



Representing Minors in Removal Proceedings

Training Materials

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I. Executive Summary

These training materials are intended as a tool for immigration attorneys, BIA-accredited representatives, and other advocates interested or already engaged in the representation of minors in removal proceedings. These, like all other training materials prepared by the Center for Human Rights and Constitutional Law (CHRCL), are non-exhaustive and subject to continuous update to reflect the rapidly changing context of immigration law and policy in which we work and live. For over thirty years, CHRCL has been at the forefront of the battle for the rights of immigrant children in the United States. In 1982, we enjoyed our first historic victory in the field when the U.S. Supreme Court decided *Plyler v. Doe*, agreeing with our claim that denying children a public education on the basis of immigration status violated the equal protection clause of the United States constitution. That case laid the foundation not only for other advocacy efforts on behalf of immigrant children, but also for CHRCL's leadership in promoting the rights of immigrant children.

Since that time, immigration law has undergone significant changes, not only in terminology, but also in the substantive standards and procedures that affect the ability of non-citizens, including children, to remain in the United States. These materials focus on the representation of minors in adversarial removal proceedings before an Immigration Judge, wherein the Department of Homeland Security seeks to remove the non-citizen from the United States. Removal proceedings are complicated, but almost always involve a consideration of two important issues: (1) whether the non-citizen is subject to removal from the United States, and if so, (2) whether the non-citizen may receive some sort of relief from removal so as to allow him or her to remain in the United States. In representing any client in removal proceedings it is important to fully consider any defenses to the charges of removability, including those that are uniquely available for minors. In the event that removability is established, a zealous representative will consider all possible avenues for relief, including certain benefits and protections that are specifically designated for minors, with an awareness of the requirements and standards as applied to a minor child. An effective advocate will, for example, provide compelling arguments regarding the timeliness of a child's asylum application and present a carefully constructed social group that complies with the case law in the circuit. The present training materials also provide a brief overview of issues collateral to removal proceedings, including representation and custody, so that advocates can be informed as to the broader context of their representation.

We invite readers to not only review these materials and consider them as a guidepost when approaching representation of a child in removal proceedings, but also to consider opportunities for strategic litigation in this field. As always, CHRCL and its staff remain available to provide technical assistance on these and other immigrants' rights issues. Please contact Peter Schey, Executive Director, at pschey@centerforhumanrights.org should you want to discuss potential cases in greater detail. We look forward to the opportunity to support you in your professional growth and to collaborate to promote the rights of immigrant children in our country.

II. Removal Proceedings

A. Removal Proceedings in General

In 1996, there was a major overhaul of many portions of the Immigration and Nationality Act (INA) through amendments wrought by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). Prior to the implementation of those amendments in April 1997, “deportation” of persons previously admitted to the United States and “exclusion” of persons seeking admission were separate procedures for removing non-citizens from the country. IIRAIRA consolidated these procedures into a single procedure called “removal.”

IIRAIRA also significantly changed the procedures involved in expedited removal which (unless there is an issue of criminal removability) is governed by INA § 235. Notably, pursuant to the 2008 Trafficking Victims Protection Reauthorization Act, unaccompanied minors should not be placed in expedited removal proceedings, but should instead be entitled to the procedural safeguards of a full removal hearing under INA § 240.

1. INA § 240

INA § 240(a): Removal Proceedings

(1) In general.

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges.

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a).

(3) Exclusive procedures.

Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 238.

2. INA § 235(b)

INA § 235(b): Inspection of Applicants for Admission

(A) Screening

(i) In general.

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) , the officer shall order the alien removed from the United States

without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

(ii) Claims for asylum.

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) and the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens.

In general.

(I) The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described.

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2- year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

3. Expedited Removal and Minors

Generally, minors are treated the same way as non-citizen adults for the purposes of being placed in removal proceedings, with the exception that unaccompanied minors have been protected from expedited removal proceedings. If a minor is not deemed to be unaccompanied, he or she may be placed in expedited removal proceedings along with their accompanying relative.

On August 21, 1997, several months after post-IIRAIRA implementation of expedited removal began at ports of entry, the Immigration and Naturalization Service (INS) issued a memorandum stating that unaccompanied minors generally would not be placed into expedited removal proceedings. Since that time, it has been the practice of immigration enforcement authorities to charge an arriving unaccompanied child with a ground of inadmissibility for which expedited removal is not required and place the child into 240 proceedings instead.

While the 1997 memorandum has been superseded and thus removed from the publicly accessible libraries maintained by the DHS and DOJ, this policy was codified in 2008 with the passage of the TVPRA.

8 U.S.C. § 1232(a)(5)(D): Placement in removal proceedings

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be—

- (i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);
- (ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and
- (iii) provided access to counsel in accordance with subsection (c)(5).

Notably, unaccompanied minors from contiguous countries (Canada and Mexico) are not entitled to be placed in removal proceedings under INA § 240, wherein they could raise claims for relief from removal as discussed below. Instead, they are screened by an agent of DHS who determines whether or not they have a fear of persecution in their home country. Although screening of these children must be done, there is no independent review of the findings of the DHS officer or a right to a hearing before an Immigration Judge prior to returning that child to his or her home country.

B. Immigration Judge

Removal proceedings are presided over by an Immigration Judge, or “IJ” and take place in Immigration Court. Immigration Judges are appointed by and exercise powers delegated by the Attorney General of the United States. As such, they are agents of the United States Department of Justice. The network of more than 55 Immigration Courts throughout the United States belongs to the component Executive Office for Immigration Review (EOIR). The over 230 Immigration Judges in the United States, who are responsible to the Office of the Chief Immigration Judge (OCIJ) within EOIR, have jurisdiction over removal cases in the first instances. Administrative appeal may be sought before another EOIR sub-agency, the Board of Immigration Appeals (BIA).

INA § 240(b): Conduct of Proceeding-

(1) Authority of immigration judge.

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this Act.

INA § 240(c)(5): Notice -

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision

and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

C. Notice to Appear

Removal proceedings are initiated when a Notice to Appear, or “NTA,” is filed in Immigration Court by an agent of the Department of Homeland Security (DHS). The NTA will assign or list a nine-digit alien registration number, or A-number, and include both factual allegations and one or more charges of removability. In the case of a minor under 14 years of age, regulations dictate that the DHS must personally serve the NTA on the person with whom the minor resides.

Notably, the DHS like any other law enforcement agency, exercises discretion in initiating removal proceedings and determining when and how to pursue them. Under the Obama administration, an explicit program of prosecutorial discretion or “PD” was adopted, allowing respondents in removal proceedings to seek administrative closure of their removal proceedings if their case did not fall within the agency’s stated enforcement priorities. In some situations, although an NTA may be issued to an individual non-citizen, negotiations with the DHS Office of Chief Counsel may stop DHS from filing the NTA in Court and this prevent the initiation of removal proceedings. This and other possible avenues of advocacy should be thoroughly considered.

INA § 239(a):

(1) In general.

In removal proceedings under section 240 , written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 240 .

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number. (iii) The consequences under section 240(b)(5) of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.(ii) The

consequences under section 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.

8 C.F.R. § 1239.1: Notice to Appear

(a) *Commencement*. Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a) .

(b) *Service of notice to appear*. Service of the notice to appear shall be in accordance with section 239 of the Act.

8 C.F.R. § 239.1(a): Issuance of Notice to Appear

Any immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such alien. In addition, the following officers, or officers acting in such capacity, may issue a notice to appear:

The Regulation proceeds to list 40 categories of DHS employees that may file NTAs and includes “[o]ther officers or employees of the Department or of the United States who are delegated the authority....”

“Prosecutorial discretion is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions” INS Commissioner Doris Meissner memorandum, *Exercising Prosecutorial Discretion* (November 17, 2000).

The June 17, 2011 memorandum from Director John Morton includes a non-exhaustive list of factors that should prompt particular care and consideration. Each case may present additional factors that may impact the discretionary determination. These factors must be considered on a case- by-case basis based on the totality of the circumstances presented by the individual case. ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding. It is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding.

Under the Morton memo, the following should prompt (positive) particular care and consideration:

- Veterans and members of the U.S. armed forces;
- Long-time lawful permanent residents;
- Minors and elderly individuals;

- Individuals present in the United States since childhood;
- Pregnant or nursing women;
- Victims of domestic violence, human trafficking, or other serious crimes;
- Individuals who suffer from a serious mental or physical disability; and
- Individuals with serious health conditions

D. Hearings

In removal proceedings, the non-citizen will have to appear for hearings before the Immigration Judge. Generally, these hearings will either be (1) master-calendar hearings or (2) individual hearings, although some cases might involve (3) bond hearings. The first two types of hearings are discussed below, while the third type of hearing (bond hearing) is discussed in the section of these materials that relate to custody.

1. Master Calendar Hearings

The first hearing that will be scheduled, as per the information contained in the NTA, is a Master Calendar Hearing. This short procedural hearing is a chance to resolve preliminary matters in a case and to schedule further processing. The Master Calendar Hearing is generally presided over by the same Immigration Judge who will hear the entire case. Multiple Master Calendar Hearings may be held, pursuant to a continuance which allows the Immigration Judge to put the case over to another date. This might be because of the need to secure counsel, the need to resolve an underlying matter in dispute, or some other logistical issue. At the master calendar hearing, many other persons responding to notices to appear (respondents) will be present in the courtroom for hearings scheduled at the same date and time. The Immigration Judge will go through each case, one-by-one, calling each respondent to appear and reviewing preliminary issues. An attorney from the Department of Homeland Security's Office of Chief Counsel will be present to present the agency's position in support of the NTA.

At the hearing, respondents are given an opportunity to plead to the information contained in the NTA. Factual allegations may either be admitted or denied, and the charge or charges of removability may be conceded or denied. If removability is established, the Immigration Judge will ask the respondent to identify the forms of relief being sought. In addition, the Immigration Judge will ask that the respondent identify the country of removal in the event that he or she is found subject to removal. Where the respondent declines to designate his or her home country, a strategic practice in asylum and other fear-based cases, the DHS will designate the respondent's country of nationality.

Although removability is often considered a preliminary issue, in some cases, it may be an issue worth disputing. A further discussion of removability and relief from removal is provided later in these materials however it is worth noting that during a master calendar hearing, an immigration judge is prohibited from accepting an admission of removability from an individual under eighteen years old who is not accompanied by an attorney or legal representative, near relative, guardian, or other adult representative.

Once all preliminary matters have been resolved or are nearing resolution, the Immigration Judge will schedule the case for an individual hearing.

2. Individual Hearings

Individual hearings are also referred to as merits hearings. Depending on the complexity of the case and the issues involved, there may be more than one individual hearing. An individual hearing is an opportunity for an individual to present evidence in support of their claim, either against removability or (more often) in support of their application for relief. It is called an individual hearing because only the respondent (and his or her family members if there are derivative claims involved) will have their hearing scheduled on this date and time. Evidence presented at an individual hearing generally always includes testimony of the respondent but may also include testimony of family members, expert witnesses, and community leaders.

As with trials in criminal court, the DHS will have the opportunity to cross-examine all witnesses presented by the respondent. In some cases, though exceedingly rare, the DHS may choose to present its own expert testimony. The Immigration Judge, in his or her role as fact finder, may also interject with his or her own questions, attempting to solicit testimony and/or to clarify confusing information in the record.

At the end of the hearing, the Immigration Judge may elect to issue an oral decision and order or may decide to reserve decision for a later date. In the event that the Immigration Judge reserves decision, it may take the form of a written decision or an oral decision upon later hearing.

3. Form of Hearings

Statute provides detail on the form that the hearings might take:

INA § 240(b)(2) Form of proceeding.

(A) In general.

The proceeding may take place:

- (i) in person,
- (ii) where agreed to by the parties, in the absence of the alien,
- (iii) through video conference, or
- (iv) subject to paragraph (B), through telephone conference.

(B) Consent required in certain cases.

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

INA § 240(b)(3) Presence of alien.

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

4. Preparation for Hearing

Because removal proceedings involve the presentation of evidence, both through testimony as well as in documentary evidence submitted according to a calendar set by the Immigration Judge, thorough preparation of witnesses and documentary submissions is very important. In addition to spending a significant amount of time preparing your witnesses, thorough research should be done to ensure that the Immigration Judge has all of the factual information necessary in order to draw favorable conclusions.

As an integral part of zealous representation, it is advisable to file a Freedom of Information Act (FOIA) request aimed at recovering the contents of the non-citizens immigration case file, as well as any other information that may be relevant to your representation. Prompt initiation of this process will ensure enough time to navigate the administrative and judicial processes that govern access to information. Successful processing of FOIA requests is another, separate area of CHRCL's expertise and we invite you to contact us for guidance in this process.

E. Rights in Removal Proceedings

The statute does explicitly recognize certain rights that non-citizens have in the course of removal proceedings. These rights, however, are in addition to the right to due process of law and in many cases are qualified by regulations, case law, and policies.

INA § 240(b)(4) Aliens rights in proceeding.

In proceedings under this section, under regulations of the Attorney General:

- (A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
- (B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act, and
- (C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

III. Removability

The Notice to Appear (NTA), also referred to as the charging document, includes a series of factual allegations in support of one or more specified grounds of removability. Following IIRAIRA's amendments, charges may be premised on grounds of inadmissibility (equivalent to the former 'excludability'), codified at INA § 212(a), or on grounds of deportability, codified at INA § 237(a).

A thorough advocate will carefully consider the contents of the NTA before advising the respondent to admit any allegations or to plea on the charges. Indeed, the removability phase of the proceedings presents an opportunity to protect the client from removal by challenging the basis of the DHS's case. Some cases will require legal argumentation as to whether certain conduct should be classified as an immigration violation or a basis for "criminal" removability. In other cases, this might involve a blanket denial of all allegations, including alienage and nationality, forcing the DHS to provide proof and opening that evidence up to further challenge.

This challenge might involve a factual argument refuting some of the allegations contained in the NTA, including by calling into question the means in which they were obtained. In many cases, the only information contained in the NTA is derived from Form I-213, Record of Inadmissible/Deportable Alien. Many of those forms, however, are prepared by the DHS following an interview with the non-citizen that lacks many of the hallmarks of due process. Although the subject of more extensive training materials relating to the application of constitutional norms, immigration judges may invoke the exclusionary rule to suppress evidence where there have been "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *INS v. Lopez-Mendoza*, 1032, 1050-51 (1984). If the DHS cannot establish a respondent's alienage through admissible evidence, proceedings should be terminated. Suppression, like other strategies for excluding evidence, should be adequately considered in light of the governing case law in the circuit.

A. Alienage

Whether a particular individual is an "alien" rather than a citizen of the United States is a jurisdictional fact that must be proven by the DHS in order for the Immigration Judge to be able to assert authority over the respondent. Evidence of alienage must be established by clear and convincing evidence. *Matter of Amaya*, 21 I&N Dec. 583, 588 (BIA 1996). "In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his claim." *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008). A person presumed to be a non-citizen bears the burden of proving a claim to United States citizenship by a preponderance of credible evidence. *See De Brown v. Department of Justice*, 18 F.3d 774, 777-78 (9th Cir. 1994); *De Vargas v. Brownell*, 251 F.2d 869, 870 (5th Cir. 1958); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 332 (BIA 1969) (finding

a preponderance of credible evidence is necessary to overcome the presumption of alienage which attaches by reason of foreign birth).

B. Inadmissibility

For non-citizens present in the United States who have not been admitted or paroled (i.e., who have arrived at a time and place not permitted by the law) and for those who arrive at the border and seek admission (other than those subject to expedited removal), once alienage has been established, the respondent has the burden to prove admission or admissibility by clear and convincing evidence. The statute provides as follows:

INA § 240(c)(2): Burden on alien.

In the proceeding the alien has the burden of establishing –

- (A) If the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212; or
- (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence.

Applicability of the various inadmissibility provisions also affects the ability of any non-citizen to access forms of relief that require eligibility for an immigrant visa. Although there are certain statutory options for waiver of grounds of inadmissibility in relation to an application for an immigrant or non-immigrant visa, the waivers do not typically serve to cure removability.

The various grounds of inadmissibility are categorized at INA § 212(a) as follows:

- 212(a)(1) – Health-related grounds, including communicable disease of public health significance, lacking required vaccinations, physical or mental disorder, or drug abuser/addict;
- 212(a)(2) – Crime-related grounds, including crimes involving moral turpitude, violations of controlled substance laws, multiple criminal convictions, controlled substance traffickers and their families, prostitution, procuring a prostitute, asserting immunity from prosecution, trafficking in persons, and money laundering;
- 212(a)(3) – Security-related grounds, including espionage, unlawful activity to security, attempts to overthrow the United States government, terrorist activities, adverse foreign policy consequences, membership in totalitarian party, Nazi party, or genocide;

- 212(a)(4) – Public charge;
- 212(a)(5) – Labor-related grounds, including labor certification, unqualified physicians, and uncertified health care workers;
- 212(a)(6) – Immigration violations, including presence without admission or parole, failure to attend removal proceedings, misrepresentation, false claim to United States citizenship, stowaways, smugglers, and student visa abusers;
- 212(a)(7) – Document-related grounds, for immigrants and non-immigrants;
- 212(a)(8) – Ineligibility for citizenship and draft evaders;
- 212(a)(9) – Ordered removed on arrival, unlawful presence, and unlawful presence after prior immigration violation;
- 212(a)(10) – Polygamists, guardian accompanying inadmissible helpless alien, international child abduction, unlawful voter, and former citizen who renounced to avoid taxes

There are some notable statutory exceptions to grounds of inadmissibility, which are relevant to minors in removal proceedings:

Immunization Requirement for Adopted Children Exception - INA § 212(a)(1)(C)

Clause (ii) of subparagraph (A) shall not apply to a child who--

- (i) is 10 years of age or younger,
- (ii) is described in section subparagraph (F) or (G) of section 101(b)(1)(F), and 1c
- (iii) is seeking an immigrant visa as an immediate relative under section 201(b), if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

Crime Involving Moral Turpitude Exception - INA § 212(a)(2)(A)(ii)

Clause (i)(I) shall not apply to an alien who committed only one crime if-

- (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Unlawful Presence – Exception to the 3 and 10 Year Bar – INA 212(a)(9)(B)(iii)(I)

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

Note, however, that no statutory exception related to age exists for the permanent unlawful presence bar where the non-citizen was previously ordered removed and attempts to re-enter without admission.

C. Deportability

For non-citizens who have already been admitted to the United States, even if they have fallen out of status, once alienage has been established, the DHS has the burden to prove deportability under INA § 237 by clear and convincing evidence.

INA § 240(c)(3) Burden on service in cases of deportable aliens.

(A) In general.

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Unlike inadmissibility, grounds of deportability do not expressly apply to bar applications for relief from removal that are premised on eligibility for an immigrant visa. Additionally, because deportability provisions apply to persons previously admitted to the United States, many of whom have ties and equities within the country, the grounds upon which they may be subject to removal are generally less strict than those that apply to arriving aliens. There are certain waivers of grounds of deportability which explicitly function to cure removability.

The grounds of deportability are codified at INA § 237(a) as follows:

- 237(a)(1) – Immigration-related grounds, including inadmissible at the time of entry or adjustment of status, violation of immigration status termination of conditional residence, smuggling, or marriage fraud;
- 237(a)(2) – Crime-related grounds, including crimes involving moral turpitude, multiple convictions, aggravated felonies, high speed flight, failure to register as a sex offender, controlled substances violations, certain firearms offenses, miscellaneous crimes, crimes of domestic violence, trafficking;
- 237(a)(3) – Document-related grounds, including failure to comply with change of address requirements, failure to register or falsification of documents, document fraud, false claims of citizenship,
- 237(a)(4) – Security-related grounds, including espionage, endangering public safety or national security, activities to overthrow the United States government,

- terrorist activities, adverse foreign policy consequences, Nazi persecution, genocide, torture, extrajudicial killing, severe violations of religious freedom, or recruitment or use of child soldiers;
- 237(a)(5) – Public charge grounds; and
 - 237(a)(6) – Unlawful voters.

D. Unaccompanied Minors

Beyond the statutory exceptions for certain grounds of inadmissibility and deportability, the Regulations provide that unless a minor is represented by “an attorney or a legal representative, a near relative, legal guardian, or friend,” the Immigration Judge cannot accept a child’s admission of removability. 8 C.F.R. 1240.10(c). Based on these and other grounds, counsel should consider challenging the charge of removability and protecting the child client from deportation on that basis.

E. Crime-related Grounds

When a respondent has been charged with a crime-related ground of inadmissibility or deportability, it is important to consider whether the DHS has provided sufficient evidence to satisfy the statutory definition. While this analysis can be extremely complicated, often requiring a review of the applicable framework in the relevant circuit, a few general standards should be considered. *See Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

Notably, “juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes” *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000)(*en banc*), citing *Matter of C.M.*, 5 I&N Dec. 27 (BIA 1953), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). In *Devison* the Board held that this longstanding rule was not changed by the 1996 enactment of a statutory definition of conviction at INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A).

Additionally, even where there is a conviction, the proof submitted by the DHS to show that conviction must be the specific requirements of the INA.

INA § 240(c)(3)(B). Proof of Convictions.

In any proceeding under this Act, any of the following records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

- (i) An official record of judgment and conviction.
- (ii) An official record of plea, verdict, and sentence.
- (iii) A docket entry from court records that indicates the existence of the conviction.
- (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records.

In any proceeding under this Act, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is:

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

Overcoming a charge of removability by excluding the evidence offered by the DHS in support of a crime-related grounds is an increasingly common way to protect a client from removal. Robust jurisprudence in all circuits makes this a highly complex area of immigration practice and thus the subject of separate training materials.

IV. Relief from Removal

Once removability has been established (or conceded), a non-citizen may still have the ability to remain in the United States if he or she can obtain one of the available forms of relief from removal. Most forms of relief also provide a pathway to lawful status in the United States.

INA § 240(c)(4): Applications for Relief from Removal

(A) IN GENERAL

An alien applying for relief or protection from removal has the burden of proof to establish that the alien--

- (i) satisfies the applicable eligibility requirements; and
- (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) SUSTAINING BURDEN

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(B) CREDIBILITY DETERMINATION

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is

explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

A. Special Immigrant Juvenile Status

Special Immigrant Juvenile status (SIJ) provides a path to lawful permanent residence for abused, abandoned or neglected youth. SIJ statutes, 8 U.S.C. §§ 1101(a)(27)(J) and 1255, amended by 2008 Trafficking Victims Protection Reauthorization Act, 110 Pub. L. 457, 122 Stat. 5044 (Dec. 23, 2008).

1. Statutory Requirements

Under the INA § 101(a)(27)(J), the term “special immigrant” means—

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States 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 United States, and whose 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;... and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that— no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; ...

2. Predicate Orders

In order to be eligible for SIJS, the non-citizen must obtain a predicate order from the juvenile court. The juvenile court in turn must declare the youth a dependent or place the child with a state department, agency, or an individual. This can include youth in dependency proceedings, delinquency proceedings, probate court guardianship proceedings, adoption proceedings, and family court proceedings.

The juvenile court must make the following findings:

(1) Reunification with *one* or both parents not viable due to *abuse, neglect, abandonment, or similar basis under state law*.

(2) It is not in the child's best interest to return to her/his country of origin.

Additionally, if the non-citizen youth is in the custody of the Department of Health and Human Service’s Office of Refugee Resettlement, specific consent of the agency may sometimes be required before the youth can go before state court.

California Courts

In *Eddie E v. Superior Court*, 234 Ca. App. 4th 319 (Cal. Ct. App. 2015), the trial Court had refused the predicate order, reasoning that even though Eddie's mother had abandoned him, he was living with his father and thus reunification was possible with his father. It also held that mother's subsequent death meant Eddie's inability to reunify with her was due to death, not abandonment. It further found that a "fresh start" in Mexico would be good for Eddie, and thus returning him to Mexico was in his best interest. The Court of Appeals rejected this reasoning, finding instead that the plain language of the statute was such that a "petitioner can satisfy this requirement by showing an inability to reunify with *one* parent due to abuse, neglect, abandonment, or a similar basis under state law." It also disagreed that the death of Eddie's mother prevented his abandonment, finding the fact "that she died only cemented the permanent abandonment already in place."

California courts have held that a state court may not deny a predicate order based on discretionary considerations that the juvenile broke the law and was unworthy of receiving benefits. In *Leslie H v. Superior Court*, 224 Cal. App. 4th 340 (Ca. Ct. of Appeal 2014), the petitioner presented evidence of statutory eligibility but also had a record of juvenile delinquency. The juvenile "court concluded Congress could not have intended juvenile wards may qualify for SIJ status because Leslie 'broke the law,' and 'rewarding' her illegal conduct might motivate other undocumented alien children to commit offenses to gain eligibility for SIJ status and eventual nationalization." (sic) The Appellate Court found this reasoning to be in error, explaining that "A state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country."

Florida Courts

Notably, not all state courts are interested in granting predicate orders for the purposes of obtaining special immigrant juvenile cases. In Florida, for example, the Third District Court of Appeals issued a series of decisions in 2015 refusing to find unaccompanied minors dependent for the sole purpose of facilitating access to SIJS, mostly in cases where the minor had some other form of *de facto* support and did not require real assistance from the state such that he or she could be considered "dependent." *See, e.g. In the Interest of F.J.G.M.*, 2015 Fla. App. LEXIS 11935, 40 Fla. L. Weekly D1908 (Fla. 3d DCA Aug. 12, 2015); *D.A.O.L. v. Dep't of Children & Families*, 170 So. 3d 927 (Fla. 3d DCA 2015); *In re J.A.T.E.*, 170 So. 3d 931 (Fla. 3d DCA 2015); *M.J.M.L. v. Dep't of Children & Family Servs.*, 170 So. 3d 931, 932 (Fla. 3d DCA 2015); *In re B.Y.G.M.*, 176 So. 3d 290 (Fla. 3d DCA 2015); *In re K.B.L.V.*, 176 So. 3d 297 (Fla. 3d DCA 2015).

Judicial challenge to the refusal to provide predicate orders has proven slow in Florida, particularly in the face of decisions finding the claims to be moot after the petitioner reaches eighteen years of age. In *O.I.C.L. v. Fla. Dep't of Children & Families*, 2016 Fla. Lexis 2072, the trial court had denied the petition for child dependency that would have

produced the required predicate order, because the petitioner had “left his Mother in Guatemala and he now resides with and is cared for by his Uncle, against whom there are no allegations of abandonment, abuse, or neglect.” The case was affirmed on appeal, but challenged before the state Supreme Court which held that “Florida courts simply cannot declare an individual over 18 years of age to be a dependent child under current Florida law.” While the petition for child dependency was filed approximately two months before O.I.C.L.’s 18th birthday, O.I.C.L. reached majority age in 2015. According to the Supreme Court, now that O.I.C.L. is over 18 years old the question of whether O.I.C.L. should be deemed a dependent child pursuant to Florida law is no longer an issue. While a dissenting opinion argued in favor of jurisdiction on the basis that these types of claims of “capable of repetition, yet evading review” the Court pointed to a separate, pending case of an individual who remains a minor. “In fact, the Third District Court of Appeal’s decision in *In re B.R.C.M.*, 182 So. 3d 749 (Fla. 3d DCA 2015) (pending review in the same court, SC16-179), addresses an issue that is very similar to the issue in this case, but the Third District’s decision involves a child who is currently less than 18 years of age. Therefore, the legal questions raised are not likely to evade appellate review, and we cannot ignore the mootness of this particular case.” It remains to be seen in the Supreme Court of Florida will take the opportunity to resolve the issue and if so, whether it will simply ratify the lower state courts’ very limited reading of the statute, or if it will engage in an analysis more in line with that of other state courts.

3. Perez-Olano Litigation

In the mid 2000s, CHRCL led efforts to challenge an age-out practice in which USCIS would prolong the processing of SIJS applications for so long that the beneficiary reached the age of majority and fell outside of the jurisdiction of the juvenile court. The litigation culminated in a 2010 Settlement Agreement, supplemented by a 2015 Stipulation, that provides protection from aging out and controls the requirements relating to specific consent. Counsel facing age-out issues should contact CHRCL for more information.

B. Asylum and Other Fear-Based Relief

1. Statutory Eligibility

Asylum

To qualify for a grant of asylum, a non-citizen must credibly demonstrate that he is a “refugee” within the meaning of section 101(a)(42)(A) of the Act. INA § 208(b)(1); *see also* INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(a). As such, he or she must demonstrate past persecution or well-founded fear of future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A). Additionally, an applicant must establish that he or she is unable or unwilling to avail of the protection of the his or her country of nationality or last habitual residence. *Id.* Moreover, his fear of persecution must be country-wide. *See Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997), *Matter of R-*, 20 I&N Dec. 621 (BIA 1992); *Matter*

of Acosta, 19 I&N Dec. at 235; *see also Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). Finally, the alien must demonstrate that he is eligible for asylum as a matter of discretion. INA § 208(b)(1); *see also Cardoza-Fonseca*, 480 U.S. at 441.

The meaning of “persecution,” as developed through U.S. case law, contemplates harm or suffering inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome. *See Matter of Acosta*, 19 I&N Dec. at 223. Persecution within the meaning of the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. *See Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997). Persecution is not limited to physical harm, but may include mental suffering, or even economic deprivation so severe as to constitute a threat to an individual’s freedom or life. *See Matter of Acosta*, 19 I&N Dec. at 222.

An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he suffered persecution in the applicant’s country of nationality or, if stateless, in his country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself of the protection of, that country owing to such persecution. 8 C.F.R. § 1208.13(b)(1). An applicant who is found to have established such past persecution shall also be presumed to have a well-founded fear of future persecution on the basis of the original claim. 8 C.F.R. § 1208.13(b)(1).

The regulatory presumption may be rebutted if DHS establishes by a preponderance of the evidence that either: (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in that applicant’s country of nationality or, if stateless, in the applicant’s country of last habitual residence, on account of one of the enumerated grounds; or (2) 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 the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1)(A)-(B). If the applicant’s fear of persecution is unrelated to the past persecution, the applicant bears that burden of establishing that the fear is well-founded. 8 C.F.R. § 1208.13(b)(1).

An applicant has a well-founded fear of persecution if: (1) the applicant has a fear of persecution in his country of nationality or, if stateless, in his country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) there is a reasonable possibility of suffering such persecution if he was to return to that country; and (3) he is unable or unwilling to return to, or avail himself of the protection of, that country because of such fear. 8 C.F.R. § 1208.13(b)(2)(I). In general, the applicant’s fear should be considered well-founded if the applicant can establish, to a reasonable degree, that his continued stay in that country has become intolerable for the applicant on the basis of one of the enumerated grounds, or would for the same reasons, be intolerable if he returned there. Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, ¶42, p. 12-13. (Geneva, January 1992).

To establish a well-founded fear of persecution, an applicant must present credible testimony that demonstrate: 1) his fear of harm is of a level that amounts to persecution; 2) that the harm is on account of a protected characteristic; 3) that the persecutor could become aware or is already aware of the characteristic; and 4) that the persecutor has the means and inclination to persecute. *See Matter of Mogharrabi*, 19 I&N Dec. at 446; *see also Matter of Acosta*, 19 I&N Dec. at 226.

A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. *See Cardoza-Fonseca*, 480 U.S. at 430-31. To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension of awareness of the risk of persecution. *See Matter of Acosta*, 19 I&N Dec. at 221. The objective component requires a showing by credible, direct, and specific evidence in the record that the alien's fear of persecution is reasonable. *See DeValle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

An applicant does not have a well-founded fear of persecution if the applicant could avoid 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, if under all circumstances it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(2)(ii).

Even where an applicant is unable to demonstrate a well-founded fear of persecution, he may still be granted asylum if he has demonstrated past persecution, he is not otherwise mandatorily barred from asylum relief and he has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution. 8 C.F.R. § 1208.13(b)(1)(iii).

Withholding of Removal

An alien who fears return to their home country may be eligible for the relief of withholding of removal under INA § 241(b)(3)(B) or under the CAT. When an applicant is found to be eligible for withholding under either, that relief is mandatory and it is not within the discretion of the court to deny withholding of removal to an eligible applicant who is not barred from that relief. See 8 C.F.R. §1208.16(d)(1).

Statutory withholding of removal requires that the applicant demonstrate that his life or freedom would be threatened in the proposed country of removal on account his race, religion, nationality, membership in a social group, or political opinion. 8 C.F.R. § 1208.16(b). To be eligible under the statute, the applicant must show that his life or freedom would be threatened in the future because of either past persecution on account of a protected ground or because it is "more likely than not" that he would face future persecution upon removal to that country on account of a protected ground. *Id.*; *see INS v. Stevic*, 467 U.S. 407 (1984); *see also INS v. Cardoza-Fonseca*, 480 U.S. at 463.

A showing of past persecution may be rebutted by the government showing by a preponderance that there was a fundamental change in circumstances such that the

applicant's life or freedom would not be threatened on a protected ground or that the applicant could reasonably avoid the threat by relocating within the country of removal. 8 C.F.R. § 1208.16(b). Similarly, an applicant will be unable to demonstrate a threat to his life or freedom if a judge finds that reasonable internal relocation would enable the alien to avoid the threat. In showing a future threat, the applicant need not show that he individually would be singled out, but rather need only show that persons similarly situated in terms of protected grounds are subject to a pattern or practice of persecution and that the applicant is sufficiently identified with that group of persons such that his life or freedom is more likely than not to be threatened.

Convention Against Torture

An applicant is eligible for withholding of removal under the Convention Against Torture if he can establish that it is more likely than not that he would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2). In determining whether it is "more likely than not" that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture should be considered. See 8 C.F.R. § 1208.16(c)(3).

"Torture" is an *extreme* form of cruel, inhuman, or degrading treatment or punishment, and does not include all such treatment. 8 C.F.R. § 1208.18(a)(2) (emphasis added). In particular, atrocious or grossly substandard prison conditions usually are not considered torture. Matter of J-E-, 23 I&N Dec. 291 (BIA 2002). To qualify for relief under the CAT, Respondent must prove that the torture inflicted would be carried out with the awareness of government officials. 8 C.F.R. § 1208.18(a)(7). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7) (emphasis added).

The Attorney General has held that a respondent cannot qualify for CAT protection by stringing together a series of suppositions to show that it is more likely than not that torture will result when the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. Matter of J-F-F-, 23 I&N Dec. 912 (AG 2006).

Even if an alien is mandatorily barred from withholding of removal, he may be granted deferral of removal under the CAT if he demonstrates that it is more likely than not that he will be tortured in the proposed country of removal. *See* 8 C.F.R. 1208.17(a). Although this burden is the same as that for withholding of removal under the CAT, an applicant that is subject to the statutory bars to withholding relief is not barred from deferral. Consequently, deferral shall be granted to any applicant who is otherwise eligible for relief under the CAT but falls under one of the grounds for mandatory denial.

2. Persecution from Perspective of a Child

The level of harm required to constitute persecution is reduced in children's cases. Case law from across the circuits has supported this interpretation:

- *Hernandez Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007): (finding that a "child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting . . . [I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child." In the case of Hernandez-Ortiz, two brothers aged seven and nine fled to Mexico due to the Guatemalan army's arrival at their village, the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army).
- *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006)(finding that where the applicant "was a child at the time of massacres and thus necessarily dependent on both his family and his community . . . This combination of circumstances [displacement - initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community").
- *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008)(holding that the adjudicator should have considered the "cumulative significance" of events to the applicant that occurred when he was between the ages of eight and thirteen. The applicant was subjected to regular "discrimination and harassment [that] pervaded his neighborhood." Such harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as Jewish, being called slurs, and being physically abused in his neighborhood).
- *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)(while finding that persecution did not take place, the court stated, "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted...There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult").

3. Formulating Particular Social Group

For social group analyses, applicant must establish that s/he belongs to a group that is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”

Childhood is an immutable characteristic because a child cannot change his age to escape persecution. See *Matter of S-E-G-*, 24 I&N Dec. 579, 583-584 (BIA 2008) (acknowledging that “the mutability of age is not within one’s control and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”)

Circuit courts have also widely recognized family-based social groups.

- *Rios v. Lynch*, 807 F.4d 1123 (9th Cir. 2015)

“The IJ’s characterization misapprehended Flores-Rios’s complaint – he does not claim to be a member of a social group comprised of witnesses against gangs. Rather, he asserts that he is a member of a social group made up of his family and that he risks persecution by the group because of its vendetta against his family. The BIA did not address the social group claim – a failure that constitutes error and requires remand.”

See also

- *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)
- *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009)
- *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993)

4. Bars to Eligibility

The INA specifies that the asylum applicant must demonstrate by clear and convincing evidence that he filed his application for asylum within one year of his arrival to the U.S. INA § 208(a)(2)(B). The statute also explicitly provides that unaccompanied children are exempt from the one-year filing deadline, as well as from the possibility of a safe third country. INA § 208(a)(2)(E).

There are various other statutory bars to eligibility for asylum, many of which overlap with the grounds of inadmissibility discussed below. Please see our asylum training materials for a more detailed discussion.

5. Discretionary Considerations

Statutory and regulatory eligibility for asylum, whether based on past persecution or a well-founded fear of future persecution, does not necessarily compel a grant of asylum. See *Cardoza-Fonseca*, 480 U.S. at 441. An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. See *Matter of Pula*, 19 I&N Dec. at 471. In exercising discretion, it is appropriate to examine the totality of the circumstances and actions of an alien in his flight from the country where persecution is feared. See *Matter of Pula*, 19 I&N Dec. at 473. Courts also consider whether the alien found safe haven after leaving the country where he claimed past or future persecution. See *id.*

General humanitarian reasons, independent of the circumstances that led to the applicant’s refugee status, such as his age, health, or family ties, should also be

considered in the exercise of discretion. *Id.* at 474. Although the totality of the circumstances and actions of an alien in his flight from that country where persecution was suffered to the U.S. are to be considered and may weigh against a favorable exercise of discretion, “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Id.*

C. Other Relief

The INA contemplates other forms of relief that are available to non-citizens regardless of age. Cancellation of removal, U-Visas, T-visas, and VAWA self-petitions are amongst the other statutory remedies that should be evaluated before committing to a particular course of action. Additional information on these forms of relief will be the subject of future training materials.

V. Collateral Issues

A. Right to Counsel

“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” INA § 292.

“The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.” TVPRA, 2008

J.E.F.M. v. Lynch, 2:14-cv-01026-TSZ (9th Cir. Sep. 20, 2016)

The general denial of a right to counsel as applied to immigrant children was recently the subject of legal challenge in the Western District Court of Washington. In *J.E.F.M. v. Lynch*, filed in July 2014 and later amended, the named plaintiffs were immigrant children subject to removal from the United States who seek to represent a larger class of similarly situated children and youth. The complaint alleged violations of the Fifth Amendment due process clause as well as the INA provisions pertaining to the requirement of a “full and fair hearing” before an Immigration Judge and sought to require the government to provide children with legal representation in their deportation hearings. Plaintiffs argued that given their capacities as children, the plaintiffs and the class that they purport to represent cannot have due process or a full and fair hearing without the assistance of a lawyer to skillfully navigate the complexities of the immigration laws and procedures.

Although the government argued that the District Court lacked jurisdiction because requests for counsel should be made before the Immigration Judge, the District Court found that it could properly exercise jurisdiction, reasoning that finding otherwise would eliminate the possibility of the claim being reviewed on the merits pursuant to the balancing of interests required by *Matthews v. Eldridge*. Specifically, the District Court found that because an Immigration Judge is not authorized to and thus would not conduct such a balancing test, the factual record on appeal would be wholly insufficient to evaluate the substance of the due process challenge. Moreover, given the ages of the named plaintiffs and the long duration of the administrative proceedings, the potential for

aging out of the minor status upon which the claim is premised by the time the administrative and judicial process had lead to the development of the requisite factual record, could put their claim at risk of mootness.

The District Court found that it had jurisdiction with regards to the constitutional due process right-to-counsel claim, but dismissed with regard to the statutory claim, finding that the channeling mechanism established in the REAL ID Act and IIRAIRA prevented the District Court from reviewing the plaintiffs' claim under the INA.

Through an order entered April 13, 2015 the District Court dismissed the plaintiffs' claim for class-wide injunctive relief. It relied on Ninth Circuit precedent in *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2009) interpreting 8 U.S.C. 1252(f)(1) which prevents any court (other than the Supreme Court) from enjoining or restraining the operation of the operative provisions of the INA, other than with regard to an individual alien against whom proceedings have been initiated. In *Rodriguez*, the 9th Circuit interpreted "enjoin" to refer to permanent injunctions, while "restrain" connotes temporary or preliminary injunctive relief. Applied to the instant case, the District Court found that while the INA does "not preclude the Court from granting a preliminary or permanent injunction as to 'an individual alien against whom proceedings . . . have been initiated,' it "deprives the Court of jurisdiction to provide injunctive relief to a class. If appropriate, the Court could enter a class-wide declaratory judgment, but the enforcement of such decision would have to be on a case-by-case basis."

The Court dismissed, on ripeness grounds, the claims of those named plaintiffs who had not yet been formally placed in removal proceedings, finding that such proceedings might never be commenced and as such, any challenge regarding a right-to-counsel in those speculative proceedings would be premature. The Court also found that it lacked jurisdiction as to one named plaintiff against whom an order of removal had been entered, albeit in absentia, as the channeling provisions required such a matter to be reopened pursuant to the appropriate administrative avenues.

In April 2016, the District Court rejected most of the government's arguments in favor of dismissal, finding that the complaint clearly set forth procedural due process claims. In its decision, the District Court tentatively certified a class of all individuals under the age of eighteen who are in removal proceedings on or after July 9, 2014 within the boundaries of the Ninth Circuit who are without legal representation and financially unable to obtain such representation, and potentially eligible for asylum, withholding of removal, or protection under the Convention Against Torture, or potentially able to make a claim of United States citizenship. The District Court also defined four tentative subclasses: (1) Class members under the age of fourteen, (2) Class members who have not been admitted to the United States and are allegedly "inadmissible" under the INA, (3) Class members who have been admitted to the United States and are allegedly "deportable" under the INA, and (4) Class members who qualify as unaccompanied alien children. In its order tentatively certifying the class and subclasses, the Court invited the parties to submit arguments as to whether the class and subclasses satisfy the requirements of the FRCP and assigned a briefing schedule ending May 20, 2016. The matter remains

pending a definitive class certification and substantive resolution of the claim.

Plaintiffs have taken an interlocutory appeal on the dismissal of the complaint as to particular named plaintiffs and the government took a counter-appeal on other aspects of the District Court's decision. Among other points of contention, the government continues to contest that those named plaintiffs who were paroled into the United States for the purposes of immigration proceedings have "entered" the country, such that they might have due process rights under the Fifth Amendment.

The Court issued an order on June 24, 2016, certifying a class of "[a]ll individuals under the age of eighteen (18) who: (1) are in removal proceedings, as defined in 8 U.S.C. § 1229a, within the boundaries of the Ninth Judicial Circuit, on or after the date of entry of this Order; (2) were not admitted to the United States and are alleged, in such removal proceedings, to be 'inadmissible' under 8 U.S.C. § 1182; (3) are without legal representation, meaning (a) an attorney, (b) a law student or law graduate directly supervised by an attorney or an accredited representative, or (c) an accredited representative, all as defined in 8 C.F.R. § 1292.1; (4) are financially unable to obtain such legal representation; and (5) are potentially eligible for asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), or protection under the Convention Against Torture, or are potentially able to make a colorable claim of United States citizenship." The order also certified the Subclass of "[a]ll individuals in the Class who are under the age of fourteen (14)." In adopting this order, the Court agreed that different rights could be due to non-admitted versus deportable aliens (i.e., persons who did not execute an official entry into the country versus those who did).

On September 20, 2016, the Ninth Circuit issued its decision on the Plaintiffs' interlocutory appeal, affirming the District Court's dismissal for lack of jurisdiction on the statutory claims for court-appointed counsel, reasoning that because the right to counsel is being claimed in the context of removal proceedings, it must be raised through an administrative process for review. Moreover, the panel reversed the District Court's finding of jurisdiction over the constitutional claims, holding that the District Court had erred when it found an exception to the INA's exclusive review process. The panel found that the District Court erred in considering that the plaintiffs' claims challenged a policy or practice collateral to the substance of removal proceedings, and disagreed that because an Immigration Judge was unlikely to conduct the requisite due process balancing the administrative record would not provide meaningful judicial review. The full text of the Court's ruling can be found here: <https://www.aclu.org/legal-document/jefm-v-lynch-ruling>.

B. Custody

While a child is initially in ORR custody, ORR may determine that the child should be released to the care and custody of a "sponsor." A sponsor is a responsible adult, usually a relative of the child. If the NTA was already filed with an immigration court and the

sponsor's home is in another jurisdiction, the child will need to request a change of venue from the immigration judge.

Being released from government custody does not mean that a child has the legal status to stay in the United States. Once a child is released from government custody, she must attend all future court hearings to determine if she can remain in the United States.

The 1997 Settlement Agreement reached in the *Flores* litigation guarantees minors in the custody of immigration authorities the right to a bond hearing before an Immigration Judge. It provides: "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination Form that he or she refuses such a hearing." The government now takes the position that the Settlement Agreement has been superseded by the Homeland Security Act of 2002 and the TVPRA which placed all authority for custody and placement decisions for UACs in the hands of HHS ("the agency that has developed expertise and experience over the past fourteen years in determining the placement that is in the best possible interest of UACs in federal custody"). A motion to enforce filed in August 2016 with regards to the right to a bond hearing remains pending a decision of the District Court.