

Designation as an “Unaccompanied [non-citizen] Child (UAC)”ⁱⁱⁱ”

Statute defines a UAC (at 6 U.S.C. § 279(g)(2)) as an individual who:

- 1) is under the age of 18
- 2) lacks lawful immigration status in the United States, and
- 3) does not have a parent or legal guardian living in the United States who is available to provide care and physical custody.

Why does the UAC designation matter in removal proceedings?

In addition to the initial protection of referral to the Office of Refugee Resettlement (ORR), a child designated a UAC (except a UAC from a contiguous country who does not meet certain requirements) *must* be put in removal proceedings under § 240 of the Immigration and Nationality Act (without requiring a credible fear interview). *See* 8 U.S.C. § 1232(a)(5)(D). The UAC designation is important during removal proceedings because it allows certain protections for applications for relief including:

- 1) Initial jurisdiction of an asylum application before the USCIS asylum office even when in removal proceedings. *See* 8 U.S.C. § 1158(b)(3); 8 U.S.C. § 1232(d)(7)(B).
- 2) Exemption from one-year filing deadline for asylum application. *See* 8 U.S.C. § 1158(a)(2)(B),(E).
- 3) Exemption from the safe-third country exception to asylum eligibility. *See* 8 U.S.C. § 1158(a)(2)(A),(E).
- 4) No cost for pre-hearing voluntary departure under 8 U.S.C. § 1229c. *See* 8 U.S.C. § 1232(a)(5)(D).

Who Makes the UAC Designation and Takes it Away?

There is no official process in statute or regulation to explain how the UAC designation should be given or taken away.ⁱⁱⁱ The only statutory guidance is that any federal agency must refer a UAC (except from a contiguous country who does not meet certain requirements) to ORR, tasked with overseeing the care and custody of UAC, within 48 hours of apprehension or claim/suspicion to be under 18 while in custody of the agency. *See* 8 U.S.C. § 1232(b)(2). By default, the designation is typically made by Border Patrol or ICE agents who apprehend a child, or by the USCIS office that receives an affirmative application for a UAC. President Trump issued an executive order in 2017 directing ICE and CBP to develop “uniform written guidance and training” on who should be classified as a UAC, and when and how that classification should be reassessed.^{iv} Subsequently:

- DHS proposed regulations for the designation process in Sept. 2018 that require DHS to reassess the designation each time the agency encounters the child, and specify that the legal protections described above cease to exist when the designation is removed.^v Those regulations were subject to much public scrutiny during the comment process. DHS [published a final rule](#) on August 23, 2019. On September 27, 2019, the judge overseeing the *Flores* Settlement Agreement [blocked the government](#) from implementing the rules.
- USCIS revised their memo issued in 2013^{vi} with a new memo effective June 30, 2019.^{vii} The 2019 “[Lafferty Memo](#)” reversed the 2013 “[Kim Memo](#)”. The “Lafferty Memo” states USCIS now will make a new factual inquiry, independent of any prior designation by an agency other than EOIR, to determine whether the asylum applicant is an unaccompanied child at the time of filing of the asylum application. On October 15, 2019, a federal judge granted a [preliminary injunction](#) which enjoined USCIS from applying the Lafferty Memo, ordered USCIS to retract adverse decisions already made, specifically including all applicants previously determined to be unaccompanied children. Catholic Legal Immigration Network, Inc. (CLINIC) [posts](#) case updates regarding the class-action, *J.O.P. v. DHS*.
- EOIR is not typically the first agency to make a UAC designation because a UAC begins removal proceedings as a result of the designation. However, EOIR issued guidelines in December 2017 directing immigration judges to reevaluate the UAC designation at the time of adjudication, emphasizing the designation is not static.^{viii} Additionally, the BIA published an opinion in October 2018, *Matter of MACO*, that revoked the protection of initial jurisdiction before the asylum office for “a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application.”^{ix} That case does not specifically address situations where the child is under 18 and reunified with a parent or legal guardian.

- The Sixth Circuit recently held that an immigration judge had jurisdiction over an asylum application of an unaccompanied child who had turned 18 before filing his asylum application. The court found the statute, 8 U.S.C. § 1158(b)(3), to be unambiguous in its requirement that an applicant meet the statutory definition of an unaccompanied child *at the time of the filing* of the asylum application.^x Additionally, the court relied on the 2019 DHS regulations which have been enjoined by the District Court of Central California which oversees the Flores Settlement Agreement, as well as a 5th Circuit opinion issued before the 2013 Kim memo (current binding policy per *J.O.P.* litigation).^{xi} The dissenting opinion sheds light on the underlying facts behind the immigration judge's jurisdictional finding: the immigration judge originally administratively closed the proceedings and found USCIS had jurisdiction but reopened the proceedings after ICE advocated (*ex parte* without notice to Respondent) for reopening immigration court proceedings which led to the young man's deportation. Note: ICE's termination of the unaccompanied child status upon transfer to ICE detention after age 18 has been held to be lawful.^{xii}
- Since *Matter of M-A-C-O-*, the Board of Immigration Appeals has issued several unpublished decisions which can be found in IRAC's Unpublished BIA Index.^{xiii} These decisions are not binding over EOIR or the BIA.^{xiv} However, they can still be used as reference in both your research and motions before the immigration court or BIA. These decisions have consistently held that USCIS retains jurisdiction over asylum applications filed before the youth turns 18.^{xv}

Additional Resources

1. Specific technical assistance requests on individual cases can be made directly to CILA through our website:
 - <http://www.cilacademy.org/request-assistance/>
2. USCIS I-589 Filing Instructions (see Part 1, Section XII for special UAC filing instructions)
 - <https://www.uscis.gov/i-589>
3. *Flores v. Barr* Permanent Injunction of the Government's Regulations (Sept. 27, 2019)
 - <https://youthlaw.org/statement-on-flores-reg-ruling/>
4. DHS Final Regulations: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 FR 45486 (August 23, 2019).
 - <https://www.federalregister.gov/documents/2019/08/23/2019-17927/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children>
5. CLINIC *J.O.P. v. DHS* Class Action (CLINIC, KIND, Public Counsel, Goodwin Procter) Litigation Updates
 - <https://cliniclegal.org/resources/litigation/jop-v-dhs-class-action-lawsuit-seeks-protection-asylum-seekers-who-arrived>
6. Memorandum: Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019)
 - https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf
7. USCIS Updates on Determining Jurisdiction of Asylum Claims from Unaccompanied Alien Children (UACs) (May 31, 2019)
 - https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%271%20Ops/Asylum/Webpage_update_UAC_Asylum_Application.pdf
8. USCIS Affirmative Asylum Procedures Manual (2016)
 - <https://www.uscis.gov/sites/default/files/document/guides/AAPM-2016.pdf>
9. USCIS Ombudsman's Office Report: Ensuring a Fair and Effective Asylum Process for Unaccompanied Children

- <https://www.dhs.gov/publication/ensuring-fair-and-effective-asylum-process-unaccompanied-children>
10. Operating Policies and Procedures Memorandum: Guidelines for Immigration Court Cases Involving Juveniles, including Unaccompanied Alien Children, EOIR, December 20, 2017.
 - <https://www.justice.gov/eoir/file/oppm17-03/download>
 11. CILA Legal Update: One Year Asylum Deadline: Does it apply to asylum applications for young people?
 - <http://www.cilacademy.org/2019/01/11/one-year-asylum-deadline-does-it-apply-to-asylum-applications-for-young-people/>
 12. National Immigrant Justice Center Legal Update: *Matter of M-A-C-O-*
 - https://www.immigrantjustice.org/admin_policy/blog/matter-m-c-o-bia-issues-published-decision-regarding-asylum-jurisdiction-and
 13. IRLC Practice Advisory: Unaccompanied Children and the One-Year-Filing Deadline
 - <https://www.ilrc.org/unaccompanied-children-and-one-year-filing-deadline>
 14. CLINIC Practice Advisory on Strategies to Combat Government Efforts to Terminate “Unaccompanied Child” Determinations, CLINIC, May 2017
 - [https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-\(May-2017\).pdf](https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Practice-Advisory-on-Strategies-to-Combat-Government-Efforts-to-Terminate-Unaccompanied-Child-Designations-(May-2017).pdf)

ⁱ www.cilacademy.org, last updated 8/13/20.

ⁱⁱ “Unaccompanied alien child” is the official term used in statute. However, the more widely accepted and humanizing shorthand used in the immigration community is “Unaccompanied Child(ren) (UC).” The statutory definition of “alien” is any person not a citizen or national of the United States. [8 U.S.C. 1101\(a\)\(3\)](#).

ⁱⁱⁱ The regulations proposed by DHS in September 2018 have not yet been finalized. See *infra*, note iv.

^{iv} Sec. John Kelly, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (Feb. 20, 2017), Sec. L; *see also* Donald J. Trump, “Executive Order on Border Security and Immigration Enforcement Improvements” (Jan. 25, 2017), Sec. 11(e).

^v Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 FR 45486 (Sept. 7, 2018).

^{vi} USCIS Memorandum, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (May 28, 2013). *See also D-V-G-*, AXXX XXX 356 (BIA Dec. 7, 2018) (USCIS retains initial jurisdiction over asylum application filed by UAC before turning 18).

^{vii} USCIS Memorandum, Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children (May 31, 2019).

^{viii} Operating Policies and Procedures Memorandum: Guidelines for Immigration Court Cases Involving Juveniles, including Unaccompanied Alien Children, EOIR, December 20, 2017.

^{ix} *See Matter of M-A-C-O*, 27 I&N Dec. 477 (BIA 2018).

^x *Garcia v. Barr*, 960 F.3d 893, 894 (6th Cir. 2020); *see also Mazariegos-Diaz v. Lynch*, 605 Fed. Appx. 675, 676 (9th Cir. 2015); *Harmon v. Holder*, 758 F.3d 728, 735 (6th Cir. 2014) (“the TVPRA does not transfer initial jurisdiction over asylum applications filed by former unaccompanied alien children [now 20 years old] to the USCIS.”).

^{xi} *See Cortez-Vasquez v. Holder*, 440 Fed. Appx. 295, 298 (5th Cir. 2011) (holding prior to 2013 Kim Memo that TVRPA protections were not applicable to Respondent because he had attained eighteen years of age and had reunited with his family in the United States).

^{xii} *See Salmeron-Salmeron v. Spivey*, 926 F.3d 1283, 1289 (11th Cir. 2019) (holding that “[t]he issuance of a new I-213 indicating that Salmeron-Salmeron was eighteen years of age followed by detention in an adult facility, is sufficient for USCIS to find an affirmative act terminating UAC status prior to Salmeron-Salmeron’s asylum application.”).

^{xiii} <https://www.irac.net/unpublished/>.

^{xiv} *See* Immigration Court Practice Manual, EOIR ((July 2,202) at J-2 (discouraging and allowing citation to non-precedential decisions); BIA Practice Manual (Oct. 19, 2018) at Chapter 1.4(d)(ii) (authorizing reference to unpublished BIA opinions so long as a copy of the decision is attached to the motion or brief when available).

^{xv} *See e.g., C-F-M-C-*, AXXX XXX 962 (BIA May 13, 2020); *B-E-B-B-*, AXXX XXX 040 (BIA July 31, 2019); *D-R-*, AXXX XXX 337 (BIA Dec. 31, 2019); *E-C-A-V-*, AXXX XXX 483 (BIA Dec. 26, 2019); *D-V-G-*, AXXX XXX 356 (BIA Dec. 7, 2018) .