New USCIS memo denies access to non-adversarial affirmative asylum procedures for many vulnerable children

Consistent with the Trump administration's ongoing efforts to roll back protections that Congress established for vulnerable children through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110–457, 122 Stat. 5044, USCIS issued a memo to asylum officers on May 31, 2019 that will take away important protections from many vulnerable child asylum seekers. The memo, titled "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children" and signed by Asylum Division Chief John Lafferty, reverses a 2013 policy, often referred to as the "Kim memo." Under the Kim memo, USCIS took jurisdiction over asylum applications filed by applicants who had previously been determined by Immigration and Customs Enforcement or Customs and Border Protection to be "unaccompanied alien children" (UC). *See* 6 U.S.C. § 279(g)(2) (defining "unaccompanied alien child" as a child with no lawful immigration status who is under 18 years old and has no parent or legal guardian in the United States available to provide care and physical custody).[1] The exception to this jurisdictional rule was if U.S. Department of Health and Human Services, ICE, or CBP had taken an "affirmative act" that terminated the UC finding before the child filed the asylum application. Under the new Lafferty memo, USCIS asylum officers must conduct an "independent factual inquiry as to whether the individual met the UAC definition at the time of first filing the asylum application." The Lafferty memo also directs that asylum officers apply the one-year filing deadline, from which UCs are statutorily exempt, if they determine that the applicant did not meet the UC definition at time of first filing. **The new memo goes into effect on June 30, 2019 and will be applied to any USCIS decision issued on or after that date.**

Background on initial asylum jurisdiction in UC cases

typically only the immigration court has jurisdiction over an asylum application filed by someone in removal proceedings. The issue in both the new and previous memos is whether USCIS or the immigration court has initial jurisdiction over an asylum application filed by an individual whom the federal government previously determined was a UC. The Kim memo said that USCIS has jurisdiction over such applications; the new memo says that the immigration court has jurisdiction, unless the applicant can prove to USCIS's satisfaction that he or she met the UC definition at the time he or she filed the asylum application.

In justifying this policy reversal, the Lafferty memo states that its purpose is to "ensure that USCIS is making these jurisdictional determinations in a manner consistent with immigration judge determinations on the same issue under *Matter of M-A-C-O-*," to "help prevent incongruous results where USCIS would otherwise have deferred to a prior UAC determination." *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), is a Board of Immigration Appeals decision upholding an immigration judge's (IJ) conclusion that the immigration court, and not the asylum office, had initial jurisdiction over an asylum application filed by a respondent who was previously determined to be a UC but turned 18 before filing. As of the date of this article, USCIS has not published the Lafferty memo on its website, although the memo has been disseminated by news media.

Details about the memo

The Lafferty memo states that "[a]s the party invoking USCIS jurisdiction, the individual filing for asylum bears the burden to establish that he or she met the UAC definition." The memo directs asylum officers to decide whether an applicant met this definition at the time of filing by reviewing "all available records and information" and, "when necessary," eliciting additional information at the interview through oral testimony. USCIS may require an applicant to provide documentary proof when testimony is not sufficient, unless the applicant does not have and cannot reasonably obtain documentary evidence. If the applicant had a parent or legal guardian in the United States on the date he or she filed for asylum and "the facts indicate that the parent or legal guardian was available at that time to provide care and physical custody to the individual, the asylum officer will find that the asylum application was not filed by a UAC." In cases where the applicant has a parent or legal guardian in the United States, "the individual must then establish that the parent or legal guardian was either unwilling or unable to provide such care and physical custody." The memo also directs that asylum officers must defer to an IJ's previous determination, if an IJ has "explicitly determined" that USCIS does not have jurisdiction per *Matter of M-A-C-O-*.

The memo cautions that in some cases there may be "doubts about the reliability of an applicant's testimony about his age or family circumstances," calling for "greater scrutiny," such as when there are questions about the applicant's age or identity or whether he or she is "being cared for by his or her parent or legal guardian," if the applicant "appears to be over the age of eighteen at the time of filing," or where the applicant "has provided contradictory evidence or testimony." This implication that children cannot be trusted to tell the truth about their age and caregivers mirrors similar language in a February 2017 Department of Homeland Security memo calling for "proper processing" of UCs to stem "abuses," a December 2017 Executive Office for Immigration Review memo asserting that UCs have an "incentive to misrepresent accompaniment status or age" and ordering IJs to be "vigilant," and September 2018 proposed DHS and HHS regulations that would allow those agencies to treat an individual as an adult for all purposes, "despite his or her claim to be under the age of 18," if the agency believes that a "reasonable person" would conclude the individual is an adult.

The Lafferty memo also notes that asylum officers must make UC determinations for two other purposes besides jurisdiction—the one-year filing deadline (which pursuant to INA § 208(a)(2)(E) does not apply to UCs) and their obligation as a federal agency to notify HHS within 48 hours of discovery of a UC. Similar to USCIS's new position on jurisdiction, the memo states that for purposes of the one-year filing deadline, officers should consider whether the applicant was a UC at the time of filing to determine if the one-year filing deadline applies. Finally, the memo notes that asylum officers will typically not encounter UCs during credible or reasonable fear interviews, given that UCs from non-contiguous countries are statutorily entitled to removal proceedings under INA § 240. But if an asylum officer discovers a UC during the credible or reasonable fear process, the officer should notify "the appropriate DHS

may have had a credible fear interview (perhaps because they were not identified as UCs or because they became UCs later), they would likely be part of the *Mendez Rojas class* and thus may be exempt from the one-year filing deadline.

Implications and Practice Tips

The Lafferty memo follows other Trump administration efforts to remove protections afforded to UCs, such as the president's January 2017 executive order, a February 2017 DHS implementing memo, an EOIR legal opinion and EOIR memo, proposed DHS and HHS regulations that would give those agencies the authority to repeatedly revisit the issue of whether children remain UCs and thereby revoke their access to TVPRA protections, and the BIA's decision in *Matter of M-A-C-O-*. Requiring asylum officers to investigate a parent's "availability" may result in children who are in HHS custody being detained for longer periods or being exposed to heightened risk of trafficking, as family members may fear coming forward as the child's sponsor. This fear may be further stoked by the Trump administration's targeting of sponsors for immigration enforcement including ICE's arrest of 170 potential sponsors from late July to late November 2018. Further, asylum officers' interrogation of children about the availability of their parents during the asylum interview is likely to lead to re-traumatization and may inhibit the child's ability to testify about his or her asylum claim, particularly for children who do not understand why they cannot be reunified with a parent who may be unfit or otherwise unable to care for the child.

From the time the TVPRA provisions went into effect in 2009 until the 2013 Kim memo, the asylum office conducted the sort of independent factual inquiries that the Lafferty memo now requires. A 2012 USCIS Ombudsman report criticized this practice, noting the delay and confusion it caused. The Lafferty memo is likely to result in increased inconsistency and inefficiency, as different asylum officers interpret their role, and the word "available," differently.

Practitioners representing asylum-seeking clients who have previously been determined to be UCs may wish to consider the following strategies:

Strategies to consider before June 30, 2019:

- Given that the Lafferty memo goes into effect on June 30 (a Sunday), practitioners should consider advocacy strategies for obtaining decisions on pending cases on or before Friday, June 28. This may include approaching the local asylum office with a list of pending cases ripe for adjudication, pushing for expedited interview scheduling and decisions prior to June 28, and seeking congressional assistance in these endeavors.
- Practitioners likewise may wish to try to file asylum applications by June 28 with USCIS for children with previous UC determinations who are in active removal proceedings to preserve the strongest possible retroactivity argument, even though USCIS intends to apply the new memo to any case pending on June 30. (Remember that for asylum applicants who are not in removal proceedings, USCIS has jurisdiction regardless of whether the applicant is a UC.)

Strategies to consider before and after June 30, 2019:

- File the asylum application with USCIS while the child is under 18 and unaccompanied. Even under the Lafferty memo's restrictive view of the INA's asylum jurisdiction provision, events that happen after filing (such as turning 18) have no bearing on USCIS's jurisdiction. This may mean that a child planning to pursue Special Immigrant Juvenile Status (SIJS) should file the asylum application before obtaining a legal guardian in state court, because USCIS could refuse asylum jurisdiction over an application filed by a child who has obtained a legal guardian, taking the position that such a child is no longer "unaccompanied." Advocates should argue that section 235(d)(5) of the TVPRA dictates that children who obtain a guardian and state court SIJS order remain UCs, but USCIS may reject such arguments. Thus, the safest course of action may be to file for asylum before any guardianship order is granted.

advise them that the asylum officer will likely ask questions about whether a parent or legal guardian is "available," and should prepare clients for such questions including explaining the significance and meaning of the word "available" under the Lafferty memo. Where possible, practitioners should use the child's birth certificate to prove age rather than having the child try to obtain a passport from his or her consulate, to avoid any possible finding by DHS that the child has availed himself or herself of the home country's protections.

    - Consider arguments for a generous interpretation of the word "filed," such as arguing that the filing date is the first time the child expressed an intention to seek asylum to government authorities, which may be evidenced on Form I-213 or other government documents. Before the Kim memo, at least some asylum officers took this view when determining the filing date for UC purposes. See footnote 110 and accompanying text of CLINIC's 2017 practice advisory.

- Consider challenging the new policy by filing with USCIS and presenting arguments about why USCIS has jurisdiction and the memo contravenes congressional intent behind the TVPRA. While this type of argument will almost certainly fail with USCIS, it may be wise to make it anyway and receive a decision from USCIS to fully preserve any possible future legal challenges.
    - Similarly, if forced to proceed with asylum in immigration court, practitioners may want to preserve the argument that the child should have been permitted to first seek asylum with the asylum office. While this argument is unlikely to succeed before the IJ and BIA, making the argument preserves the legal issue for possible federal court review.

- If USCIS does not make its own jurisdictional determination and instead defers to a previous determination by the IJ (see footnote 5 in the Lafferty memo), practitioners should consider arguing that USCIS has a statutory duty to determine its jurisdiction and cannot simply defer to an IJ without looking at the facts. The TVPRA grants USCIS exclusive initial jurisdiction over "any asylum application filed by an unaccompanied alien child," *see* INA § 208(b)(3)(C), which necessarily encompasses the authority, and obligation, to determine whether it has jurisdiction.
- If the client has a one-year filing deadline problem under the new memo—that is, he or she filed for asylum more than a year after entry and was either over 18 or had a parent or guardian available in the United States at that time—practitioners should make all available arguments that the one-year filing deadline should not apply. This may include anti-retroactivity arguments as well as arguing that the policy changes, the applicant's age, and/or other factors meet the requirements for the extraordinary circumstances or changed circumstances exception. A 2017 unpublished BIA case has helpful language on this point.
    - Practitioners should also explore whether the client is exempt from the one-year filing deadline as a member of one of the classes certified in *Mendez Rojas*, which includes certain individuals who were previously detained by DHS upon arrival, expressed a fear of return, and did not receive notice from DHS about the one-year filing deadline. For more information about the status and scope of the *Mendez Rojas* decision, see this FAQ issued by American Immigration Council, Dobrin & Han, PC, and Northwest Immigrant Rights Project.
    - For clients who have not yet filed for asylum and will likely be subject to the one-year filing deadline under the Lafferty memo—those who were previously determined to be UCs but have turned 18 or have an "available" parent or legal guardian—practitioners should file asylum applications within one year of entry.

- For children whose asylum applications were already filed at the time USCIS issued the Lafferty memo, practitioners could argue that, notwithstanding the purported applicability to cases already filed, USCIS may not apply the new policy retroactively, invoking relevant precedents. USCIS may not accept these arguments, but, again, practitioners may want to preserve this argument for potential federal court review.

about IJ authority to make IJC determinations, and article on *Matter of M-A-C-O-*. For more ideas on one-year filing deadline arguments, practitioners may want to review CLINIC's practice advisory discussing one-year filing deadline issues for DACA recipients.

[1] This article uses the abbreviation "UC" rather than "UAC"—the government's term—given the dehumanizing connotations of the word "alien."

Thursday, June 13, 2019 - 3:15pm

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National Office
8757 Georgia Avenue, Suite 850, Silver Spring, MD 20910
Main Phone: (301) 565-4800 / Main Fax: (301) 565-4824