra) these strict measures against possible asylum seekers would seem at odds with the general amnesty for refugees and asylum seekers observed in customary international law. However, these prohibitions are actually in keeping with the provisions of the Refugee Convention. Under Article 33(3) persons found

to be a threat to the national security of either their host state or their home country can be refused asylum or refugee status.

d. Terrorist Exclusion and 9/11

While security threats to the U.S. have therefore been traditionally excluded from seeking any sort of amnesty as refugees, the bar for asserting said exclusion has been drastically changed since the attacks of September 11th, 2001 and the revamping of domestic security under the Homeland Security Act of 2002.

Prior to this, qualification as a threat to national security required clear involvement in organizations that conducted terrorist activity. For example, in the case *McAlister v. Attorney General*, 444 F.3d. 178 (3rd. Cir. 2006) the petitioner was denied asylum as he had not only been involved in the Irish National Liberation Army (INLA) but was wanted for the death of a British solider in furtherance of the group's goals.

However, subsequent to the Act's passage, the exclusion was extensively expanded. Under the new inadmissibility grounds of S.212(a)(3)(B)(iv)(V) persons could be found to constitute security threats if they had in any way provided "material support" to known terrorist groups. By "material support" S.212 means a person will qualify for the exclusion if they gave any aid whatsoever to "an individual the actor knows, or reasonably should know, is involved in terrorist activity." (S. 212(a)(3)(b)(iv)(V).

Using this definition, courts have broadly applied the security threat category to validate a number of controversial, or at the very least questionable, exclusions. For example, In the case of *Singh-Kaur v. Ashcroft*, 365 F.3d. 293 (3d. Cir. 2004) the Third Circuit held that petitioner had materially supported terrorist activity when he had unknowingly provided food and drink to members of a Sikh militant group during a religious ceremony

Similarly, in the Matter of S-K 23 I&N Dec. 936 (BIA 2006), petitioner was 1)considered to have materially supported terrorist activity when she donated $985 to the Chin National Army. The Board maintained its ruling despite the fact that 1) the donations was for religious reasons and 2) the Chin National Front was fighting the Burmese government alongside organizations that were known to have U.S. financial and military support.

Due to the severe consequences that such interpretations of the material support bar have engendered, in 2007 the DHS announced efforts to tighten the standard of a security threat. While this did not include a re-wording of the definition currently in use, it has included the creation of two sets of waivers. The first of these is for refugees that supported particular organizations such as the CNF, while the second set are more generic and are aimed at aiding persons found to have supported terrorist activity under duress. Of course, due to the difficulty of

validating a duress based refugee petition, the latter group of waivers comes with a rather high burden of proof. (See 72 Fed. Reg. 9954, 9956 (March 6, 2007)