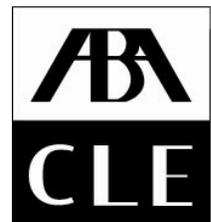


The American Bar Association  
Children's Rights Litigation Committee of the Section of Litigation,  
Commission on Immigration, and the  
ABA Center for Continuing Legal Education  
Present

**Child Clients Are Different:  
Best Practices for Representing Unaccompanied Minors**





**American Bar Association**  
**Center for Continuing Legal Education**  
**321 North Clark Street, Suite 1900**  
**Chicago, IL 60610-4714**  
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"Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children" by Christopher Nugent and Steven Schulman which was published in 78 Interpreter Releases 1569 (Oct. 8, 2001), © 2001 Thomson/West, is reprinted with Thomson/West's permission. For additional information on Interpreter Releases visit <http://west.thomson.com/store/product>.

This publication accompanies the audio program entitled "Child Clients Are Different: Best Practices for Representing Unaccompanied Minors," broadcast on March 6, 2007 (Event code: CET7CCD).

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## Links to Additional Resources

- *ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, see [http://www.abanet.org/publicserv/immigration/Immigrant\\_Childrens\\_Standards.pdf](http://www.abanet.org/publicserv/immigration/Immigrant_Childrens_Standards.pdf)
- US Department of Justice 1998 Guidelines for Children's Asylum Claims <http://www.abanet.org/cle/programs/nosearch/materials/2007/t07ccdc2.pdf>
- *Seeking Asylum Alone* Report, Jackie Bhabha and Susan Schmidt, see [http://www.humanrights.harvard.edu/conference/Seeking\\_Asylum\\_Alone\\_US\\_Report.pdf](http://www.humanrights.harvard.edu/conference/Seeking_Asylum_Alone_US_Report.pdf)
- *Using Expert Witnesses for Asylum Cases in Immigration Court*, Rachael Keast, see <http://cgrs.uchastings.edu/country/experts.php>
- *Best Practices in Representing Asylum Seekers*, A DVD training program for pro bono attorneys developed by ALI-ABA, see <http://www.ali-aba.org/aliaba/RDVD01.asp>
- *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*, a manual available from Lutheran Immigrant and Refugee Services at <http://www.lirs.org/What/children/manual.htm>



## Faculty

**Anne Chandler, Program Chair and Moderator**, Supervising Attorney, University of Houston Law Center - Immigration Clinic, Houston, TX

Anne Chandler has worked with the University of Houston Law Center Immigration Clinic for the last three years where she assists students representing clients before the Department of Homeland Security and the Department of Justice; educates legal professionals and the community on policy issues and the law in the areas of asylum, Convention Against Torture, Human Trafficking, and U Visa; screens potential clients for credibility and likelihood of success; represents low-income immigrants in non-employment based immigration law issues, such as, asylum, VAWA and family petitions; and coordinates grants used to fund the clinic's community outreach and direct representation of immigrant victims of crime.

**Brigitte De Lay**, Consultant on International Child Protection Issues, Evanston, IL

Brigitte De Lay has over 15 years experience in international child protection work, including work in post-genocide Rwanda, post-tsunami Thailand and in Sierre Leonean refugee camps. Whether designing social service programs, conducting field research or working as a child advocate, she always strives to ensure meaningful child participation in all aspects of her work. She has trained hundreds of child advocates across the globe in participatory methodology and more inclusive interview techniques. Brigitte recently received her JD from Loyola University Chicago School of Law, where she was a Child Law Fellow and graduated Cum Laude. She received her MSW from Columbia University with a Minor in International Affairs (1994) and a BA from University of Michigan.

**Vanessa Melendez Lucas**, Children and Family Justice Center, Evanston, IL

Vanessa Melendez Lucas was an Assistant Clinical Professor of Law for the Children and Family Justice Center (CFJC) at Northwestern Law School's Bluhm Legal Clinic from 1998 until 2006. There, she supervised the Asylum Law Clinic which provides legal representation to undocumented children seeking immigration relief in the United States, including asylum, Convention Against Torture protection and Special Immigrant Juvenile status. She has a BA from Yale University and a JD from Fordham University School of Law. Ms. Lucas has also worked as a legal advocate for women refugees seeking protection in the United Kingdom on account of gender-based persecution. Ms. Lucas is currently a consultant with the CFJC and continues to mentor pro bono attorneys in this area nationwide.

**Christopher Nugent**, Senior Counsel, Holland & Knight – Community Services Team, Washington, D.C.

Chris Nugent is responsible for developing cutting-edge immigration-related pro-bono projects and trainings for firm offices and for casework involving immigration and public policy. He has over fifteen years of experience in immigration law and policy, having served as Director of the ABA Commission on Immigration Policy, Practice and Pro Bono; the Executive Director of the Florence Immigrant and Refugee Rights Project (Florence, Arizona) serving immigration detainees; and a National Association for Public Interest Law Equal Justice Fellow working with Mexican and Guatemalan indigenous farm workers in California in community development projects. He has written extensively about immigration policy and practice issues.

**Anne Wideman, Lutheran Immigrant and Refugee Services, Baltimore, MD**

Anne Wideman, Ph.D. is a licensed clinical psychologist. She currently is employed as Senior Child Specialist for LIRS. She has worked for the past 6 years as a volunteer with detained child and adult immigrants in Arizona. Her areas of clinical specialty are forensic psychology, trauma and serious mental illness.



## **People and Organizations Assisting in the Development of the Program**

This call is offered on a complimentary basis due in part to a grant from the ABA Underserved Lawyer Fund, administered by the ABA Standing Committee on Continuing Education of the Bar, Steven O. Weise, Chair. <http://www.abanet.org/cle/soundbytes/stand/home.html>

**Bob Glaves**, Executive Director, The Chicago Bar Foundation  
[www.chicagobarfoundation.org](http://www.chicagobarfoundation.org)

**Catherine Krebs**, Committee Director, ABA Section of Litigation Children's Rights Litigation Committee, <http://www.abanet.org/litigation/committees/childrights/>

**Irena Lieberman**, Director, ABA Commission on Immigration  
<http://www.abanet.org/publicserv/immigration>

**JoNel Newman**, Assistant Professor of Clinical Education, Director, Community Health Rights Education Clinic, University of Miami School of Law, Center for Ethics and Public Service (also chair of the immigration subcommittee of the Children's Rights Litigation Committee)

**Liz Williamson**, ABA Center for Continuing Legal Education  
<http://www.abanet.org/cle/>

**Maria Woltjen**, Director, Immigrant Children's Advocacy Center  
[www.ImmigrantChildAdvocacy.org](http://www.ImmigrantChildAdvocacy.org)

The Immigrant Children's Advocacy Center at the University of Chicago is dedicated to advocating for the best interests of immigrant and refugee children who are alone in the United States. We're working to develop a national network of guardians *ad litem* or Child Advocates for unaccompanied and separated immigrant and refugee children and to promote consideration of best interests in all decisions affecting unaccompanied immigrant children in the United States. The Immigrant Children's Advocacy Center, based at the University of Chicago Law School Legal Clinic, trains bilingual law students and lay volunteers to serve as Child Advocates. Their role is to figure out what brought the children to the United States and advocate on their behalf. The Advocates get to know the children, help sort out their story and help identify their eligibility for asylum or special protective visas. The Advocates help ensure the best interests of these most vulnerable children while they are in the United States and separated from their families.



## Hypothetical

Vanessa Lucas, Children and Family Justice Center, Evanston, IL

Marcos Trujillo is a fifteen (15) year old native and citizen of Honduras who entered the United States without inspection on July 26, 2006 by Brownsville, Texas when he was apprehended by the US Customs and Border Patrol and transferred to Office of Refugee Resettlement (ORR) custody for immigration removal proceedings before the Executive Office for Immigration Review (EOIR).

Marcos grew up in a working class family in Lima, Honduras. His father Jose Trujillo was a carpenter and died in 2003 when Marcos was eleven year old. His mother Carmen Alvarez is a part-time seamstress who works from home. Marcos has one sister, Imelda Trujillo, who is four (4) year old.

After his father Jose died, Marcos' mother Carmen, knowing that she could not support her children on her meager salary, began a relationship with Alvaro Benitez, a notorious MS-13 gang member who resided in their neighborhood. Alvaro moved into their home in 2004. Despite their cohabitation, Carmen and Alvaro do not plan to marry because Alvaro thinks marriage is merely Christian propaganda. The household, however, has prospered all the stolen goods Alvaro has provided, including a new refrigerator with an ice-maker and a TV/VCR.

On the other hand, Marcos also reports that Alvaro hates him because he (Marcos) refused his directive to join the MS-13 gang, instead choosing to work for a living, attend school and go to church. In response, Alvaro has had his gang cohorts beat Marcos on several occasions and Alvaro himself has also beaten him at home almost on a daily basis with his belt, brooms, chairs, and any other object he could get his hands on. Although the majority of these beatings occurred when Marcos' mother Carmen was not home, she did witness some. In response, Carmen would ask Marcos to stop making Alvaro angry. Marcos reports that Alvaro adored his little sister Imelda and routinely provided her with pilfered dresses and toys.

In January, 2006, Marcos' teacher Mrs. Torres spoke with Marcos about the bruises and scratches on his face and arms (resulting from Alvaro's latest beating). Mrs. Torres told Marcos that she would call the local authorities to report that Alvaro was abusing Marcos. Marcos was afraid that if his teacher made the report this would cause problems for his mother (whom he loved dearly). Moreover, Marcos was convinced that the authorities would not protect him from Alvaro because his stepfather was a notorious criminal in his hometown of Lima and the police were scared of him. Instead, Marcos decided to flee his home, believing that Alvaro would kill him for telling his teacher about the beatings and for reporting him to the police.

Marcos took a bus to the capital city of Tegucigalpa. There, he met some other youths who also had to run away because of their family problems. Marcus began living on the streets with his new friends, where they were often preyed upon by gangs and other homeless youth. For several months, Marcos was repeatedly robbed and beaten. The police were aware of the beatings and robberies and instead of providing protection to Marcos, they often threatened him and on occasions beat him for being a public nuisance. To make money to eat, Marcos prostituted himself and sniffed glue to keep warm at night.

After a particularly brutal beating by gang members and after months of sexual abuse at the hands of “customers,” Marcos became convinced he would not survive in the streets of Tegucigalpa for long. He decided to flee out of Honduras. Mercurio, one of Marcos’ john’s offered to help by paying the smuggling fee to the U.S. and offering to give Marcos the contact information for a friend of his in Los Angeles who could help Marcos find work.

Marcos traveled with the smuggler to the U.S. where he was apprehended upon entry. While in the custody of the Office for Refugee Resettlement (ORR), Marcos has become quite homesick for his mother. He has been allowed to make several phone calls to his mother who said that she does not want him to return because he made Alvaro angry and she cannot survive without her “husband’s” support.

Marcos also contacted his cousin Juan Pablo, a lawful permanent resident who lives in Los Angeles for release purposes. Juan Pablo agreed to fill out the paper work with the condition that he would not have to support Marcos. The plan is for Marcos to be released and then contact his “john’s” friend for help with work and a place to live.

Marcos has provided this information to his pro bono attorney under the promise of confidentiality. The attorney has considered whether he is eligible for asylum, Special Immigrant Juvenile Status and/or as a T visa as a victim of severe trafficking.

The following are the steps taken by the attorney:

- Files application for Department of Homeland Security (DHS) consent for state dependency proceedings.
- Prepares for a scheduled asylum hearing after the immigration judge’s denial of her motion to hold the proceedings in abeyance pending consideration of his eligibility for Special Immigrant Juvenile Status.
- Contacts ORR regarding custody transfer to the foster care program of the Unaccompanied Refugee Minor (URM) program as a prima facie trafficking victim in need of emergency benefits. Marcos allowed this, but under the condition that his “john” would not get into any trouble.



# Using Mobility Maps, Flow Diagrams and Timelines in Child Interviews

Prepared by Brigette DeLay  
Consultant on International Child Protection Issues, Evanston, IL

## 1. Mobility Map

### *What is a Mobility Map?*

A Mobility Map is a drawing of a child's home community that represents all the places that he or she goes. It acts as a sort of snapshot of a child's life.

### *Why should I use this method?*

Mobility Maps can be used to learn more about a child's home and community. Along with a visual picture of a child's neighborhood, an interviewer can explore topics such as important relationships, participation in community activities, degree of integration or isolation from others, education, daily routines, chores and work, family, etc.

### *The Process:*

The map is usually drawn on a piece of paper, using colorful pencils or crayons. Provide an eraser to allow for changes.

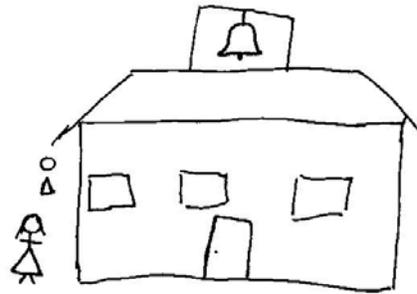
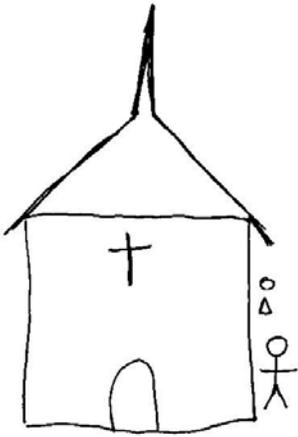
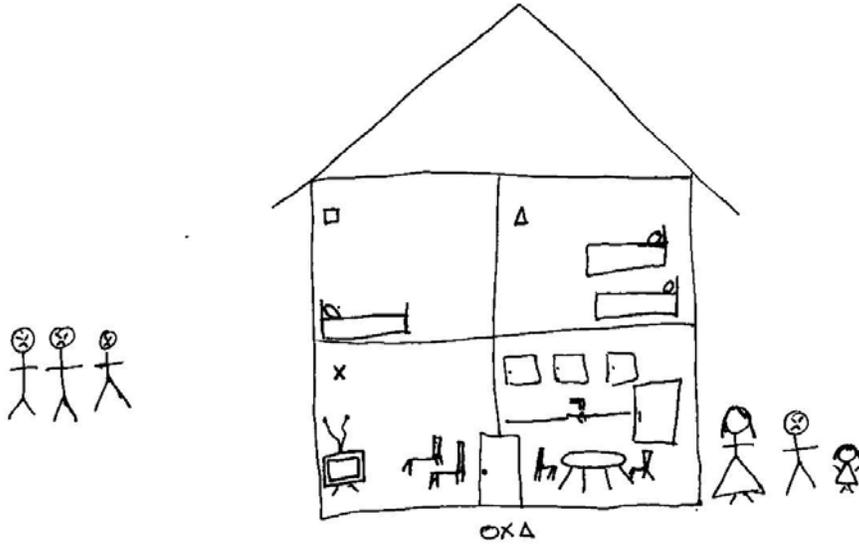
### *The Steps:*

- Start by introducing the activity
  - a. For example, "I have learned a lot about what your life is like here in the center, but it is also good to know what your life was like before. To do this, let's draw a picture of your home."
- Place paper and pencils in front of the child. Begin by asking whom the child lived with before they came to the U.S. Is this the only place they lived? (If the child lived in more than one place, ask the child to pick one place to talk about) Draw a small house in the center of the paper to represent the child's home (if the child did not have a home, draw a stick figure to represent the child) "Let's say this is where you lived before coming here"
- Now, ask the child to draw ALL the places and people he/she visited/stayed in contact with when he/she was living in his/her home country. (If the child is confused, give select examples – such as a school, garden, friends' house, next village).
- Let the child draw their map without interruption – do not rush the exercise.
- When the map is completed, ask the child to mark all the places he liked with a green pencil. Then ask him to mark the places he didn't like with a red pencil. (Explain that he does not have to mark all the places, just preferred and disliked ones).
- Then ask the child to mark all the places he visited frequently with a blue pencil; places he rarely visited with an orange pencil.
- When the child has completed the map, interview the child through the diagram. Discuss each person/place. Possible questions include:
  - Tell me about your map.
  - Tell me about this place/person.
  - Who did you live with?
  - What did you do when you went to this place?
  - Who is this person? How would you describe them?
  - What did you study at school? For how long?
  - What sort of things did you do here?

- How often did you visit here? (everyday, once a week...)
  - Can you tell me why you liked visiting this place/person?
  - Can you tell me what you didn't like about this place/person?
  - Did you map always look like this? Was there a time when it looked different?  
Can you tell me about that?
  - If you could change anything about this map, what would you change?
- 
- Once the interview is complete, thank the child for his time – then review the map with the child. “This was really helpful! Let me tell you what I’ve learned...”
  - Leave the map with the child (You can always refer back to it at a later time) – If need be, you can ask the child’s permission to make a copy for your notes

- O - likes
- X - dislikes
- Δ - visits frequently
- - visits rarely

# Mobility Map



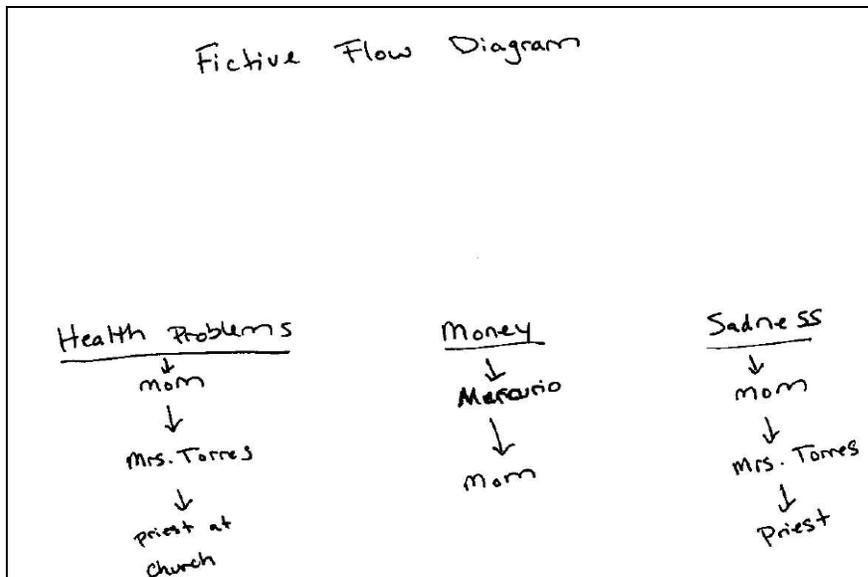
## 2. *The Flow Diagram*

A flow diagram is a diagram of all the different people a child might go to for support when the child needs medical care, money, or moral support. The diagrams are an excellent way to verify and explore in greater depth the information gathered during the mobility map exercise. Flow diagrams provide information that serves as a basis for a simple interview with a child. The following steps describe how a flow diagram is made:

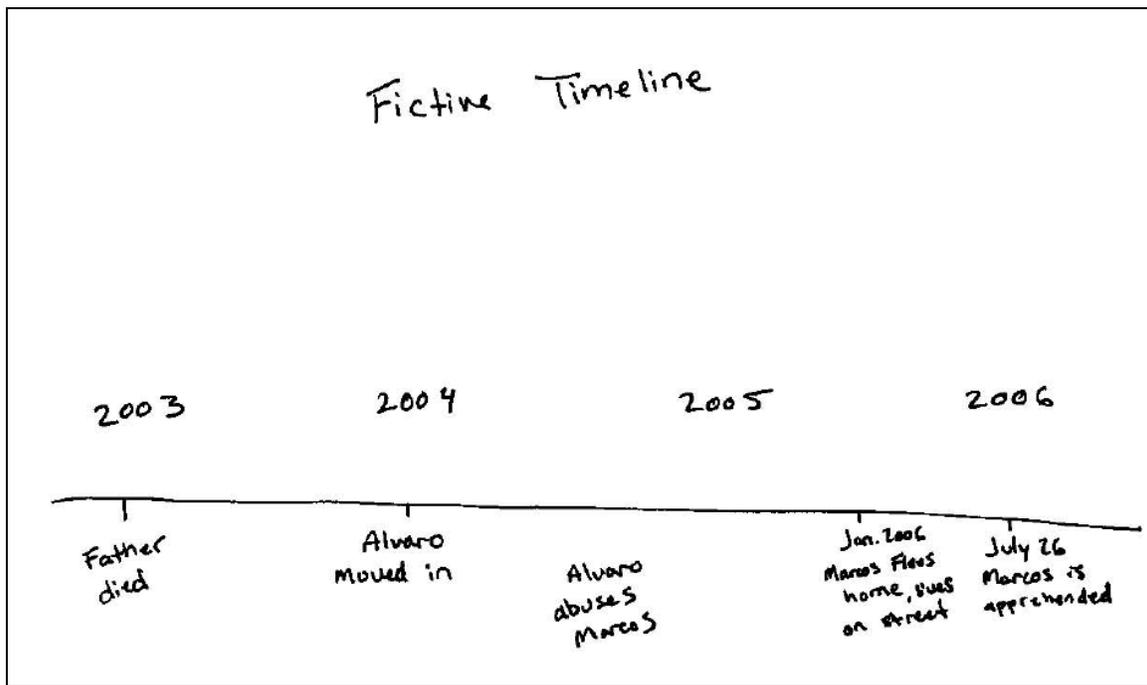
1. After establishing a rapport with the child, explain that the purpose of the exercise is to help you understand whom the interviewee turns to for help when there is a problem. Often, people turn to different individuals for different types of problems. For that reason, you will address these areas of need: money, health, and emotional support.
2. Begin with health problems. Ask the child whom they ask for help when they have a health problem. Write that name at the top of a piece of paper.
3. Proceed by asking whom would he or she turn to if the person listed were unable to help. Continue this line of questioning, writing the names in descending order until the family member's options are exhausted.
4. Next ask whom he or she would approach in the event of a financial problem. Once again, write this name down and then exhaust other options for assistance.
5. Conduct the same line of exhaustive questioning for emotional (or moral) support.

During the interview, you may ask probing questions such as "What type of support is provided?" "Why do you approach certain people?" "What are some past examples of support?"

Flow diagrams are an excellent complement to mobility maps and can often identify or confirm the importance of resource persons. In some cases, a new individual may be mentioned and should be added to the map.



### 3. *The Timeline*







## **Model Code of Professional Responsibility for Interpreters in the Judiciary**

(Taken with permission from Chapter 9 of Court Interpretation: Model Guides for Policy and Practice in the State Courts; by William E. Hewitt)

### **Introduction**

The following document is a Model Code of Professional Responsibility for interpreters in the judiciary. The model code presents key concepts and precepts, which over the years have emerged in statutes, rules, case law, and professional experience. Like the Model Court Interpreter Act (Chapter 10), it has been prepared in consultation with an advisory group of individuals who have special expertise in court interpretation. The advisory group included the judges, lawyers, court administrators, and state and federally certified professional interpreters who are named in the acknowledgements for this publication.

### **Purposes of the Model Code**

The purposes of the Model Code are threefold:

1. to articulate a core set of principles, which are recommended for incorporation in similar codes that may be adopted in the several states or local jurisdictions;
2. to serve as a reference, which may be consulted or cited by interpreters, judges, and court managers where no other authoritative standards have been adopted, and

3. to serve as a basis for education and training of interpreters and other legal professionals.

Research has shown that courts must often rely on interpretation services of bilingual individuals who have received no specific training about the requirements, role and responsibilities of a court interpreter. Research has also shown that many judges and attorneys are also unaware of the professional responsibilities of the interpreter and how these translate into highly demanding technical skill requirements. At the very least, anyone serving as a court interpreter should be required to understand and abide by the precepts set out in this Model Code. Judges and attorneys should also become familiar with the code and expect conduct from interpreters that is consistent with it.

## CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS IN THE JUDICIARY

### **PREAMBLE**

**Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier.<sup>1</sup> As officers of the court, interpreters help assure that such persons may enjoy equal access to justice and that court proceedings and court support services function efficiently and effectively. Interpreters are highly skilled professionals who fulfill an essential role in the administration of justice.**

### **APPLICABILITY**

**This code shall guide and be binding upon all persons, agencies and organizations who administer, supervise use, or deliver interpreting services to the judiciary.**

---

<sup>1</sup> A non-English speaker should be able to understand just as much as an English speaker with the same level of education and intelligence.

## **Commentary:**

The black letter principles of this Model Code are principles of general application that are unlikely to conflict with specific requirements of rule or law in the states, in the opinion of the code's drafters. Therefore, the use of the term "shall" is reserved for the black letter principles. Statements in the commentary use the word "should" to describe behavior that illustrates or elaborates the principles. The commentaries are intended to convey what the drafters of this model code are probable and expected behaviors. Wherever a court policy or routine practice appears to conflict with the commentary in this code, it is recommended that the reasons for the policy as it applies to court interpreters be examined.

## **CANON 1: ACCURACY AND COMPLETENESS**

**Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.**

## **Commentary:**

The interpreter has a twofold duty: 1) to ensure that the proceedings in English reflect precisely what was said by a non-English speaking person, and 2) to place the non-English speaking person on an equal footing with those who understand English. This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.

Therefore, interpreters are obligated to apply their best skills and judgement to preserve faithfully the meaning of what is said in court, including the style or register of speech. Verbatim, "word for word," or literal oral interpretations are not appropriate when they distort the meaning of the source language, but every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements.

Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the

interpreter should ask the court's permission to provide an explanation. Interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker's emotions, or dramatic gestures.

Sign language interpreters, however, must employ all of the visual cues that the language they are interpreting for requires-- including facial expressions, body language, and hand gestures. Sign language interpreters, therefore, should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct.

The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance.

## **CANON 2: REPRESENTATION OF QUALIFICATIONS**

**Interpreters shall accurately and completely represent their certifications, training, and pertinent experience.**

**Commentary:**

Acceptance of a case by an interpreter conveys linguistic competency in legal settings. Withdrawing or being asked to withdraw from a case after it begins causes a disruption of court proceedings and is wasteful of scarce public resources. It is therefore essential that interpreters present a complete and truthful account of their training, certification and experience prior to appointment so the officers of the court can fairly evaluate their qualifications for delivering interpreting services.

**CANON 3: IMPARTIALITY AND AVOIDANCE OF CONFLICT OF INTEREST**

**Interpreters shall be impartial and unbiased and shall refrain from conduct that may give an appearance of bias. Interpreters shall disclose any real or perceived conflict of interest.**

**Commentary:**

The interpreter serves as an officer of the court and the interpreter's duty in a court proceeding is to serve the court and the public to which the court is a servant. This is true regardless of

whether the interpreter is publicly retained at government expense or retained privately at the expense of one of the parties.

The interpreter should avoid any conduct or behavior that presents the appearance of favoritism toward any of the parties. Interpreters should maintain professional relationships with their clients, and should not take an active part in any of the proceedings. The interpreter should discourage a non-English speaking party's personal dependence.

During the course of the proceedings, interpreters should not converse with parties, witnesses, jurors, attorneys, or with friends or relatives of any party, except in the discharge of their official functions. It is especially important that interpreters, who are often familiar with attorneys or other members of the courtroom work group, including law enforcement officers, refrain from casual and personal conversations with anyone in court that may convey an appearance of a special relationship or partiality to any of the court participants.

The interpreter should strive for professional detachment. Verbal and non-verbal displays of personal attitudes, prejudices, emotions, or opinions should be avoided at all times.

Should an interpreter become aware that a proceeding participant views the interpreter as having a bias or being biased, the interpreter should disclose that knowledge to the appropriate judicial authority and counsel.

Any condition that interferes with the objectivity of an interpreter constitutes a conflict of interest. Before providing services in a matter, court interpreters must disclose to all parties and presiding officials any prior involvement, whether personal or professional, that could be reasonably construed as a conflict of interest. This disclosure should not include privileged or confidential information.

The following are circumstances that are presumed to create actual or apparent conflicts of interest for interpreters where interpreters should not serve:

1. The interpreter is a friend, associate or relative of a party or counsel for a party involved in the proceedings;
2. The interpreter has served in an investigative capacity for any party involved in the case;
3. The interpreter has previously been retained by a law enforcement agency to assist in the preparation of the criminal case at issue;
4. The interpreter or the interpreter's spouse or child has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that would be affected by the outcome of the case;
5. The interpreter has been involved in the choice of counsel or law firm for that case.

Interpreters should disclose to the court and other parties when they have previously been retained for private employment by one of the parties in the case.

Interpreters should not serve in any matter in which payment for their services is contingent upon the outcome of the case.

An interpreter who is also an attorney should not serve in both capacities in the same matter.

#### **CANON 4: PROFESSIONAL DEMEANOR**

**Interpreters shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible.**

#### **Commentary:**

Interpreters should know and observe the established protocol, rules, and procedures for delivering interpreting services. When speaking in English, interpreters should speak at a rate and volume that enable them to be heard and understood throughout the courtroom, but the interpreters presence should otherwise be as unobtrusive as possible. Interpreters should work without drawing

undue or inappropriate attention to themselves. Interpreters should dress in a manner that is consistent with the dignity of the proceedings of the court.

Interpreters should avoid obstructing the view of any of the individuals involved in the proceedings. However, interpreters who use sign language or other visual modes of communication must be positioned so that hand gestures, facial expressions, and whole body movement are visible to the person for whom they interpreting.

Interpreters are encouraged to avoid personal or professional conduct that could discredit the court.

## **CANON 5: CONFIDENTIALITY**

**Interpreters shall protect the confidentiality of all privileged and other confidential information.**

### **Commentary:**

The interpreter must protect and uphold the confidentiality of all privileged information obtained during the course of her or his duties. It is especially important that the interpreter understand and uphold the attorney-client privilege, which requires confidentiality with

respect to any communication between attorney and client. This rule also applies to other types of privileged communications.

Interpreters must also refrain from repeating or disclosing information obtained by them in the course of their employment that may be relevant to the legal proceeding.

In the event that an interpreter becomes aware of information that suggests imminent harm to someone or relates to a crime being committed during the course of the proceedings, the interpreter should immediately disclose the information to an appropriate authority within the judiciary who is not involved in the proceeding and seek advice in regard to the potential conflict in professional responsibility.

#### **CANON 6: RESTRICTION OF PUBLIC COMMENT**

**Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.**

## **CANON 7: SCOPE OF PRACTICE**

**Interpreters shall limit themselves to interpreting or translating, and shall not give legal advice, express personal opinions to individuals for whom they are interpreting, or engage in any other activities which may be construed to constitute a service other than interpreting or translating while serving as an interpreter.**

### **Commentary:**

Since interpreters are responsible only for enabling others to communicate, they should limit themselves to the activity of interpreting or translating only. Interpreters should refrain from initiating communications while interpreting unless it is necessary for assuring an accurate and faithful interpretation.

Interpreters may be required to initiate communications during a proceeding when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to

satisfy an assignment competently. In such circumstances they should make it clear that they are speaking for themselves .

An interpreter may convey legal advice from an attorney to a person only while that attorney is giving it. An interpreter should not explain the purpose of forms, services, or otherwise act as counselors or advisors unless they are interpreting for someone who is acting in that official capacity.

The interpreter may translate language on a form for a person who is filling out the form, but may not explain the form or its purpose for such a person.

The interpreter should not personally serve to perform official acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation counselors.

## **CANON 8: ASSESSING AND REPORTING IMPEDIMENTS TO PERFORMANCE**

**Interpreters shall assess at all times their ability to deliver services. When interpreters have any reservation about their ability to satisfy an assignment competently, they shall**

**immediately convey that reservation to the appropriate judicial authority.**

**Commentary:**

If the communication mode or language of the non-English speaking person cannot be readily interpreted, the interpreter should notify the appropriate judicial authority.

Interpreters should notify the appropriate judicial authority of any environmental or physical limitation that impedes or hinders their ability to deliver interpreting services adequately (e.g., the court room is not quiet enough for the interpreter to hear or be heard by the non-English speaker, more than one person at a time is speaking, or principals or witnesses of the court are speaking at a rate of speed that is too rapid for the interpreter to adequately interpret.) Sign language interpreters must ensure that they can both see and convey the full range of visual language elements that are necessary for communication, including facial expressions and body movement, as well as hand gestures.

Interpreters should notify the presiding officer of the need to take periodic breaks to maintain mental and physical alertness and

prevent interpreter fatigue. Interpreters should recommend and encourage the use of team interpreting whenever necessary.

Interpreters are encouraged to make inquiries as to the nature of a case whenever possible before accepting an assignment. This enables interpreters to match more closely their professional qualifications, skills, and experience to potential assignments and more accurately assess their ability to satisfy those assignments competently.

Even competent and experienced interpreters may encounter cases where routine proceedings suddenly involve technical and specialized terminology unfamiliar to the interpreter (e.g., the unscheduled testimony of an expert witness.) When such instances occur, interpreters should request a brief recess to familiarize themselves with the subject matter. If familiarity with the terminology requires extensive time or more intensive research, interpreters should inform the presiding officer.

Interpreters should refrain from accepting a case if they feel the language and subject matter of that case is likely to exceed their skills or capacities. Interpreters should feel no compunction about notifying the presiding officer if they feel unable to perform competently, due to

lack of familiarity with terminology, preparation, or difficulty in understanding a witness or defendant.

Interpreters should notify the presiding officer of any personal bias they may have involving any aspect of the proceedings. For example, an interpreter who has been the victim of a sexual assault may wish to be excused from interpreting in cases involving similar offenses.

## **CANON 9: DUTY TO REPORT ETHICAL VIOLATIONS**

**Interpreters shall report to the proper judicial authority any effort to impede their compliance with any law, any provision of this code, or any other official policy governing court interpreting and legal translating.**

### **Commentary:**

Because the users of interpreting services frequently misunderstand the proper role of the interpreter, they may ask or expect the interpreter to perform duties or engage in activities that run counter to the provisions of this code or other laws, regulations, or policies governing court interpreters. It is incumbent upon the interpreter to inform such persons of his or her professional

obligations. If, having been apprised of these obligations, the person persists in demanding that the interpreter violates them, the interpreter should turn to a supervisory interpreter, a judge, or another official with jurisdiction over interpreter matters to resolve the situation.

## **CANON 10: PROFESSIONAL DEVELOPMENT**

**Interpreters shall continually improve their skills and knowledge and advance the profession through activities such as professional training and education, and interaction with colleagues and specialists in related fields.**

### **Commentary:**

Interpreters must continually strive to increase their knowledge of the languages they work in professionally, including past and current trends in technical, vernacular, and regional terminology as well as their application within court proceedings.

Interpreters shall keep informed of all statutes, rules of courts and policies of the judiciary that relate to the performance of their professional duties.

An interpreter should seek to elevate the standards of the profession through participation in workshops, professional meetings, interaction with colleagues, and reading current literature in the field.

## Additional References

The following sources were used as references when the Model Code was originally drafted for discussion by the work group of judges, interpreters and interpreter program administrators in Williamsburg, Virginia, in July 1993. Source materials marked with an asterisk are recommended as supplementary references.

- |                |   |
|----------------|---|
| California     | Standards of Judicial Administration-Section 18.3, <i>Standards of Professional Conduct for Court Interpreters</i> (See California Rules of Court, Rule 985)  |
|                | *Judicial Council of California, Administrative Office of the Courts Workshops for court Interpreters (training Manual), <i>Professional Ethics and the Role of the Court Interpreter</i>                             |
|                | California Court Interpreters Association, <i>Code of Ethics</i>  |
| Federal Courts | <i>Code of Professional Responsibility of the Official Interpreters of the United States Courts</i>   |
| Massachusetts  | *Office of the Chief Administrative Justice, Massachusetts Trial Court, <i>Code of Professional Conduct for Court Interpreters of the Trial Court</i>   |
| New Jersey     | *Administrative Office of the Courts, Court Interpreting, Legal Translating and bilingual Services Section, <i>Recommended Code of Professional Responsibility for Interpreters, Transliterations and Translators</i> |

Washington

\*Rules of Court, General Rule 11.1, *Code of Conduct for Court Interpreters*

Registry of  
Interpreters  
for the Deaf,  
Inc.

*Code of Ethics*

Texts

\*Chapter 34, "Ethical Principles and Standards" in  
Gonzalez, Roseann; Vasquez, Victoria; and  
Mikkelson, Holly, *Fundamentals of Court  
Interpretation*, Carolina Academic Press, 1991.



**Interim Operating Policies and Procedures Memorandum 04-07:  
Guidelines For Immigration Court Cases Involving Unaccompanied  
Alien Children**



# U.S. Department of Justice

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500  
Falls Church, Virginia 22041

September 16, 2004

## MEMORANDUM

TO: All Immigration Judges  
All Court Administrators  
All Judicial Law Clerks  
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children

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I.     Introduction

This OPPM provides guidance and suggestions for adjudicating cases where the respondent is an unaccompanied alien child (defined later). The suggestions focus primarily on assisting the judge in ensuring that the respondent understands the nature of the proceeding, effectively presents evidence about the case, and has appropriate assistance. Issues of age, development, experience and self-determination impact on how a court deals with a child respondent and are highlighted in the OPPM.

When the respondent is a child, the immigration judge faces fundamental challenges in adjudicating the case: does the respondent understand the nature of the proceeding, can the respondent effectively present evidence about the case, and is there anyone who can properly advocate for the respondent’s interest? Issues of age, development, experience and self-determination impact how a court deals with a child respondent.

Organizations involved in handling children’s asylum claims have developed special guidance for adjudicators. Canada’s Immigration and Refugee Board was the first to draft such guidance: Child Refugee Claimants: Procedural and Evidentiary Issues (1996). The following year the United Nations High Commissioner for Refugees issued Policies and Procedures for Unaccompanied Children Seeking Asylum. Finally, in 1998 the former Immigration and Naturalization Service distributed Guidelines for Children’s Asylum Claims to its asylum officers. Copies of these guidelines have been distributed to all Immigration Courts, and judges have been encouraged to consult them as appropriate.

None of these documents specifically addresses the issues that arise when children’s asylum claims are presented in an adversarial setting. Therefore, in developing guidelines for the kinds of cases that we handle, the Office of the Chief Immigration Judge (OCIJ) sought additional guidance, primarily in materials developed for juvenile and family courts. The guidelines that follow are informed both by the asylum-specific documents mentioned above and by writings of judges and litigators in other areas of the law.

## II. Definition of unaccompanied alien child

These guidelines use the terms “child” and “children” in a way that is slightly different from the definitions provided in the Immigration and Nationality Act (Act). The Act defines a “child” as an unmarried person under 21 years of age. Sections 101(b)(1) and 101(c)(1). The regulations follow this statutory definition. The regulations also define a “juvenile” as an alien under the age of 18. 8 C.F.R. § 1236.3. The regulations also use (but do not define) the word “minor” when describing aliens under 14 years of age. 8 C.F.R. § 1236.2.

The Homeland Security Act of 2002 transferred responsibility for detained alien children from the former INS to the Department of Health and Human Services. It also introduced a new term -- unaccompanied alien child – to define a child who has no lawful immigration status in the United States, has not attained 18 years of age, and who has no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody.

These guidelines use the term “unaccompanied alien child” as defined in the Homeland Security Act: a person under 18, without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is able to provide care and physical custody. Once a person attains the age of 18, he or she would not fall within the definition. For these guidelines, all references to child or children should be construed with that definition.

## III. Basic principles

Several principles are central to these guidelines:

- A. Authority of guidelines Every immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom. However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager. These guidelines are suggestions that should be applied as circumstances warrant. All immigration judges understand that special attention is required for cases involving child witnesses or unaccompanied alien child respondents. The way that special attention is shown is left to a case-by-case determination by the individual judge.
- B. Best interest of the child Issues of law -- questions of admissibility, eligibility for relief, etc. -- are governed by the Immigration and Nationality Act (INA or Act) and the regulations. The concept of “best interest of the child” does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.

- C. Legal and personal representation Neither the INA nor the regulations permit immigration judges to appoint a legal representative or a guardian ad litem. Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent needs a legal representative. Likewise, although there is no independent court role for a personal representative or guardian ad litem, if such services are made available to respondents they have the potential to increase a child's understanding of the proceeding and to improve the child's communication with his or her legal representative.
- D. Applicability to all immigration judges All judges must be able to handle cases involving unaccompanied alien children. Circumstances in a particular court may require specialized dockets for children's cases, and responsibility for such dockets may be assigned to certain judges. However, all immigration judges are trained to handle these cases. It is the responsibility of every immigration judge to be familiar with these guidelines and related training materials.
- E. Additional considerations While these guidelines are written for cases involving unaccompanied alien children, some provisions will apply in other cases where children are accompanied by a parent or guardian or where children testify as witnesses. Additionally, the guidelines mention, but do not address in detail, other topics that apply whenever a child is present as respondent or witness. These topics include the effect of age and development on a child's ability to participate in the proceeding; gender, mental health (including possible post-traumatic stress syndrome); and general cultural sensitivity issues; and appropriate questioning and listening techniques for child witnesses. OCIJ has provided training to immigration judges on some of these issues and will continue to do so in the future. These guidelines should be viewed as one component of that training.

#### IV. Ensuring an appropriate courtroom setting

Claims in Immigration Court are raised in an adversarial setting in a courtroom. Recognizing that cases involving unaccompanied alien children may make special demands on all parties, consideration should be given in appropriate circumstances to some modifications to the ordinary courtroom operations and configuration. These modifications may include:

- A. Courtroom orientation The courtroom is usually an unfamiliar place for children. Many family and juvenile court experts recommend allowing children to visit an empty courtroom prior to their scheduled hearing. Under the supervision of court personnel, the children should be permitted to explore the courtroom, sit in all the locations (including, especially, the judge's bench and the witness stand), and to practice answering simple questions in preparation for testimony. To the extent that resources permit, court administrators should be receptive to requests by legal representatives or custodians for unaccompanied alien children to visit our courts prior to the initial hearing. Additionally, they should be open to other ways to familiarize unaccompanied alien children with court operations.

- B. Scheduling unaccompanied alien children's cases Wherever possible, courts should conduct cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month. If the number of cases do not warrant a separate docket, courts should try to schedule children's cases at a specific time on the regular docket, but separate and apart from adult cases. Such a docket or schedule will improve the ability of custodians to transport the children and of legal service providers to assist them. Similarly, courts should keep detained dockets for adults and children completely separate. Courts should try to ensure our dockets do not have the effect of forcing detained alien children to be transported or held with detained adults.
- C. Courtroom modifications Immigration judges do not have the luxury of equipping their courtrooms with special furniture designed on a child's scale. However, judges can and should permit reasonable modifications: allowing counsel to bring pillows or booster seats for young respondents; permitting young respondents to sit in one of the pews with an adult companion or permitting the companion to sit at counsel's table; allowing a young child to bring a toy, book or other personal item into the courtroom; permitting the child to testify while seated next to an adult or friend, rather than in the witness stand; etc. Simple, common sense adjustments need not alter the serious nature of the proceedings. They can, however, help foster an atmosphere in which a child is better able to present a claim and to participate more fully in the proceeding.
- D. Assessing the use of video conferencing It is important to note that Congress made no distinction between hearings conducted in person and hearings conducted by video conference. Video conference generally will be appropriate unless circumstances dictate otherwise. Therefore, when handling cases involving unaccompanied alien child respondents, if under ordinary circumstances the hearing would be conducted by video conference, the immigration judges should determine if particular facts are present in the case to warrant an exception from the usual practice.
- E. Removing the robe. Like the courtroom, the robe is a symbol of the judge's independence and authority. For this reason, OPPM 94-10, "Wearing of the Robe During Immigration Judge Hearings," provides that a robe shall be worn in every proceeding when any of the parties is present with the immigration judge. While most unaccompanied alien children will be far more interested in the judge's behavior than the judge's attire, the robe may be disconcerting for younger respondents. If a judge determines in a particular case that dispensing with the robe would add to the child's ability to participate, OPPM 94-10 is modified to permit the judge to remove the robe for that case.

V. Ensuring appropriate courtroom procedures

There is a consistency in the published recommendations for improvements in handling children's cases. Many of these recommendations come not from child psychologists but from lawyers and judges. Although most suggestions pertain to juvenile and family court cases, they have applicability in immigration cases as well, despite the added complexities of language and cultural differences. By carefully controlling how the proceedings are conducted, immigration judges can effectively discharge their obligation under the INA and the regulations in a way that takes full account of the best interest of the unaccompanied alien child. The following suggestions have relevance to most, if not all, cases where children are respondents:

- A. Explain the proceeding at the outset Judges should consider making a brief opening statement at the beginning of each proceeding to explain the purpose and nature of the proceeding, to introduce the parties and discuss each person's role, and to explain operational matters such as tape recording, note taking, telephonic or video conference appearances, etc.
- B. Pay particular attention to the interpreter Judges should allow time for the interpreter and the unaccompanied alien child to establish some rapport by talking about unrelated matters before testimony is taken. Judges should also watch for any indication that the child and the interpreter are having difficulty communicating. Any statement to be translated should be made in English at an age-appropriate level and translated at that level for the child respondent.
- C. Be aware of time As in any case, the judge should give the parties a full opportunity to present or challenge evidence. However, stress and fatigue can adversely impact the ability of an unaccompanied alien child to participate in his or her removal proceeding. Consistent with case completion goals, immigration judges should seek not only to limit the number of times that children must be brought to court, but also to resolve issues of removability and relief without undue delay. As appropriate, judges should require the parties to narrow issues through pre-trial conference and stipulations. Additionally, if a child is called to testify, judges should seek to limit the amount of time the child is on the stand. Similarly, judges should recognize that for emotional and physical reasons children may require more frequent breaks than adults.
- D. Prepare the child to testify As with any witness, judges should be confident that the child is competent to testify in the proceeding, including whether the child is of sufficient mental capacity to understand the oath and give sworn testimony. The explanation of the oath should vary with the age of the witness: promise "to tell the truth" or promise "to tell what really happened" etc. Children should be told that it is all right for them to say, "I don't know" if that is the correct answer, and to request that a question be asked another way if the child does not understand it. Explain also that the child witness should not feel at fault if an objection is raised to a question.

- E. Employ child-sensitive questioning Language and tone are especially important when children are witnesses. Proper questioning and listening techniques will produce a more complete and accurate record. Although the Immigration Court process is adversarial, judges should insist that questions are phrased in age-appropriate language and tone. Attachment A contains a detailed set of instructions from the DHS guidelines. Immigration judges should consult these suggestions and adapt them to the courtroom setting to the extent possible.
- F. Make proper credibility assessments Judges should recognize that children, especially young children, usually will not be able to present testimony with the same degree of precision as adults. Do not assume that inconsistencies are proof of dishonesty, and recognize that a child's testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.
- G. Control access to the courtroom As a general matter, it is best to have as few people in court as possible. Children may be reluctant to testify about painful or embarrassing incidents, and the reluctance may increase with the number of spectators or other respondents.

## VI. Coding unaccompanied alien child cases

It is important that the Immigration Courts code these cases so that they can readily be identified. Courts for many years have used the J-code in ANSIR to designate cases involving children. However, the J-code alone does not permit us to distinguish children who are with a parent or legal guardian from unaccompanied alien children.

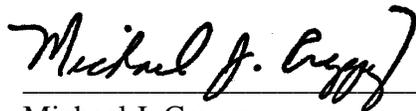
Beginning immediately, court administrators should assign the J-code in ANSIR only to cases where a child in proceedings has a parent or legal guardian in the United States who is providing care and physical custody. Those children, obviously, will not be in the custody of the Department of Homeland Security or the Office of Refugee Resettlement. If, on the other hand, a child in proceedings meets the definition of an unaccompanied alien child -- has no parent or guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody -- the court administrator should use a new ANSIR code, UJ. In most if not all instances, those unaccompanied alien children will be in the custody of DHS or the custody of ORR. The UJ code should remain on the record unless the child is released from DHS custody or ORR custody to a parent or legal guardian. If the court staff or the judge become aware that the child has been released from DHS custody or ORR custody to a parent or legal guardian, the case should be re-coded J-1. The J-1 code should also be used if an unaccompanied alien child attains the age of 18 while still in proceedings.

These new codes should be used for all new case filings. Additionally, for pending cases court staff should change the case identifier from J to UJ if the respondent meets the definition of an unaccompanied alien child.

The use of these three codes is temporary until the new CASE system is operational in all courts. Although it is an interim procedure, it will permit us to report on the number and disposition of unaccompanied alien children cases in our courts.

VII. Training

Immigration judges can play an active part in training programs for pro bono attorneys. Mock trials and other efforts are effective ways of increasing the available pool of representatives. When judges are invited to participate, these requests should be promptly forwarded to OCIJ for approval. Recognizing that docket demands must come first, this office is committed to assisting in such efforts.

A handwritten signature in black ink that reads "Michael J. Creppy". The signature is written in a cursive style and is positioned above a horizontal line.

Michael J. Creppy  
Chief Immigration Judge

Attachment

## Attachment A

The following suggestions are drawn from the Guidelines for Children's Asylum Claims issued by the Immigration and Naturalization Service (now the Department of Homeland Security) in 1998. Specifically, they are found in the section entitled "Child-Sensitive Questioning -- And Active Listening -- Techniques."

As a general rule, use short, clear, age appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask "Who was the person?" rather than "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case ... ?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

Choose easy words over hard ones: use expressions like "show," "tell me about," or "said" instead of complex words like "depict," "describe," or "indicate."

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visual terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.

Avoid the use of technical legal terms in questions, such as "persecuted" or "persecution." Instead of "Were you persecuted?", ask "Were you hurt?"

Use the active voice when asking a question (e.g., "Did the man hit your father?"). Avoid the passive voice (e.g., "Was your father hit by the man?").

Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say ... ?" should be avoided.

Keep each question simple and separate. For example, a question like "Was your mother killed when you were 12?" should be avoided. The question asks about the child's mother and the child's age at the same time.

Generally, avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.

Use open-ended questions to encourage narrative responses. Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired.

Coercion has no place in any hearing. Children are never to be coerced into answering questions during the hearing. For example, telling a child that she cannot leave the hearing until she answers the questions posed by counsel or the judge should never occur.

Do not expect children to be immediately forthcoming about events which have caused great pain.

Before asking how many times something happened, the immigration judge should determine the child's ability to count. Children may try to answer without the requisite skill, resulting in irrelevant, inconsistent, misleading, or erroneous responses.

Children may not know the specific circumstances that led to their flight from their home countries and, even if they know the circumstances, they may not know the details of the circumstances. The child may also have limited knowledge of conditions in the home country, as well as his or her vulnerability in that country. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Imprecise time and date recollection may be a common problem for children. Many aliens, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) Or relational (earthquakes, typhoons, religious celebrations, etc.) events. In response to the question "When were you hurt?", it may not be uncommon for a child to state "During harvest season two seasons ago" or "shortly after the hurricane." To be sure, these answers may appear vague, but they may be the best and most honest testimony the child has to offer.

It should be noted that children can not be expected to present testimony with the same degree of precision as adults with respect to context, timing, and details.



SAMPLE AFFIDAVIT

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE**

**AFFIDAVIT OF JOHN DOE\*  
IN SUPPORT OF APPLICATION FOR  
ASYLUM AND WITHHOLDING OF REMOVAL**

1. I was born in [CITY], Guatemala, on [DATE]. I am [\_\_\_] years old. My mother is Jane Doe and lives in [U.S. CITY]. My father is Jimmy Doe and lives in Guatemala. I am the second of five children; I have four sisters and one brother. Three of my sisters are in the United States: Linda Doe, [AGE], Betty Doe, [AGE], and Lucy Doe, [AGE]. My younger brother Tom Doe, [AGE], and my older sister Cindy Doe, [AGE], remain in Guatemala.

Family life in Guatemala

2. I lived with my parents and my siblings in [CITY] until my mother left us to go to the United States. When we all lived together, my parents argued and fought all the time. My father sometimes got so mad he threw furniture around. He also hit my mother. When he did, me and the other children would get scared and cry and hope he did not beat her too badly. We heard slaps and the sound of her screaming from inside their room. We also heard things being thrown against the walls. Sometimes my mother told us to call our aunts or uncles to come over when my father was hitting her. Once I remember she came out with blood coming from her mouth and a bandage covering her face.
3. My father also hit me and my siblings. He hit me, Tom Doe and Linda Doe the most. I do not remember if he hit my youngest sisters, Betty Doe and Lucy Doe. He hit my sister Cindy Doe as well, but he also bought her nice things like rings

- and other jewelry. My father did not hit us as often when my mother was there because she always tried to stop him. When my mother resisted him like that, he got even angrier.
4. My Aunt Maria Smith – my mother’s sister – told my mother she had to leave my father; that she needed to escape. My aunt told my mother they would find a way to get us children out later.
  5. When my mother left for the United States for the first time, I was about 8 years old. Before leaving, she took me and my siblings to my grandmother’s house. My grandmother’s name is Luisa Smith and lives several hours away from [CITY] by bus. We lived with our grandmother for about six months, but then my father came and took us back home to live with him.
  6. After my mother left, my father changed. He had always had a bad temper, but he became even more aggressive towards us. He yelled at and beat us more often. It seemed like he was directing all of his anger at us now that my mother was no longer there.
  7. My father was a construction worker. He worked about three or four times a week. Sometimes he would go for a long time without working, maybe up to a month. Soon after my mother left, my father told me I was old enough to work. I was around 9 years old. I stopped going to school and started going with my father to the construction site where he worked. He made me work as a bricklayer. I would have to carry large bricks and heavy buckets filled with cement. If I accidentally dropped something, he would become very angry and yell at me and hit me on the head with his knuckles.

8. My brother Tom Doe started working soon after I did. My father told both of us we had to work somewhere, so at first he came with me and my father to the construction site. Later, he worked in the salt mines with me.
9. When I was about 10, I began to fish at night with my neighbor Mario, who was 16. We took Mario's rowboat out to sea and put a big net into the water. One end floated up high, while the other sank beneath the water. I would jump into the water and drag the net back to the boat. Mario and I would then pull the net full of fish into the boat together. We would catch about 50-70 fish at a time, which we cleaned and sold to a man in town. I fished maybe 3 or 4 times a week. We took the boat out around midnight and stayed out until dawn. The water where we fished was very deep, and some fishermen drowned while fishing, but I liked it better than working with my father.
10. Every morning when I got back from work, my father took my money. Then he used it to buy alcohol and bet on card games. He drank with his friends at least once or twice a week. Sometimes they came over to our house; sometimes they went out. They drank beer or liquor, and played cards. My mother told me later that my father had always gone out "onto the streets" to drink and gamble. He lost his money often because he liked to gamble. Once, my father got so drunk that he gambled away our house in a bet. My aunt had to pay off his opponent or we would have lost our house.
11. My father never used our money to buy me or my siblings anything. We never had food, toys, or new clothes. When he went out with his friends, my father left us at home by ourselves all night. He would go out at night and wouldn't return

- until morning. He would leave us to our own devices. This started happening almost every night. Sometimes there was nothing to eat and no money to buy food. When we got hungry, we sometimes went to our neighbor Irma's house, and she would feed us. We went to Irma's house almost 4 or 5 times every week.
12. My father always demanded money from me. If I refused, he would get very angry and beat me. When I was about 10, I told my father that I didn't like what he was doing. I said that he shouldn't spend all our money on drinking and cards. I said he shouldn't leave us home all alone like that. I said what he was doing was wrong. He got very angry. He said I was a rebellious and disobedient son, and called me a *pendejo* ("dumbass"); *hijo de puta* ("son of a bitch") and other bad names.
13. My father hit me maybe two or three times a week. He hit me with his hands all over my body, but mostly on the face and head. Sometimes he hit me with his belt. Once his belt buckle hit my jaw and left a scar there. He also hit me with his open hand, and sometimes with his fist. While I was still on the ground, he would kick me. He would hit me on my back also. My father hit me more when I refused to give him my money. My younger sisters did not work, but my father would hit them if they didn't follow his directions or if they were making too much noise.
14. My mother sent money to us from the United States after she left. My grandmother told me that at first, my mother tried to send the money to our house, but my father would spend the money on himself. Eventually my mother started sending money to my grandmother so we would receive the money. My

- grandmother came to our house about once a month to bring us money so we could buy food. My older sister Cindy Doe would cook for me and my younger siblings.
15. About a year-and-a-half after my mother left, I sent a letter to my grandmother telling her everything that had happened. I told her my father was taking all our money and using it on drinking and cards. My grandmother came to get me and my siblings and took us to live with her. After about two months, my father came and took the younger children back to live with him. They were still small, so they wanted to live with their father. I did not want to go back, so I stayed at my grandmother's house even though my father got angry at this.
  16. My grandmother did not ask me to work. My grandmother had a salt mine, so I stopped fishing and helped my grandmother pack salt from her mine into bags instead.
  17. Shortly after that, my older sister Cindy Doe moved out with her boyfriend, Tommy.
  18. Tommy lived across the street from our house. He and Cindy Doe started dating at some point. I didn't know they were dating or even how they met. Once he came over and started talking to my sister out in the front yard. My father came home and saw them talking. He told her to come inside, and asked her why she was talking to strange boys when he had told her not to. Then he started hitting her with his belt. I felt very bad for her.
  19. Later on, Cindy Doe asked my father if she could go out with a boy; I think it may have been Tommy. My father said okay, but told my sister Linda Doe to follow

- them. When Linda Doe came back home alone later that night, I knew it was probably because my sister was with Tommy.
20. I later found out that Cindy Doe and Tommy had run away to El Salvador, where Tommy was from. When he found out they had gone to El Salvador, my father went all the way there to try and track them down. I knew this because my uncle Colin Doe, my father's brother, asked me why my dad wanted to know how to go to El Salvador. My suspicions were confirmed later when Cindy Doe returned to Guatemala and told me that my father had followed her to El Salvador.
21. Several months passed before Cindy Doe came back from El Salvador. I don't know exactly what happened, but that my father found out Cindy Doe's whereabouts in El Salvador, yelled at her, and tried to get her to come back with him. I know that he returned to Guatemala alone. I think the reason he wasn't able to force her to come back to Guatemala is because Tommy was there to protect her. She was out of touch with the family the whole time she was there. When she came back to Guatemala, my father started to go after her again.
22. I found out later that after Cindy Doe left the house, after she told my grandmother and my aunt Maria Smith that my father had been raping her in her bed at night. She told them that he had been asking her to "do things" in exchange for clothes and jewelry.
23. After my mother heard this, she decided to come back to Guatemala to get Linda Doe, Betty Doe, and Lucy Doe and take them back with her to the United States. My mother was worried that my father would do the same thing to them.
- 24.

## Mother returns to Guatemala

25. My mother came back to Guatemala on Christmas Eve of either 1995 or 1996. I was about 11 or 12 years old. My grandparents, my brother and my father went to greet my mother at the airport. Only Cindy Doe was not with us. From there, we returned to my grandmother's house.
26. When we arrived, my parents began arguing. They went outside to continue arguing. My mother told my father that she wanted to take my younger sisters back with her to the United States. My father got very angry and started to scream at her. He said my mother had gone to the United States to prostitute herself. He asked if she wanted to take my sisters away to prostitute themselves too. My uncle told my father to shut up and shoved him. At the time, I did not know why they were arguing, but my grandmother told me later that it was because my father had done bad things to my sister. My siblings and I were very upset; we were crying.
27. For a short period of time after my mother arrived, my whole family, excluding Cindy Doe, stayed at our old house. Eight days after my mother arrived, my sister Cindy Doe came to visit her. Cindy Doe had not been home since she left to live with her boyfriend Tommy. My parents began to argue. My mother accused my father of everything that had happened with my sister. Cindy Doe said my father had raped her. My mother said that she would put my father in jail. My grandparents took me and my younger siblings away so we couldn't hear. I asked my mother afterwards if what Cindy Doe had said was true. She told me that it was.

28. Later, we returned to live at my grandmother's house, except for my father. He came one day later and began to argue with my mother and sister. He told Cindy Doe that he always bought her everything she wanted. Cindy Doe answered that he "charged her" for those things at night. She was crying and shouting. I could not believe what I was hearing. I felt sick to my stomach. My father did not say anything in response.
29. When we children still lived with our father, my father and sister would sometimes sleep in the same bed. He would sleep wearing only his underwear. I thought that was odd at the time, but could not believe he would do such a thing to her.
30. About two weeks after she arrived, my mother told my father she wanted to get a divorce. They went to see a judge. Afterwards the judge wanted to speak to me and my brother Tom Doe. He asked us whether we thought the house should stay in our mother's or father's name. We told him it should go to our mother. Then he decided who the children should stay with. He decided the girls should go with my mother, and the boys should stay with my father. My mother told me that if the judge had not made me and my brother stay with our father, my mother would have brought all of us back to the United States with her.
31. When my mother left Guatemala for the second time, she left the keys to the house with my aunt, Maria Smith, who gave them to Cindy Doe. Four months later, Cindy Doe moved in with Tommy and their new baby.

32. My mother left Guatemala for the second time in February of [year], taking Linda Doe, Betty Doe and Lucy Doe with her. Tom Doe and I stayed with my father.

#### Mother Leaves for Second Time

33. My father took me and my brother to live with his sister Martha Doe in the capitol, Guatemala City. We stayed there for eight months.
34. While we lived with Martha Doe, my father had a mistress named Sara, a friend of Aunt Martha Doe's. He would buy things for Sara, who lived in [CITY] in Guatemala. Sara had three children of her own. My father still did not buy us anything. He spent all his time with his mistress and not with his children.
35. I learned later that my father knew that Cindy Doe had moved into the house where we used to live and had gone to the house while she was alone. Though Cindy Doe lived in the house for a while, my father would come to the house and threaten her, insult her, and tell her to leave. Once, while Cindy Doe's boyfriend was away, my father arrived with a machete, called her very harsh things like "piece of shit" and "daughter of a whore," and tried to force her out of the house. He would also insult her when he saw her in the street. Eventually, it got so bad that she had to leave the house. I'm not sure what has happened to the house. It may have been sold or one of my aunts may be living there.
36. Around one year later, my father found a job closer to his sister in [CITY], so we moved back to [CITY] to live with his other sister, Maria Doe. We lived with Maria Doe for over a year.

37. During this time, I began working at the salt mines and I applied for school at Colegio Rural Mixto. When mom left for the first time (when I was around 8 or 9 years old), I stopped going to school. My brother also worked in the mines and applied for school. I attended school for two years. Because I went to a school where I could complete two grades per year, it took me two years to get through sixth grade. After I finished 6<sup>th</sup> grade, I stopped going to school. The 6<sup>th</sup> grade is the end of primary school in Guatemala.
38. Aunt Maria Doe treated us very badly. I had to work to pay for the food she gave us. I gave her half the money I earned in the salt mines. Tom Doe and I did all the chores around Maria Doe's house, but her children didn't lift a finger. Maria Doe was constantly yelling at Tom Doe and me. She hit Tom Doe and would try to hit me, although I wouldn't let her. I would tell her, "How dare you try to hit me, I'm not your son."
39. Once Maria Doe sent me to buy 50 logs of firewood, and I couldn't carry all of the wood. It took me a really long time to gather all of the wood, and Maria Doe started yelling, telling me to hurry up, and saying that I should be able to work faster with all the food I was eating. She told me that food wasn't free, and that I was barely paying her anything. I threw logs down and told her carry them. She tried to hit me. I told her that she was yelling at me for no reason because she knew that I couldn't carry everything. Then I walked away.
40. I was upset about the living situation at Aunt Maria Doe's house, and I told my Aunt Martha Doe. Martha Doe advised me to ask my mother if I could come to

the U.S. I called my mother and she said I had to wait until she could send me money.

41. For the five months before I was to leave Guatemala, I stayed with my mother's sister, Aunt Luisa Smith. I didn't talk to my dad for the five months before I left.

### Leaving for Mexico

42. My mom and aunt arranged for me to come to the U.S. and sent me money so I could come.

43. I left Guatemala in [MONTH & YEAR]. I met a lady who agreed to take me to the Mexican border. We traveled by bus and transferred twice along the way. We took three buses in total, spending two or three days traveling on each of them. My mother had given me \$[\_\_\_\_\_] to pay this lady when I arrived in Mexico.

44. In Mexico, I went to a hotel where I called my mother for money for a *coyote*. The *coyote* was supposed to take me to [U.S. CITY], where my mother would give him \$[\_\_\_\_\_] , but because I got caught, I did not have to pay.

45. In Mexico, a Mexican immigration officer approached me, took my money, and told me to get on a bus.

46. Outside the hotel, people were waiting inside a car. We were taken to a house for four days, and then we got in a car and drove towards a river.

47. At the river, we got out and used rafts to cross to the other side. We then walked all night until we were picked up by a van. There were 25 people in the van. The van dropped us off at another place. From there we slept during the day when the sun was strong and walked at night towards the border.

48. One day we were spotted by Immigration. Everyone scattered and ran. I jumped over a fence to escape them. I ran from immigration for three days.
49. I was arrested in [CITY] early in [MONTH & YEAR].
50. I was detained for 2 months. While I was detained, I wrote my brother a letter. I received one envelope in return, inside were two letters: one from my brother and one from my father. In my father's letter, he said that he was sure that because I was in prison I would have to go back to Guatemala and he would look for me when I returned.
51. I left these letters along with my old clothes in the prison.

Release from Detention and Arrival in [U.S. CITY]

52. I was released from detention around [MONTH & YEAR].
53. After being released, I came to [U.S. CITY] and signed up for high school in mid-August. I started school in September 2001.
54. An attorney named [\_\_\_\_\_] called me. I began to meet with her and tell her my story. I don't remember exactly how many times I met with her, but we met many times. She asked me why I came to the U.S. I said it was because my mom is here. She asked me if my mom was here legally. I told [\_\_\_\_\_] that my mom was married to a citizen but didn't have any paperwork.
55. Around five months after I arrived in the U.S., I talked with my father on the phone. My mom and I had phoned him because we wanted him to send us the papers that would make my parents' divorce official. I told him that we needed the papers so that my mom could officially be married to a U.S. citizen, and I

- could stay in the U.S. He told me that he didn't care, and he wouldn't give us the papers. He was very angry with me and told me that if I got sent back to Guatemala, wherever I was, he would find me. This was the only time I spoke with my dad after arriving in the U.S.
56. I lived with my aunt in [U.S. CITY] for a year and a half.
57. I now live with my mother and my three sisters. My mother got married either [MONTH & YEAR] or [MONTH & YEAR] to Julio. She knew Julio for around five months before I came to [U.S. CITY]. In the beginning, they seemed to get along well, but after they got married, problems started. Julio drank, used drugs, was jealous, and stopped working. My mom and Julio began arguing a lot, and after a while, Julio began to hit my mom. When my mom fought back, things got worse. I remember the first time he hit her. They were downstairs and I heard a loud noise, so I went downstairs. Julio had my mom by her hair and he grabbed her neck. I kicked him in the face to protect my mother.
58. Because my mom didn't want her children to live in another violent household, she decided to leave. My mom, my three sisters, and I now live alone. My mother and Julio are still married, but they stopped living together in [MONTH & YEAR].
59. My sisters and I don't talk to my dad anymore. Thinking about the abuse makes me angry and there are times when I will break down and cry because I can't understand how a father could treat his kids the way my dad treated us. I think my dad should be punished for what he did to Cindy Doe.

60. I have been in therapy at [\_\_\_\_\_] since the end of [YEAR]. I started with a man named Luke and saw him for around a month and a half. Then I started to see Nancy every Friday for seven months. For a while I was going once a week, but then switched to once every two weeks because I am working. I started therapy mainly because I was told it would be good for the case, but then he realized it was good to have someone to talk to about everything that was going on. From the beginning, my therapist and I talked about what had happened to me in the past. Then we began to talk about my current life; Nancy counsels me about what to do and what not to do. She encouraged me to not get into fights with my mom's second husband. It is nice to have a way to release my sorrow.

#### The current situation with family in Guatemala

61. Cindy Doe is now living with Aunt Luisa Smith. Cindy Doe has told me that my dad knows she lives in the capital city, but he doesn't know her address. I am not sure how my dad knows that she is in capital city.

62. I haven't talked to Cindy Doe for a while, but my mom has. Cindy Doe told my mom she isn't feeling well, and that every time she remembers what her dad did to her, she feels bad and bursts into tears.

63. About three months ago, my great-grandmother passed away. Cindy Doe went to the funeral. My dad then showed up and yelled at her to come back and live with him. She left the funeral, very upset.

64. I talk to my aunts (my mom's sisters) in Guatemala and my brother every three weeks or so.

65. As of three months ago, Tom Doe no longer lives my dad; he lives with my uncle, Martin Doe. Although my dad technically lives with Martin Doe also, he hardly ever stays there. Tom Doe and my dad rarely see each other, but when they do see each other, they argue.
66. About two-and-a half years ago, I told Tom Doe to come over to the U.S. Tom Doe said he couldn't. When I asked why, he said it was because he was afraid of what our dad would do to him if he tried to leave Guatemala. The last time I talked to Tom Doe was [MONTH & YEAR].
67. I am still terrified of my father. He is a violent and unforgiving man. Because of what my father did to me, my mother, and Cindy Doe, I have a lot of flashbacks and nightmares.
68. I am afraid of what would happen if I went back to Guatemala. My dad has constantly tracked my sister Cindy Doe down and continues to terrorize her to this day. Cindy Doe doesn't have a house, so I couldn't stay with her. If I stayed with another relative, and my dad found out that I was there, he would go looking for me.
69. Due to the circumstance described above, I respectfully request that you grant my petition for asylum.



## SAMPLE BRIEF FILING CHECKLIST

### **Asylum Clinic –Memorandum of Law Filing Checklist**

When you file your memorandum of law in immigration court include the following:

- Cover Letter/Pre-Hearing Statement**
  - State date and time of merits hearing
  - List all documents you plan to submit
  - Give the names of all witnesses and the proposed length of time of testimony for each witness
  - State whether an interpreter is needed
  - State when fingerprint was taken
- Memorandum of Law**
  - Table of Contents
  - Table of Authorities
  - Introduction
  - Statement of Facts
    - Client's Personal Story
    - Country Conditions
  - Argument
  - Conclusion
- Exhibits**
  - Client's Personal Documents
  - Country conditions expert affidavit
  - Psychological assessment
  - Forensic medical exam
  - Lay witness affidavits
  - U.S. Department Country Reports
  - Reports from human rights organizations
  - Relevant newspaper and magazine articles
  - Articles from scholarly journals or books
- Certificate of Service**
- Copy of above for DHS**
- Copy of above for Client**
- Copy of above for File**

### **Asylum Law Clinic – Motion Filing Checklist**

- Cover letter**
- Motion**
- Proposed Order in Triplicate**
- Certificate of Service**
- Copy of above for DHS**
- Copy of above for Client**
- Copy of above for File**

### **Asylum Law Clinic - Immigration Court Filings**

Make sure to have your client printed at least 6-9 months before the individual hearing. Follow fingerprint instructions given to you by DHS Trial Attorney at Master Calendar Hearing.

File documents at least 10 calendar days prior to Merits Hearing – unless otherwise instructed. File documents at 55 E. Monroe Street, Chicago, IL.

- Original to the court - Suite 1900
- Courtesy copy for judge – Suite 1900 (some judges do not want a courtesy copy)
- DHS counsel copy – Suite 1700
- Obtain file-stamped copy for your records—Suite 1900

File motions at least 14 calendar days prior to merits hearing – unless otherwise instructed.

- Original to the court - Suite 1900
- Courtesy copy for judge – Suite 1900 (some judges do not want a courtesy copy)
- DHS counsel copy – Suite 1700
- Obtain file-stamped copy for your records – Suite 1900

## **Asylum Clinic--Affirmative Application Filing Check List**

When filing affirmative application for a client that lives in Chicago, file with Nebraska Service Center. Do not staple any documents.

For more details on assembling the application for NSC, see

[http://www.uscis.gov/files/form/I-589\\_Inst.pdf](http://www.uscis.gov/files/form/I-589_Inst.pdf)

- Cover letter listing documents below**
- G-28 Notice of Appearance as Attorney / Representative**
- Two passport type photographs** (Photograph should be stapled to the form at Part D.)
- Form I-589** (signed by applicant and lawyer)
- Any I-589 supplemental sheets** (signed by applicant)
- Copy of Client's passport**
- Copy of Client's birth certificate**
- Memorandum of Law**
  - Table of Contents
  - Table of Authorities
  - Introduction
  - Statement of Facts
    - Client's Personal Story
    - Country Conditions
  - Argument
  - Conclusion
- Exhibits**
  - Client's Personal Documents
  - Country conditions expert affidavit
  - Psychological assessment
  - Forensic medical exam
  - Lay witness affidavits
  - U.S. Department Country Reports
  - Reports from human rights organizations
  - Relevant newspaper and magazine articles
  - Articles from scholarly journals or books
- Two copies of everything listed above**
- Copy of above for Client**
- Copy of above for File**



SAMPLE ASYLUM BRIEF

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE**

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<b>IN THE MATTER OF:</b>	)	
	)	<b>No.</b>
<b>JOHN DOE</b>	)	
	)	
<b>Respondent</b>	)	<b>Presiding Judge</b>
	)	

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**MEMORANDUM OF LAW AND FACTS**  
**IN SUPPORT OF APPLICATION FOR ASYLUM AND/OR**  
**WITHHOLDING OF REMOVAL**

The asylum applicant, John Doe, by and through his attorney, Vanessa Meléndez Lucas, and law students M. Angela Buenaventura, Jessa DeSimone, and Jennifer Lee of the Children and Family Justice Center at Northwestern University School of Law, has applied for asylum pursuant to § 208 of the Immigration and Nationality Act (the “INA”), 8 U.S.C. § 1158. Mr. John Doe’s asylum request is also a request for withholding of removal pursuant to § 243(h) of the Act, 8 U.S.C. § 1253 (h).

**INTRODUCTION**

John Doe is a citizen of Guatemala who, as a child, fled his home country to escape his father’s persecution. John Doe’s father, James Doe (“Dad”), subjected him to brutal physical abuse and labor exploitation from the time he was about eight (8) or nine (9) years of age. Dad abused John Doe’s other siblings as well with varying degrees of

intensity. John Doe was singled out by his father for particularly frequent and savage beatings because of his open challenge of his father's abusive treatment. Even as a young boy John Doe knew it was wrong for his father to let him and his siblings go hungry. His frequent protests were met with beatings. Dad forced John Doe to leave school at the age of nine (9) to take on dangerous and strenuous jobs. He would then beat John Doe to get his hands on the child's wages. Dad also sexually abused his daughter Cindy Doe on a regular basis until she finally ran away from home at about age fifteen (15).

For years John Doe and his siblings lived in constant fear of their father and his abusive domination. At about the age of sixteen (16), John Doe decided he had had enough. He finally realized that life would never be safe as long as he remained in Guatemala. John Doe was confident that seeking protection from the authorities would be futile in a country with a long established history of failing to protect youth from parental abuse and exploitation. John Doe had no choice but to flee Guatemala.

John Doe should be granted asylum because his Application for Asylum, his Affidavit, and other supporting materials clearly establish that from the time he was a young boy he was subjected to severe and sustained harm that rose to the level of persecution on account of his status as a child member of the John Doe family as well as his political opinion that parents do not have the right to abuse their children. John Doe suffered this past persecution at the hands of his father who acted with impunity and the tacit sanction of Guatemalan society and a legal system unwilling to punish his parental abuse. John Doe has a well-founded fear of future persecution at the hands of his father not only due to the past persecution he suffered but also because he cannot change the fact that he remains Dad's son and cannot and should not change his decision to escape

his father's grip or his political beliefs. These beliefs and John Doe's decision to flee the abuse, marks him (as most other domestic violence survivors) for increased violence at the hands of an abuser seeking to reassert control over his victim.

### **FACTS**<sup>1</sup>

John Doe was born in [CITY], Guatemala, on [MONTH & DATE],<sup>2</sup> and lived in Guatemala until [MONTH & YEAR]. He arrived in the United States on or about May 31, 2001 at the age of [\_\_\_\_].<sup>3</sup> He is now [\_\_\_\_] years old, and is the second of six children; John Doe has four sisters and one brother. John Doe's father, James Doe, as well as John Doe's older sister, Cindy Doe (age \_\_\_\_), and younger brother, Tom Doe (age \_\_\_\_), still live in Guatemala. His mother, Jane Doe (Mrs. Jane Doe), lives in [U.S. CITY]. John Doe and his three younger sisters, Betty (age \_\_\_\_), Lucy (age \_\_\_\_), and Linda (age \_\_\_\_), who live with their mother.

#### ***Young John Doe's Family Life in Guatemala***

Young John Doe and his siblings lived with their parents in the town of [CITY], Guatemala.<sup>4</sup> On or about [YEAR], when John Doe was between ages \_\_\_\_ and \_\_\_\_, his mother left for the United States. John Doe has early memories of his father beating his mother, and recalls their frequent arguments during which John Doe's father often threw furniture around and the children heard the sounds of slaps, screaming, and objects

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<sup>1</sup> All facts derived from "Affidavit of John Doe in Support of His Application for Asylum and/or Withholding of Removal," [hereinafter "John Doe Aff.,"], attached hereto as Exhibit 1. Facts are also based on the Affidavits of Jane Doe [herinafter "Jane Doe Aff.,"] and Maria Smith [hereinafter "Maria Smith Aff.,"], attached hereto as Exhibits 2 and 3 respectively.

<sup>2</sup> See Birth Certificate of John Doe (original in Spanish, certified English translation provided), attached hereto as Exhibit 4.

<sup>3</sup> John Doe filed his application for Asylum and Withholding of Removal on [DAY, MONTH & YEAR] at the age of \_\_\_\_\_. His case has been pending before the Immigration Court since that date; Form I-589 Application for Asylum and for Withholding of Removal, attached hereto as Exhibit 5.

<sup>4</sup> [CITY] is a town located \_\_\_\_\_ of Guatemala---- See Map of Guatemala, attached hereto as Exhibit 6.

hitting walls and the ground. John Doe recalls his father beating his mother so badly that on at least one occasion she emerged from their bedroom with a bloody mouth. Other times, John Doe remembers his mother begging the children to call their aunts or uncles to come over to stop the beatings, but John Doe and his siblings were too scared to seek help.

The abuse continued unabated and eventually John Doe's mother made the decision to flee her husband. Mrs. Jane Doe left Guatemala to the safety of the United States hoping that her family would watch over her children.<sup>5</sup> At the time, John Doe was approximately \_\_\_\_\_ years of age.

### ***Physical Abuse and Labor Exploitation***

Prior to his mother's departure, John Doe's father had already begun physically abusing John Doe and his siblings. However, he usually targeted his wife for the brunt of his brutal control. After their mother's departure, and without her efforts to protect them, the children became the victims of frequent and severe beatings.

After his wife's flight, Mr. Dad eventually forced his sons out of school and into the workforce. To meet his father's demands young John Doe began to work in various dangerous and demanding jobs. As a young child John Doe worked at a construction site with his father.<sup>6</sup> There, the boy was forced to carry large blocks and heavy buckets filled with cement and his father would hit him and berate him when he dropped the loads or did not move fast enough.

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<sup>5</sup> Maria Smith Aff., *supra* note 1 at 2.

<sup>6</sup> *Id.* (“...when he was nine years old he took him out of school and took him as a helper in construction carrying bricks and cement buckets, a very grueling task for a minor...”); *see also* Cindy Doe Aff., *supra* note 1 at 2 (“he took my male siblings out of school and took them to work in construction, to carry bricks and cement buckets something that was very hard on them...”)

To avoid his father's violent temper, John Doe began fishing to earn money between the ages of \_\_\_\_ and \_\_\_\_\_. Young John Doe fished three to four times a week, sometimes from around midnight until dawn, other times during the day. Fishing was very dangerous.<sup>7</sup> John Doe and his neighbor Mario, fished on a small boat from which John Doe would often jump into the water to gather the fishing net back towards the boat so that he and Mario could then pull the net into the boat together. The boy would then have to give every cent earned to his father who always demanded his earnings, often by force. When John Doe refused, his father would beat him. Despite John Doe's hard work he and his siblings often went hungry and would have to beg a neighbor for food at least three times per week.

Later on from approximately ages \_\_\_\_ to age \_\_\_\_\_, John Doe worked in salt mines to make ends meet while living with one of his paternal aunts, Aunt Doe. Every day he engaged in strenuous labor, dragging in heavy bags of salt that were left outside to dry the day before.

### ***John Doe's Challenge of His Father's Abuse***

When it came to his children, Dad asserted control over his offspring with beatings whenever he wanted, which was often. John Doe bore the brunt of the aggression due to his objections to his father's behavior. John Doe thought it wrong for his father to abandon his children every night and to spend the little money the family had (including John Doe's earnings and the money his mother sent for their care) in alcohol,

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<sup>7</sup> John Doe Aff., *supra* note 1 at ¶ 8 (fishermen drowned while working in the deep waters); *see also* Maria Smith Aff., *supra* note 1 at 2 (“...he later sent them to fish at night, at the mouth of the river towards the Pacific Ocean and not only exposed them to the danger, but the money they earned from fishing he took it for himself to drink and play cards...”); Cindy Doe Aff., *supra* note 1 at 2 (“and he would send them to fish at night at the *bocabarra* that is out to sea, a job that is well paid but extremely dangerous and he would take away the money they earned and used it to pay cards and drink liquor...”)

gambling, and fun times with his mistress. And, even as a young child he chose to *voice* his objections with bold candor directly challenging the power dynamics in his household.

John Doe's father not only rejected his son's demands – he decided to beat any insubordination out of his son. Anytime John Doe told his father that he should not spend the family's money on drinking and cards, Dad would physically assault him. He would beat John Doe with his fists and with a belt (one time so severely that the buckle left a scar on John Doe's jaw). He would beat him hard, and kick him on his back while on the ground. These beatings occurred two to three times a week. He would tell his son he was disobedient and rebellious. John Doe never sought help from the police. He did not believe they would help.

Aware of the dismal conditions of her nieces' and nephews' lives, Maria Smith, John Doe's maternal aunt, attempted to reason with their father, exhorting him to send the children to school. Her advances were resolutely refused by Dad who reminded her, in no uncertain terms, she had no business interfering in the way he was "raising *his* children."<sup>8</sup>

#### ***Dad's persecution of John Doe's older sister***

John Doe's father physically abused most of his children. He also sexually abused his eldest daughter Cindy Doe. John Doe does not know how or when it began, but he is certain now that his father raped Cindy Doe on a regular basis after their mother left.<sup>9</sup> As a young boy he thought it strange that his father shared a bed with Cindy Doe and that he would often sleep in his underwear. However, it was not until much later that

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<sup>8</sup> Maria Smith Aff., *supra* note 1 at 2-3 (emphasis added).

<sup>9</sup> *Id.* at 3; See also Cindy Doe Aff., *supra* note 1 at 2.

John Doe became fully aware of his sister's living nightmare. John Doe's father's obsession with controlling the members of his household was limitless. Even after leaving the country and moving to El Salvador with her boyfriend in the hopes of escaping the sexual abuse, Cindy Doe was still targeted by her father who traveled there in an attempt to intimidate her into returning with him to Guatemala.<sup>10</sup>

When Cindy Doe was in her mid-teens the truth of her abuse became known to John Doe's family. It was then that John Doe's mother returned to Guatemala to retrieve the children. Once there she confronted her husband and sought a divorce. Dad merely laughed when faced with the allegations stating "there is no proof."<sup>11</sup> Within weeks a divorce judge granted Mrs. Cardona custody of her daughters but ordered the boys to live with their father. According to John Doe's aunt, under Guatemalan law at the time, girls under the age of eighteen (18) were given to the custody of mothers and boys to their fathers.<sup>12</sup> John Doe's mother soon departed with the three youngest girls for the United States, and once again John Doe and Tom Doe were at the mercy of their father.

Dad continued to hound his daughter (then living with her partner Mauricio in the old family home), threatening her with machetes and insulting her (calling her "piece of shit" and "whore's daughter"). Dad also threatened Cindy Doe's boyfriend and as a result he fled leaving Cindy Doe and her children with her aunt Maria Smith.<sup>13</sup> As recently as early 2005, Dad approached his daughter at a family funeral to demand that she return to

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<sup>10</sup> Cindy Doe Aff., *supra* note 1 at 3; Maria Smith Aff., *supra* note 1 at 3.

<sup>11</sup> Maria Smith Aff., *supra* note 1 at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

live with him. Today, Cindy Doe lives with her aunt Maria Smith who believes “her presence here is also dangerous.”<sup>14</sup>

### *John Doe’s Long Journey to Safety*

After his mother left Guatemala with his younger sisters, John Doe’s life was once again within his father’s control. Although Dad disappeared for weeks at a time, leaving John Doe and his brother Tom Doe with other relatives, he was never gone for long and the teen boy was never far from his grasp. Whenever John Doe saw his father they would eventually argue about Dad’s habits and mistreatment of his children. During these fights, Dad would berate and verbally abuse John Doe and on at least one occasion slapped him forcefully across the face. Dad’s absences from John Doe’s daily life during that time did not provide John Doe with solace or peace. During the time (between one and two years) John Doe lived with his paternal aunt Aunt Doe, both he and his brother were subjected to degrading and emotionally abusive treatment.<sup>15</sup> John Doe and his brother Tom Doe had to work to pay for their meals and were verbally and emotionally abused.

John Doe eventually realized that he would never live a normal, safe life if he remained in Guatemala within his father’s reach. No matter how old he was or who he lived with his father would continue to abuse him. In Guatemala John Doe lived in fear of his father. There was no safe place for him to go. He decided to reach out to his aunt Maria Smith and his mother and seek her help to leave the country and come to the United States.

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<sup>14</sup> *Id.*

<sup>15</sup> Maria Smith Aff., *supra* note 1 at 4.

In [MONTH & YEAR] at the age of \_\_\_\_, John Doe left Guatemala for the United States. He traveled from Guatemala into Mexico and then the United States where he was arrested by immigration authorities in late [MONTH & YEAR] and detained for approximately two months. On or about [DATE], John Doe was released to a maternal aunt, [NAME], in [U.S. CITY] and enrolled in public school shortly thereafter in [MONTH & YEAR].

### ***John Doe's Fear of Return***

After his flight to the United States in [YEAR], John Doe's father threatened to find him if he returned to Guatemala. While in detention in [YEAR], John Doe received a letter from his father stating that he was sure that because John Doe was caught by immigration he would be sent back to Guatemala. He assured his son that he would find him upon his return.

Five months after his arrival in the U.S., John Doe spoke with his father, pleading with him to finalize the divorce from his mother. John Doe's father refused, still very angry with John Doe and reminding him that if he got sent back to Guatemala, wherever John Doe was, he would find him. This is the last time John Doe spoke with his father.

John Doe's father's reaction to John Doe's decision to flee has been so extreme that John Doe's brother Tom Doe is afraid to leave Guatemala. John Doe has spoken with Tom Doe about him leaving Guatemala but his brother has said he is afraid of what their father would do if he tried to leave.

Today John Doe is terrified of his father. This is evidenced by his statement and corroborated by his mental health therapist.<sup>16</sup> In addition to the threats he received

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<sup>16</sup> Affidavit of Therapist, Respondent's therapist, dated July 2005, [hereinafter "Therapist Aff.,"] at 2 ("John Doe is truly scared of his father and what he could do to him"), attached hereto as Exhibit 7.

directly from Dad, John Doe is aware of his father's continuous persecution of his sister. These facts support John Doe's belief that his father's violent nature and obsessive need to control his children have not diminished since his departure. This fact is verified by John Doe's aunt who has stated under oath her belief that John Doe's presence in Guatemala would be "unsafe and perilous."<sup>17</sup> John Doe is still Dad's son and as such will always be vulnerable to his father's wrath and life in Guatemala will never be safe.

### *Life in the United States*

Today John Doe lives with his mother and three younger sisters in [U.S. CITY]. He has graduated from High School and hopes for a future free from fear. John Doe and his sisters no longer talk to their father. For the first time in his life, John Doe lives in a safe environment.<sup>18</sup> Although having a safe home has helped John Doe stabilize, the memories of his experience in Guatemala will not be easily erased and forgotten. Fear of return is part of John Doe's life. John Doe has experienced symptoms consistent with Post-Traumatic Stress Disorder and Depression, including flashbacks.<sup>19</sup> Although he has made significant progress, he still has a long road ahead for complete recovery.<sup>20</sup>

John Doe fled Guatemala because as the son of the persecutor, he will always be targeted for violence and as a child who chose to speak out his deeply held beliefs and later fled the abuse he is highly vulnerable to retaliatory violence.

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<sup>17</sup> Maria Smith Aff., *supra* note 1 at 4; *see also* Cindy Doe Aff., *supra* note 1 at 3 ("My brother John Doe, has been the object of mistreatment at the hands of my father who is angry with him because he left and I do not recommend that he returns.").

<sup>18</sup> *See* Therapist Aff., *supra* note 16 at 3

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 3.

## ARGUMENT

### **I. JOHN DOE SUFFERED PAST PERSECUTION AND HAS A PRESUMED WELL-FOUNDED FEAR OF FUTURE PERSECUTION ON ACCOUNT OF HIS MEMBERSHIP IN A PARTICULAR SOCIAL GROUP THE CHILDREN (SONS AND DAUGHTERS) IN THE DOE FAMILY.**

An applicant may be granted asylum if he or she qualifies as a refugee within the meaning of § 1101(a)(42)(A) of the Immigration and Nationality Act (“INA”), as amended, 8 U.S.C.A. § 1101(a)(42)(a); § 208, as amended, 8 U.S.C. (1994 Ed.) § 1158. Section 1101(a)(42)(A) defines “refugee” as:

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion... 8 U.S.C. § 1101(a)(42)(A) (emphasis added).

An applicant who can demonstrate that he or she has been persecuted in the past on the basis of at least one of the statutory grounds establishes his or her eligibility for asylum. *See In re Chen*, 20 I&N Dec. 16, 17 (BIA 1989). Both the Board of Immigration Appeals (“BIA”) and the Seventh Circuit have recognized past persecution as a basis for granting asylum. *See Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991) (“past persecution creates a presumption in favor of granting asylum”); *see also In re D-C-*, Interim Decision 3253 (BIA 1995); *In re B-*, Interim Decision 3251 (BIA 1995).

Furthermore, John Doe’s past persecution establishes a presumption of a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1). There is a wealth of evidence which demonstrates the reasonableness of John Doe’s subjective fear of return to Guatemala. Moreover, objective evidence regarding the dynamics of intra-familial

violence also supports the reasonableness of this young man's continued fear of persecution.

John Doe is entitled to asylum because he has experienced past persecution on account of his membership in the particular social group of *children (sons and daughters) of the Doe family*. From an early age John Doe and most of his siblings were beaten, verbally abused, forced to labor and all were subjected to extreme neglect by their father, James Doe. Dad also raped his daughter Cindy Doe on repeated occasions. This father targeted John Doe, Cindy Doe and the other siblings because of their status as *his* children. He was particularly brutal in his persecution of John Doe because of his son's vocal objections to his domination and mistreatment and he will continue to hound his son because of his decision to escape his abuse.

John Doe was persecuted by his father with impunity due to his status as a member of the social group of the children of the Doe family. As will be discussed below, John Doe's father cruelly asserted control over the children in this family, namely John Doe and his brothers and sisters. Dad was secure in his ability to inflict sustained and severe physical and emotional pain on his sons and daughters due to the Guatemalan government's well established failure to protect victims of intra-familial violence, including child abuse. Moreover, within Guatemalan society domestic violence is usually tolerated and the abused is expected to be sympathetic toward the aggressor,<sup>21</sup> thus, intervention by law enforcement authorities is rare in what is widely considered a private matter.

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<sup>21</sup> Inforpress Centroamericana, *Domestic Violence in Guatemala* 7 (Aug 1998) [hereinafter "*Domestic Violence in Guatemala*"], attached hereto as Exhibit 8.

In *Lwin v. INS*, the Seventh Circuit set forth a three-prong test to evaluate asylum claims based on social group membership which requires that an applicant: “(1) identify a particular social group; (2) establish that [he] is a member of that group; and (3) establish that [his] well-founded fear of persecution is based on [his] membership in that group.” *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998); *see also Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996). John Doe is able to establish all three requirements.

**A. The children of the Doe Family comprise a recognizable social group which merits asylum protection.**

The viability of a social group for asylum relief purposes hinges on the applicant’s membership in a recognizable “group of persons all of whom share a common, immutable characteristic” and who is targeted for persecution on account of that common and immutable trait. *In re Acosta*, 19 I&N Dec. 211, 232 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Board of Immigration Appeals defined an “immutable characteristic” as “one that the members of the group *cannot change* or should not be required to change because it is *fundamental to their identities* or consciences.” *Id.* at 233 (emphasis added). It may be a trait “such as sex, race, *kinship*, or in some cases, past experiences.” *Lwin v. INS*, 144 F.3d 505, 510 (7th Cir. 1998) (quoting *Acosta*, 19 I&N Dec. at 233) (emphasis added). The Seventh Circuit has adopted *Acosta’s* interpretation of “immutable” in adjudicating social group asylum claims. *Lwin*, 144 F.3d at 512 (holding that parents of Burmese student dissidents share a “common, immutable characteristic sufficient to constitute a particular social group”).

In this case, John Doe Doe is a member of a social group comprised of himself and his siblings. John Doe and his siblings are the biological sons and daughters of

James Doe and Jane Doe. Their familial relationship is immutable, and neither John Doe nor any of his siblings can change their birth lineage, even though they may wish to. Their kinship ties to their parents is a fundamental and intrinsic aspect of their identities. This familial association is a biological fact that creates cultural and legal bonds that cannot be severed

The principle of family membership as the basis for a particular social group initially espoused in *Acosta* has been accepted by all Circuit courts that have considered the issue. *See Thomas v. Gonzalez*, 409 F.3d 1177, 1180 (9th Cir. 2005) (en banc). Federal Courts of Appeal across the country, including the Seventh Circuit, have acknowledged that a family may constitute a “particular social group” within the meaning of §1101(a)(42)(A). In *Iliev v. INS*, the Seventh Circuit noted that “case law has suggested, with some certainty, that a family constitutes a cognizable “particular social group” within the meaning of the law.” *Iliev v. INS*, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (“This court has indirectly treated, for purposes of the well-founded fear analysis, a family as a “particular social group.”); *see also Thomas*, 409 F.3d at 1180 (reconciling “diverging lines of authority” within that circuit and holding that “a family may constitute a social group for the purposes of refugee statutes.”); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (joining the First, Third, Seventh and Ninth Circuits in holding that “‘family’ constitutes a ‘particular social group’ under 8 U.S.C. § 1101(a)(42)(A)”); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (“[t]here can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of a nuclear family.”); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993) (adopting the B.I.A.’s ruling in *Acosta* that “kinship ties” qualify

as a particular social group). Recognizing the immutable nature of familial ties, immigration courts throughout the U.S. have granted asylum to youth in situations similar to John Doe's on account of the persecution they had experienced because of these familial relationships.<sup>22</sup>

In the context of domestic violence, the Department of Homeland Security (DHS) has recognized that a marital relationship may be an immutable characteristic defining a social group meriting asylum protection. In its brief in the case of Rodi Alvarado-Pena, DHS argued that "married women in Guatemala who are unable to leave the relationship" is a formulation that would meet the requirements for a particular social group.<sup>23</sup> DHS reasoned in that case that the applicant's marital status should be considered immutable because her "husband would not recognize a divorce or separation as ending their relationship."<sup>24</sup> Similarly, in this case, John Doe's familial status with respect to his father is immutable.<sup>25</sup> Both John Doe and Alvarado-Pena were targeted by abusers in

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<sup>22</sup> See *In the Matter of E.S.A.M.*, at 17 (EOIR, Phoenix, AZ, Mar. 20, 2003) (granting asylum to a Guatemalan youth who had been abused by her mother and stepfather and holding that the applicant had been persecuted due to her membership in the social group comprised by her "immediate family."), attached hereto as Exhibit 9. In *E.S.A.M.* the immigration court reasoned the applicant was targeted simply due to her familial association as there was "no evidence [she] would have been abused by her mother or stepfather if she were not part of her family." *Id.* at 17-18; *In re Jose*, at 4 (EOIR San Francisco, CA, Feb. 12, 2003) (asylum granted to youth abused by his father on account of his membership in the social group "made up of himself and of members of his family, specifically his siblings and mother," and rejecting DHS' argument that persecutor cannot be a member of the social group targeted), attached hereto as Exhibit 10. *In Re C.E.L.T. et al.*, at 10-11 (EOIR, Memphis, TN, Oct. 7, 2004) (granted asylum to the group of "daughters of [father] who have been or are at risk of being sexually molested by him," reasoning that kinship ties are immutable and thus a nuclear family can be a particular social group.), attached hereto as Exhibit 11; *In the Matter of Dennis Reyes-Diaz*, at 11 (EOIR Los Angeles, CA, Aug 2, 2001) (recognizing persecution of Honduran youth on account of his status as an "immediate family member."), attached hereto as Exhibit 12.

<sup>23</sup> Department of Homeland Security's Position on Respondent's Eligibility for Relief at 15, *In re R - - A - -*, 22 I&N Dec. 906 (BIA 1999), vacated, (Att'y Gen. 2001) (No. A-73-753-922) [hereinafter "DHS's Position Brief *In re R- A-*"].

<sup>24</sup> *Id.* at 20.

<sup>25</sup> Under the Guatemalan Civil Code, children, even after they reach adulthood, owe their parents "honor and respect" and are "compelled to provide them assistance in all circumstances of life." Code Civil [C. Civ.] chap. VII, art. 263 (Guatemala).

their family and are linked to their abusers by ties that cannot be severed.<sup>26</sup> John Doe is a youth who is the son of his abuser. The members of this social group are defined by their biological relationship to their parents, a fact that cannot be altered and which carries legal, cultural and societal implications.<sup>27</sup>

Children and youth like John Doe are targeted by family members, often parents, due to their vulnerable position within their families. When this abuse takes place in a country where no resources are available for the protection of children and where such abuse is tolerated and condoned by the silence and inaction of the government then the applicant is entitled to protection outside his country. As reasoned by an Immigration Judge granting asylum to an abused adolescent from India in 2001:

If the respondent because he [is] “merely” a child lacks protection against abuse by anyone in society *but especially his family*, because the government and society and[sic] general simply do not intervene, *then that child lacks protection of his own state precisely because he is a child and perhaps more definitively because he is the child of people abusing him*, rather than of someone else.<sup>28</sup>

Because John Doe could not change this kinship association to this family and because he was severely abused without any realistic hope of protection by his own government he should be granted asylum.

**B. John Doe’s past persecution was directly linked to his status as the child of the abuser and thus “on account of” his membership in this particular social group.**

The statutory language of § 1101(a)(42)(A) also requires that there be a causal connection between the persecution and one of the five enumerated grounds for asylum –

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<sup>26</sup> A minor child has few legal rights that can be asserted independently of his or her parents. Code Civil [C. Civ.] chap. VII, art 254 (Guatemala); Even after a child reaches the age of majority the societal expectations of obedience and deference remain. Code Civil [C. Civ.] chap. VII, art. 263 (Guatemala).

<sup>27</sup> *Id.*

<sup>28</sup> *In the Matter of D-S-* (EOIR, York, PA, December 28, 2001) at 7-8, (emphasis added), attached as Exhibit 13.

in this case, social group membership. The U.S. Supreme Court has held that persecution is “on account of” an enumerated ground when the persecutor is motivated to act because of the victim’s *status* or belief. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (emphasis added). Further, the Court has held that an applicant need not establish the *exact motive* behind the persecution to show the required connection. *Id.* An applicant needs only establish that a reasonable person would fear that the persecution was based on an enumerated ground. *Matter of S-P-*, Int. Dec. 3287 (BIA 1996). Thus, in order to establish a causal link, John Doe need only show that the persecutor, his father, was motivated to harm him, at least in part, because John Doe was one of his children, and that John Doe held the reasonable belief that his father’s abuse was inflicted for that same reason.

In cases involving domestic violence, the Department of Homeland Security has acknowledged that a person may be subjected to persecution by a private actor “because of the social status that the applicant has within the family relationship...”<sup>29</sup> Noting that such social status within a family is “*highly relevant*” evidence of motive, DHS also recognized the legitimacy of circumstantial evidence such as

patterns of violence [that] are (1) supported by the legal system or social norms in the country in question, and [which] (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society<sup>30</sup>.

In this case, there is ample direct and circumstantial evidence that Dad used violence to enforce his authority over John Doe and his siblings due to their status as his biological children. First, Dad strongly believed in asserting his control as head of the household. He demonstrated this by his abusive treatment of his wife prior to her leaving

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<sup>29</sup> DHS’s Position Brief *In re R- A-*, *supra* note 23 at 35.

<sup>30</sup> *Id.* at 36 (emphasis added).

Guatemala. He continued this domination by removing his sons from school and forcing them to work to provide him with their earnings. He beat John Doe and told him he was disobedient and rebellious. He targeted his daughter for sustained sexual abuse because she was within his control. Dad's behavior was calculated to realize his notions of parental authority and directed toward the only suitable and available victims: his children. The effectiveness of his brutality is best exemplified by Cindy Doe's reflections regarding the horrendous years of sexual abuse:

“He went to the extreme of sexually abusing me at night, for me this was terrible because I had conflicting thoughts, on the one hand my mind would tell me that I owed obedience and respect to my father, on the other hand I thought that this was not right, that my sexual life was supposed to happen when I was mature and was married...”<sup>31</sup>

Dad knew he could abuse his own children because there was nothing he had to fear in a country where law enforcement and society accept this treatment of children and private actors may act with impunity.<sup>32</sup> See *E.S.A.M.* at 16 (Guatemalan culture is one “where parents can do as they please [and] police and society do not interfere with the family unit.”). This context in addition to Dad's pattern of behavior establishes reasons for the abuse or “*nexus.*” See *In re Jose*, at 5 (nexus requirement satisfied where “broader societal reasons for persecution” exist). Similarly to cases involving spousal abuse, in this case John Doe is able to establish the motive for his persecution “because of [his] status in a domestic relationship.”<sup>33</sup>

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<sup>31</sup> Cindy Doe Aff., *supra* note 1 at 2.

<sup>32</sup> Affidavit of [Social Work Expert, L.C.S.W.], dated July 8, 2005 [hereinafter “Prof. Social Work Expert Aff.”] at ¶ 9 (in Guatemala “children are subject to horrendous abuse by their parents who have no cause to fear intervention by the authorities, prosecution, and punishment.”), attached hereto as Exhibit 14.

<sup>33</sup> Asylum and Withholding Definitions, 65 Federal Register 76,588, 76,593 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208), attached hereto as Exhibit 15.

Furthermore, in cases such as this the Guatemalan government's long history of failing to protect children abused by their families establishes the motive for the persecution.<sup>34</sup> See *In re M-T-*, (EOIR, San Francisco, CA, Dec. 19, 2002) (a state's inability or unwillingness to control an actor provides motive for persecution).<sup>35</sup> That is, when the persecution is at the hands of a non-state actor, such as a family member, and is unrelated to a Convention ground, the inability or unwillingness of the State to offer protection for Convention reasons satisfies the causal link.<sup>36</sup> Guatemala's abysmal response to the plight of children physically and sexually abused in effect "legitimizes the domination of the parent [and] deprives the child of effective protection or escape through the system of justice" and as such also constitutes persecution.<sup>37</sup>

**C. John Doe is entitled to a presumption of a well founded fear of return due to his past persecution and because country conditions in Guatemala and the possibility of future persecution have not changed.**

John Doe's past persecution establishes a presumption of a well founded fear of future persecution. 8 C.F.R. 208.13(b)(1).<sup>38</sup> It is the burden of the government to rebut the presumption of well-founded fear by showing that "(1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of future persecution; or (2) the applicant could avoid future persecution by relocating to

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<sup>34</sup> Holbrook, Dane, *Protecting Immigrant Child Victims of Domestic Violence Through U.S. Asylum Law*, 12 Kan. J.L. & Pub. Pol'y 311, 316 (Winter 2003), attached hereto as Exhibit 16.

<sup>35</sup> Attached as Exhibit 17.

<sup>36</sup> United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to "Membership of a Particular Social Group" and "Political Opinion"* 10 (Jan. 9, 2004), attached as Exhibit 18.

<sup>37</sup> Holbrook, *supra* note 34 at 316 ("When a government is not willing or able to intervene in institutionalized inequality and, as a result, violence against women [children] pervades society -- domestic violence becomes de facto public persecution.") (citation omitted); Prof. Social Work Expert Aff., *supra* note 32 at ¶ 5 (under Guatemala's child welfare system "children are vulnerable and protection is almost non-existent").

<sup>38</sup> See also *In the Matter of D-S-*, *supra* note 28 at 41-42 (applying presumption of well founded fear where child had suffered persecution at the hands of his mother "instead of speculating as to whether or not he would have to go back to that situation ...").

another part of the applicant's country of nationality...[where] it would be reasonable to expect the applicant to do so. 8 C.F.R. 208.13(b)(1)(i)(A)-(B). The government cannot meet its burden in this case.

Circumstances in John Doe's native Guatemala or within the John Doe family have not changed in any way that would alter the reasonableness of John Doe's fear of return or his inability to relocate safely within Guatemala.<sup>39</sup> In fact, John Doe's decision to flee the years of abuse has heightened the possibility of future violence at the hands of his father.

**1. Perpetrators of intra-familial violence in Guatemala continue to act with impunity and victims such as John Doe cannot reasonably expect government protection.**

The human rights and children's rights situation in Guatemala remains unchanged, since John Doe's departure. Human rights experts and bodies, including the United Nations Verification Mission in Guatemala (MINUGUA), the Inter-American Commission on Human Rights (IACHR), the United Nations Human Rights Committee and the UN Special Rapporteur on the independence of judges and lawyers, have expressed serious concern about continuing human rights violations, rising levels of crime, and the failure of the state to hold the perpetrators of both past and present abuses to account. They have repeatedly condemned the chronic and systemic weaknesses in the justice system and continuing impunity for those responsible for committing human rights violations.<sup>40</sup> Specifically, Guatemala is facing a national crisis caused by a wave of

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<sup>39</sup> As discussed in Section IV below, John Doe is also vulnerable to future persecution on account of political beliefs his father is aware of and is inclined to punish.

<sup>40</sup> Amnesty International, *Guatemala: No Protection, No Justice, Killing of Women in Guatemala* 8 (2005), [hereinafter Amnesty International], attached hereto as Exhibit 19.

violence against children and adolescents.<sup>41</sup> Child abuse remains a serious problem, and the Public Ministry reporting 798 cases of child abuse in 2004,<sup>42</sup> even while the Network for Non-Violence Against Women reported that an estimated 90% of domestic violence cases go unreported.<sup>43</sup> This rampant abuse can be attributed to two aspects of Guatemalan society, (1) the incapacity of the state to implement protective security measures for children and youth<sup>44</sup>, and (2) the reluctance of citizens to make reports of familial abuse.<sup>45</sup>

A 2001 Report of the U.N. Special Rapporteur found that “crimes against children . . . are not being investigated and continue to go unpunished”<sup>46</sup> and highlighted the widespread failure of the Guatemalan justice system to punish perpetrators of human rights violations.<sup>47</sup> The U.N. Special Rapporteur observed “long delays in the hearing of cases concerning children” and that “children continue to appear before judges without legal representation.”<sup>48</sup> In 2001, the U.N. Committee on the Rights of the Child explicitly stated its concern regarding Guatemala’s “lack of data and appropriate measures, mechanisms and resources to prevent and combat domestic violence, including

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<sup>41</sup> Covenant House, *Guatemala Congress Declares “Day of No Violence Against Children and Adolescents’ In Memory of Nahaman Carmona,”* 2 (June 2005), attached hereto as Exhibit 20.

<sup>42</sup> U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 2004* 15 (Feb. 2005) [hereinafter 2004 Guatemala Country Report], attached hereto as Exhibit 21.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> Guatemala Human Rights Update, *Two Children Killed Daily* vol 16 at 3 (July 2004), attached hereto as Exhibit 22.

<sup>45</sup> Peter Katel, *Children Abandoned: Guatemala’s Young People and Their Search for a Future* 7 (2003), [hereinafter *Children Abandoned*], attached hereto as Exhibit 23.

<sup>46</sup> *Civil and Political Rights Including Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the [UN] Special Rapporteur, Mission to Guatemala*, U.N. Comm’n on Human Rights, 48th Sess., Agenda Item 11, at 23, (2001), attached hereto as Exhibit 24.

<sup>47</sup> *Id.* at 4.

<sup>48</sup> *Id.* at 23.

child physical and sexual abuse, and neglect and the limited number of services for abused children, in particular in rural areas.”<sup>49</sup>

Current research indicates that not only is the state incapable of protecting children and youth, but domestic abuse has been treated as a fact of life, one which Guatemalan society has come to accept as relatively legitimate.<sup>50</sup> The Office of Human Rights of the Archdiocese of Guatemala reported that “[c]hild abuse is a common social practice in Guatemala.”<sup>51</sup> Moreover, the factors that contribute to domestic violence, such as an ingrained patriarchal system and an ethos of “machismo,” continue to exist in Guatemala.<sup>52</sup> According to leading international development agencies and national institutions, such cultural and social norms are manifest in the very high incidence of domestic violence in the family.<sup>53</sup>

John Doe’s persecutor, his father, remains in Guatemala and the country conditions that enabled him to physically and psychologically torment his son without any fear of repercussion from Guatemalan law enforcement officials persist. Documentary evidence of the persistence of intra-family violence in Guatemala shows country conditions have not improved. Thus, John Doe’s fear of future persecution if he is denied protection in the United States is reasonable.

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<sup>49</sup> Concluding Observations of the Committee on the Rights of the Child, Guatemala, U.N. Cmm. on the Rights of the Child, 27th Sess., ¶ 36, U.N. Doc. CRC/C/15/Add.154 (2001), attached as Exhibit 25.

<sup>50</sup> Children Abandoned, *supra* note 45 at 7.

<sup>51</sup> *Id.*

<sup>52</sup> See generally U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 2002* (Mar. 2003), [hereinafter 2002 Guatemala Country Report], attached hereto as Exhibit 26; *Domestic Violence in Guatemala*, *supra* note 21 at 6 (“Three female officers questioned by Inforpress reported that they often try to convince both members involved in the dispute to resolve the problem at the family level to avoid a long and “shameful” process. This indicates that the women officers are often as complicit as their male colleagues in reinforcing “machismo.””).

<sup>53</sup> Amnesty International, *supra* note 40 at 10.

## **2. Internal Relocation is Not a Feasible Alternative to Achieve John Doe's Safety Were He to Return to Guatemala.**

When an asylum applicant has shown past persecution, it is the burden of the government to show that it would be reasonable for him to relocate within the country. See 8 C.F.R. § 208.13(b)(3)(i)(2003). In determining whether internal relocation is a feasible option for an asylum seeker, adjudicators “should consider, but are not limited to considering, whether the applicant *would face other serious harm* in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as *age*, gender, health, and social and *familial ties*.” 8 C.F.R. 208.13(b)(3) (emphasis added). The facts of this case clearly show that internal relocation is not a reasonable alternative for this young man.

After John Doe left Guatemala, his father threatened that if John Doe ever returned, he would come “find” him.<sup>54</sup> All of John Doe’s relocation options were he to return to Guatemala would leave him openly vulnerable to grave danger. Although John Doe has relatives in Guatemala, anyone he could live with is known to his father. Thus, it would not be long before Dad would locate his son. Moreover, Guatemala is a very small country, approximately the size of Tennessee, and all of John Doe’s relatives live within a few hours drive of each other.<sup>55</sup> In the past, John Doe’s relatives were unable to protect him from his father and this reality has not changed given the cultural norms in Guatemala resulting in the “the renewal of the destructive relationship...[as] his father

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<sup>54</sup> John Doe Aff., *supra* note 1 at ¶ 43.

<sup>55</sup> Both Guatemala and the state of Tennessee are approximately 42,000 square miles. See The Geography of Tennessee at [http://www.netstate.com/states/geography/tn\\_geography.htm](http://www.netstate.com/states/geography/tn_geography.htm) (last visited July 7, 2005);

expresses his domination with physical abuse, a pattern that he will again attempt with impunity.” Prof. Social Work Expert Aff., at ¶ 9.

Most likely of all (as more fully discussed in Section VI.B. below), John Doe would have to attempt to eke out an existence in the violent, unforgiving streets of Guatemala where thousands of street children and youth (mostly male and victims of intra-family violence) face a whole new host of horrors.<sup>56</sup> According to the Department of State, abuse of street children remains a serious problem.<sup>57</sup> The majority of street children and youth run away from home after being abused and the life expectancy of a street child is only thirty (30) years.<sup>58</sup> Moreover, even if John Doe returned to Guatemala and moved to another part of the country, he would not be safe from his father. Dad has shown a willingness to track down his children in the past, following John Doe’s sister Cindy Doe all the way to El Salvador when she ran away with her boyfriend. Studies on domestic violence show that a victim’s absence or removal from an area does not necessarily result in protection from an abuser.<sup>59</sup>

Clearly, the situation in Guatemala is as dangerous for John Doe as it was when he left. He cannot return to his family and he has nowhere else to go. Thus, John Doe has no viable relocation option in Guatemala to escape the persecution of his abusive father.

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<sup>56</sup> Consortium for Street Children, *Violence Against Children Within the Family*, (Sept. 2001), attached hereto as Exhibit 28.

<sup>57</sup> 2002 Guatemala Country Report, *supra* note 52 at 25.

<sup>58</sup> *Id.*

<sup>59</sup> See 65 Federal Register, *supra* note 33 at 76,595 (citing U.S. Dep’t of Justice *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act*).

**II. THE BEATINGS, VERBAL AGGRESSION AND LABOR EXPLOITATION JOHN DOE ENDURED AS A CHILD AND TEENAGER WERE PERSECUTION AND MAKE HIS FEAR OF FUTURE HARM REASONABLE.**

The term “persecution” encompasses the “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.” *Begzatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002); *In re Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Physical abuse, even when not life-threatening, will generally constitute persecution when the suffering or harm experienced amounts to more than mere harassment. *Begzatowski*, 278 F.3d at 669; *Miljkovic v. Ashcroft*, 376 F.3d 754 (7th Cir. 2004) (“When discrimination reaches the level of physical violence or threats of violence, it becomes persecution”); *Asani v. INS*, 154 F.3d 719 (7th Cir. 1998) (the conduct in question need not necessarily threaten the petitioner's 'life or freedom,' it must rise above the level of mere 'harassment' to constitute persecution).

As a child and adolescent, John Doe was subjected to beatings and labor exploitation on a regular basis. Dad beat John Doe to quiet his objections to physical and emotional abuse, to hunger, and to neglect. Dad beat John Doe to take away the little money he earned in dangerous construction work or fishing. Finally, Dad beat John Doe because he was his son and, therefore as his father, he could do this with impunity. The violence John Doe was subjected to was severe and sustained. The repeated physical attacks against John Doe were not random mistreatment, but directed aggression to ensure John Doe’s compliance with his father’s will and to punish his views condemning parental abuse. Dad struck his son two to three times a week, either with a belt or with his fist. On a countless number of occasions (too many to give an accurate estimate),

John Doe was struck forcibly with a belt. Once, the buckle on his father's belt hit his jaw, leaving a permanent scar. Dad would strike John Doe until he fell to the ground, but his father did not stop there.<sup>60</sup> On occasion, he would repeatedly kick John Doe while he lay on the ground, helpless.<sup>61</sup> When forced to work in construction, John Doe was often struck when, as a young child, he dropped buckets too heavy to carry.

After his mother fled Guatemala, John Doe and his siblings were the only targets of his father's domination. Dad was fully in control when he engaged in this behavior. He did not go about beating or assaulting strangers for money – he beat *his children* and forced them (John Doe and Tom Doe) into hazardous work to indulge his gambling and drinking habits. He sexually abused his daughter and terrorized her so effectively that at the time not even John Doe was aware of the horrors she was enduring. Dad yelled at the younger girls when they annoyed him.<sup>62</sup>

To compound the physical and emotional toll on these children and despite John Doe's labor, the children often went hungry. To keep from starving, John Doe and his siblings often begged a neighbor for food.

Not only was John Doe forced to endure physical violence against his own person but from a very tender age he was exposed to the severe abuse Dad inflicted on his wife, John Doe's mother. John Doe recalls the screams from his parents' bedroom, his mother's bloodied face and her pleas for help. John Doe also has had to survive the devastating reality of his sister's sexual abuse at the hands of his father. All of this

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<sup>60</sup> John Doe Aff., *supra* note 1 at ¶ 12.

<sup>61</sup> *Id.* The mistreatment John Doe and his siblings were subjected to was undoubtedly physical and emotional abuse as well as neglect under U.S. federal and state laws. See National Clearinghouse on Child Abuse and Neglect Information, *State Statute Series 2005 – Definitions of Abuse and Neglect*, (physical abuse is non-accidental injury to a child and includes striking and kicking “or any action that results in physical impairment of the child.”), attached hereto as Exhibit 29.

<sup>62</sup> John Doe Aff., *supra* note 1 ¶ 3.

trauma has had a significant impact on John Doe’s mental health. John Doe has experienced symptoms consistent with Post-Traumatic Stress Disorder and Depression.<sup>63</sup> John Doe has contemplated suicide.<sup>64</sup> His development of self-esteem and confidence have been impaired and instead he has experienced “intense fear and helplessness..., recurrent and intrusive distressing thoughts about his past, [as well as] some memory lapses to some of his history.”<sup>65</sup> Today, although he has made significant progress and “has hopes for his future,” he remains “truly scared of his father,” and “helpless [and] anxious, and terribly sad” about the possibility of return to Guatemala.<sup>66</sup>

The sustained physical abuse, labor exploitation and exposure to intra-familial violence John Doe endured as a child and adolescent amount to persecution. Although individually each and every instance of violence against John Doe and his siblings may not have risen to the level of persecution, “the cumulative effect of several incidents may constitute persecution.” *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (“Persecution may be found by cumulative, specific instances of violence and harassment toward an individual...by a [persecutor] the government declines to control.”).

**A. John Doe’s tender age at the outset of years of persecution and the long duration of the physical and emotional abuse are critical facts in evaluating the nature of the harm he endured.**

Immigration Courts throughout the United States have acknowledged the special vulnerability of children in families and societies which view intra-familial violence as a private matter not within the purview of law enforcement authorities.<sup>67</sup> As in the cases of

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<sup>63</sup> Therapist Aff., *supra* note 16 at 1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1-2.

<sup>66</sup> *Id.* at 2

<sup>67</sup> See *In Re C.E.L.T., et. al*, *supra* note 22 at 10 (daughter sexually abused by father suffered past persecution); *In Re Jose*, *supra* note 22 at 3 (physical abuse, witnessing abuse of siblings, labor exploitation and education deprivation are persecution); *In the Matter of Dennis Reyes-Diaz*, *supra* note 22 at 11 (child

these children, John Doe was victimized by a parent or guardian without any realistic possibility of protection by the government. The fact that this non-government actor was able to act with impunity and to this day live free from fear of punishment underscores the reality of John Doe's past horror and reasonableness of his fear of future harm at the hands of his father.<sup>68</sup> Moreover, in assessing the severity of John Doe's past experiences this court must consider the fact that he was a young child and adolescent at the time. Pursuant to the *U.S. Guidelines for Children's Asylum Claims* the harm a child fears or the past experience a child has survived may rise to the level of persecution, even if the same harm would not be considered persecution against an adult.<sup>69</sup> This is consistent with the United Nations High Commissioner for Refugee's position that interpreting persecution involves an assessment of the "psychological makeup of individuals and the circumstances of each case."<sup>70</sup> This approach recognizes the special vulnerability of children like John Doe and his sister Cindy Doe to harm such as physical abuse, forced labor and sexual assault.

The Seventh Circuit also recently adopted the view that an applicant's age may be a critical factor in assessing his asylum claim and may "bear heavily on the question of whether an applicant was persecuted or has a well-founded fear of future persecution."

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who was beaten by family members and denied schooling suffered persecution); *Matter of Juan* (EOIR Harlingen, TX March 12, 1998), *aff'd by In re Juan* at 2 (BIA January 20, 1999) (child who was consistently beaten, forced into hard labor and subjected to other forms of cruel treatment was a victim of persecution), attached as Exhibit 30.

<sup>68</sup> See *C.E.L.T.*, *supra* note 22 at 10 (holding that sisters had well-founded fear of future persecution at the hands of father who had sexually abused eldest girl).

<sup>69</sup> Memorandum from Jeff Weis, Acting Director Office of International Affairs U.S. Dep't of Justice Immigration and Naturalization Service to Asylum Officers, Immigration Officers, and Headquarters Coordinators *Guidelines For Children's Asylum Claims*, 19 (Dec. 10, 1998) [hereinafter "U.S. Children's Asylum Guidelines"], attached hereto as Exhibit 31; See also *In the Matter of E.S.A.M.*, *supra* note 22.

<sup>70</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Conventions and the 1967 Protocol Relating to the Status of Refugees* ¶ 52 (Jan. 1992) [hereinafter "UNHCR Handbook"].

*Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) In this case John Doe was regularly beaten by his father with fists and belts and unlike the applicant in *Liu v. Ashcroft*, John Doe’s persecution began much earlier in his life, around the time he was eight (8) or nine (9) years of age and continuing until his flight at the age of 16. *Liu*, at 313 (relatively short detention, hair-pulling and pushing more akin to harassment). John Doe suffered severe physical and emotional harm from the time he was a young child in his native Guatemala and it within that context that this court must hold that his past experiences rise to the level of persecution.

**B. John Doe was persecuted by his Father, a private actor, the Guatemalan government was unable and unwilling to control.**

Harm or suffering which meets the definition of persecution must be inflicted by the government or by a non-governmental agency or actor the government is unwilling or unable to control. A government is unable or unwilling to control a private actor in cases where it “condoned [the persecution] or at least demonstrated a complete helplessness to protect the victims.” *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *see also Bartesaghi-Lay v. INS*, 9 F.3d 819, 821-822 (10th Cir. 1993); *In re Fauziya Kasinga*, 21 I&N Dec. 357 (BIA 1996). The non-governmental actor may be a *family member* who persecutes another family member on account of one of the required grounds through *physical and/or emotional abuse*. *See In re S-A-*, 22 I&N Dec. 1328 (BIA 2000) (granting asylum application to a young Moroccan woman who was repeatedly beaten by her father and holding that the persecution she suffered was “on account of her religious beliefs”); *See also Faruk v. Ashcroft*, 378 F.3d 940, 943 (9th Cir. 2004) (“There is no

exception to the asylum statute for violence from family members; if the government is unable or unwilling to control persecution, it matters not who inflicts it.”).

### **1. Child abuse and labor exploitation of children in Guatemala.**

In Guatemala children like John Doe and his siblings can be beaten, sexually assaulted and forced into virtual slave labor by family members (particularly parents) with impunity.<sup>71</sup> Violence against children within the home in Guatemala is “alarmingly widespread” and is present within all communities.<sup>72</sup> In October 2002 the National Commission Against Child Abuse (CONACMI) reported that more than 4,000 Guatemalan children are treated for physical abuse injuries in hospitals every year and a CONACMI 2000 opinion poll “estimated that seven out of ten children were abused daily[.]”<sup>73</sup> According to the U.S. Department of State as of 2004, “[c]hild abuse remained a serious problem”<sup>74</sup> and out of 4,580 complaints of family violence against women and children during the year; none of the cases came to trial and an estimated 90 percent of the cases went *unreported*.<sup>75</sup> Children are considered the property of family, so local

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<sup>71</sup> See *In Matter of E.S.A.M.*, *supra* note 22 at 16 (Finding child abuse in Guatemala “prevalent” in a culture “where parents can do as they please [and] police and society do not interfere with the family unit.”)

<sup>72</sup> Caroline Moser & Cathy McIlwaine, *Violence in a Post-Conflict Context: Urban Poor Perceptions from Guatemala* 4, 57, (Dec. 2001), sections cited attached hereto as Exhibit 32.

<sup>73</sup> Guatemala Human Rights Update, *Rights of the Child* vol 14 at 4 (Oct. 15, 2002), available at <http://www.ghrc-usa.org/Publications/v14no19.pdf>, attached hereto as Exhibit 33.

<sup>74</sup> 2004 Guatemala Country Report, *supra* note 42 at 15. The Dep’t of State has consistently reported Guatemala’s failure to adequately protect its children from abuse. In its all its reports between 1999 and 2004, the Department of State reported “Violence and discrimination against women persisted, as did societal abuse of children.” *Id.* at 1; U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 2003* at 2 (Feb. 2004), [hereinafter 2003 Guatemala Country Report], attached hereto as Exhibit 34; 2002 Guatemala Country Report, *supra* note 52 at 2; U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 2001* at 2 (Mar. 2002), [hereinafter 2001 Guatemala Country Report], attached hereto as Exhibit 35; U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 2000* at 2 (Feb. 2001), [hereinafter 2000 Guatemala Country Report], attached hereto as Exhibit 36; U.S. Dep’t of State, Bureau of Democracy, Human Rights, & Labor, *Guatemala: Country Reports on Human Rights Practices – 1999* at 2 (Feb. 2000), [hereinafter 1999 Guatemala Country Report], attached hereto as Exhibit 37.

<sup>75</sup> 2004 Guatemalan Country Reports, *supra* note 42 at 14 (emphasis added).

and/or national intervention by authorities is rare.<sup>76</sup> According to a local NGO leader, “the police believe that children need to be disciplined and so would not intervene in cases of intra-family violence, unless perhaps shots were fired.”<sup>77</sup> The very few abused children removed from their homes are often placed in facilities with delinquent youths.<sup>78</sup> However, removing a child from the home is rarely done.<sup>79</sup>

The staggering incidence of domestic violence in Guatemalan society<sup>80</sup> is evidence of the lack of state protection for child abuse victims, the state’s failure and unwillingness to prevent and punish violence within the home and a good indicator of the dismal status of children within these troubled families. Domestic violence studies over the last twenty years “have revealed that in families where women are abused, many of their children also are mistreated.”<sup>81</sup> These studies show that between thirty (30) percent and sixty (60) percent of children of battered mothers are abused themselves.<sup>82</sup> In 1996 Guatemala passed legislation regarding domestic abuse but addressed the issue as a “health problem, not a crime”<sup>83</sup> since “domestic abuse itself is not punishable by prison sentences,” and providing for assault charges “only if bruises from the abuse remained visible for at least ten days.”<sup>84</sup> Not surprisingly, the law has yielded minimal response on

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<sup>76</sup>Immigration and Refugee Board of Canada, *Guatemala: In instances of familial child abuse (physical and sexual): services available (government, NGO’s, Church); police intervention, arrests, charges; government authority to intervene; if interventions occur; variances between rural and urban cases*, 1 (Nov. 2001), attached hereto as Exhibit 38.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citations ommited).

<sup>79</sup> *Id.*

<sup>80</sup> See generally 2004 Guatemalan Country Reports, *supra* note 42.

<sup>81</sup> National Council of Juvenile & Family Court Judges Family Violence Department, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* 9 (1998), sections cited attached hereto as Exhibit 39.

<sup>82</sup> *Id.*; See also The National Clearinghouse on Family Violence, *Wife Abuse—The Impact on Children*, at 2, attached hereto as Exhibit 40.

<sup>83</sup> Women’s Legal Rights Initiative, *Guatemala: Women’s Legal Rights Initiative of the Women in Development IQC Assessment and Analysis Report* 8 (September 29, 2003).

<sup>84</sup> 2004 Guatemalan Country Reports, *supra* note 42 at 14.

the part of law enforcement officials and attorneys<sup>85</sup> and few law enforcement officers have received “any training in victim’ assistance or working with domestic violence.”<sup>86</sup> Rather, police often try to resolve domestic disputes instead of taking legal action, as domestic violence is still considered a private problem that remains in the home.<sup>87</sup>

In addition to the brutal beatings he was subjected to at home, John Doe was also forced into virtual slave labor at an early age. He, like many other children had no meaningful recourse to escape this exploitation. While formal measures of protection to end child labor in Guatemala exist on paper, these do not translate into practice. Under Article 102 of the Guatemalan Constitution, minors under the age of fourteen (14) are prohibited from working if they do not have authorization from the Ministry of Labor.<sup>88</sup> Yet as of 2000, according to the Guatemalan Archbishop’s Human Rights Office, 23% of children between the ages of ten (10) and fourteen (14) were working.<sup>89</sup> For years, State Department Reports on human rights in Guatemala cite child labor as a problem.<sup>90</sup> Despite the Guatemalan government’s contention that it is dealing with this issue, as of 2003 the International Labor Organization (ILO) reported that Guatemala leads Central

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<sup>85</sup> *Domestic Violence in Guatemala*, *supra* note 21 at 2-3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 3-5; According to the U.S. Department of State, “in many cases the police do not respond to calls for help. [A watch-dog group] reported that officers who do arrive often chastise female victims for behavior that provokes their husbands’ ire.” 2003 Guatemala Country Report, *supra* note 74 at 16. In fact, much of the violence against women is categorized by the police as “crimes of passion” or “due to personal problems” and so are not investigated or are de-prioritized. Amnesty International, *supra* note 40 at 19.

<sup>88</sup> U.S. Dep’t of Labor, Bureau of International Labor Affairs, *Guatemala* at 2 (May 26, 2005), [hereinafter DOL], attached hereto as Exhibit 41.

<sup>89</sup> EFE News Service, *Two Million Children Work in Guatemala* 1 (Sept. 16, 2000), attached hereto as Exhibit 42; *see also* “The Plight of Coffee’s Children,” 174 *Tea and Coffee Trade J.* Issue 1 (Jan./Feb, 2002) (The legal working age for children in Guatemala is 14-18, according to Guatemalan Labor Law), attached hereto as Exhibit 43; Camille B. Social Work Expert, *Survey of the Literature – Guatemala* at 6 (Jan. 2003) (UNICEF and Save the Children estimate that approximately two million children work), attached hereto as Exhibit 44.

<sup>90</sup> 1999 Guatemala Country Report, *supra* note 74 at 24; 2000 Guatemala Country Report, *supra* note 74 at 31; 2001 Guatemala Country Report, *supra* note 74 at 28; 2002 Guatemala Country Report, *supra* note 52 at 31; 2003 Guatemala Country Report, *supra* note 74 at 18; 2004 Guatemala Country Report, *supra* note 42 at 16.

American countries in the absolute number of child workers, 957,530, close to half of all child laborers in Central America.<sup>91</sup> Moreover, twenty-three percent (23%) of children between the ages of five (5) and seven (7) in Guatemala work, the highest percentage in Central America<sup>92</sup> And there is no sign of relief in sight: Guatemala's child labor rate *tripled* in less than ten years, from 7.9% in 1994 to 23.5% in 2002.<sup>93</sup> These statistics indicate that the Government of Guatemala is failing to implement its international obligations to protect the lives and human rights of its most vulnerable citizens.

**2. Seeking protection from the Guatemalan government would have been futile.**

John Doe, a mere child of \_\_\_\_ at the onset of the abuse, never sought help from the police because he thought they would not intervene.<sup>94</sup> This fact does not adversely affect his eligibility for relief. *See In re S-A-*, 22 I&N Dec. 1328, at 1333 (finding it was futile to seek police protection from father's abuse in light of religious and cultural norms as well as State Department report corroborating ineffective legal system). Children rarely seek affirmative help to stop physical abuse, particularly when the abuser is the child's caretaker.<sup>95</sup> As detailed further below, John Doe was persecuted by his father in a

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<sup>91</sup> Nefer Munoz, *Central America: More Than 1.9 Million Child Workers*, (Apr. 2003), attached hereto as Exhibit 45.

<sup>92</sup> Nefer Munoz and Abraham Lama, *Every Day More Children Go to Work*, (Dec 2002), attached hereto as Exhibit 46.

<sup>93</sup> Caribbean Update, *Child Labor Rate Triples*, (June 1, 2003), attached hereto as Exhibit 47.

<sup>94</sup> John Doe Aff., *supra* note 1 at ¶ 36; *see also* 2003 Guatemala Country Report, *supra* note 74 at 16 ("The Law to Prevent and Sanction Intra-family Violence requires the [police] to intervene in violent situations in the home. The press reported that in many cases the police did not respond to calls for help."); Social Work Expert, *supra* note 95 at 8 ("Most of the population in rural Guatemala continues to see state law and state institutions as arbitrary, distant and ineffective.")

<sup>95</sup> Prof. Social Work Expert Aff., *supra* note 32 at ¶ 7 ("children are seldom the source of complaints, but rather that responsibility falls to the adults..."); *see also* Department of Justice, Nova Scotia, Canada, available at <http://www.gov.ns.ca/just/childAbuse.htm> ("Very seldom will a child disclose abuse immediately after the first incident has occurred. Victimized children often experience a great sense of helplessness and hopelessness and think that nobody can do anything to help them. Also, victimized children may try to make every attempt to protect an abusive parent. Or, they may be extremely reluctant to report any abuse for fear of what the abuser may do to them."); *see generally* John Bowlby, *A Secure Base:*

country where “it is inconceivable that a complaint by a child would occur or be accepted by authorities as most children are subject to physical punishments and are considered the property of adults.” Prof. Social Work Expert Aff., at ¶ 7. In Guatemala child abuse has “persisted” and “increased” continually for years<sup>96</sup> and the State Civil Police was reportedly at that time “one of the main perpetrators of [child] torture.”<sup>97</sup> Moreover, it is not reasonable to charge John Doe, a young child at the time, with the sole responsibility of seeking government protection. In cases such as this, where the applicant is a child and the persecutor is a parent, it is reasonable to envision a situation where it would be almost impossible for a child to escape the persecutor’s physical and psychological domination to seek outside help.<sup>98</sup> Even assuming John Doe had approached the police for help, the available evidence overwhelmingly shows they would have been unable or unwilling to assist him.<sup>99</sup> Like the applicant in *S-A-*, John Doe would have had to return home to face his father and his wrath. *Id.* at 1335 (granting asylum despite failure to seek protection where evidence showed “government would have been unable or unwilling to control her father’s conduct”.)

### **III. JOHN DOE HAS A WELL FOUNDED FEAR OF FUTURE PERSECUTION EVIDENCED BY HIS GENUINE UNWILLINGNESS TO RETURN TO GUATEMALA AND HIS CONTINUED MEMBERSHIP IN THE TARGETED SOCIAL GROUP.**

To establish a well-founded fear of future persecution, an applicant does not need to show a clear probability of future prosecution; rather, an applicant need only show a

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Parent-Child Attachment and Health Human Development (Basic Books 1989) (series of lectures by a prominent British psychiatrist exploring the nature and importance of early child-caregiver bonds).

<sup>96</sup> See e.g. 2004 Guatemala Country Report, *supra* note 42 at 1.

<sup>97</sup> The World Organization Against Torture (OMCT), *Rights of the Child in Guatemala* 15 (Geneva 2001), attached as Exhibit 48.

<sup>98</sup> John Doe Aff., *supra* note 1 at ¶ 2.

<sup>99</sup> See *In the Matter of D-C-G-* (EOIR San Francisco, CA, January 29, 2003) (granting asylum to a Guatemalan victim of domestic violence finding that “[her] belief that it would have been futile to seek the protection from the authorities of her country was entirely reasonable.”), attached as Exhibit 49.

*reasonable* possibility of future persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *INS v. Stevic*, 467 U.S. 407, 424-25 (1984) (emphasis added). A reasonable possibility exists when there is a mere *ten percent chance* of an applicant facing persecution. *Cardoza-Fonseca*, 480 U.S. at 431, 440 (emphasis added). A well-founded fear of future persecution is determined on a case-by-case, fact-specific basis and it encompasses both objective and a subjective elements. 8 U.S.C. §§1101(a)(42), 1158(b)(1); *Useinovic v. INS*, 313 F.3d 1025, 1030 (7th Cir. 2002). To satisfy the subjective component, an individual must show that he or she has a genuine fear of returning to his or her home country. *Asani v. INS*, 154 F.3d 719 (7th Cir. 1998). To satisfy the objective component, an individual must demonstrate that a *reasonable person in his or her circumstances* would fear persecution if forced to return to his or her native family. *Useinovic*, 313 F. 3d at 1030 (citing *Cueves v. INS*, 43 F.3d 1167, 1170 (7th Cir. 1995)).

**A. John Doe’s fear is genuine and the long years of severe physical and emotional abuse have taken a toll on his psychological well-being.**

John Doe has demonstrated his subjective fear of future persecution at the hands of his father. He has asserted he is fearful of returning to Guatemala because of the physical and psychological abuse, exploitation, and explicit threats he experienced at the hands of his father.<sup>100</sup> John Doe has stated he is afraid that if he returns to Guatemala, his father will find him and severely harm him. Moreover, during a telephone conversation with this father after his arrival in the United States, Dad assured his son that he would find him if he returned to Guatemala. John Doe’s subjective fear is also demonstrated by the psychological trauma he suffered as a result of the abuse. As is evidenced by his

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<sup>100</sup> See also Therapist Aff., *supra* note 16 at 2 (reporting that the thought of returning to Guatemala makes John Doe feel “scared, helpless, anxious and terribly sad”).

long-term therapy, John Doe still dwells on the painful memories of his father's physical attacks on him and his siblings. Moreover, John Doe's aunt Maria Smith has made it clear that he is not safe if he returns and that she fears Dad may retaliate against his son.<sup>101</sup>

**B. John Doe's fear of future persecution is objectively reasonable as he remains a "child" member of this family and the persecutor is still inclined to victimize members of this particular social group.**

There is ample objective evidence supporting the reasonableness of John Doe's fear of return. John Doe remains his father's son and as such he will continue to be targeted for abuse. For years, John Doe's father terrorized his children without fear of repercussion from authorities because of the general "culture of silence" that pervades Guatemalan society<sup>102</sup> and the government's dismissive approach towards domestic violence and child abuse. This reality has not changed. Mr. Cardona Sandoval continued to threaten John Doe's sister with impunity despite her efforts to distance herself from him. Over the last few years (starting prior to John Doe's exit from Guatemala) on repeated occasions, Dad has terrorized Cindy Doe with violence, threats and insults. As recently as a few months ago, Dad began to harass Cindy Doe at a family funeral insulting her and demanding that she return to live with him.<sup>103</sup>

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<sup>101</sup> Maria Smith Aff., *supra* note 1 at 4; *see also* Cindy Doe Aff., *supra* note 1 at 2 (John Doe's sister warns in her own sworn statement that her father "is angry with [John Doe] because he left and I do not recommend that he returns.").

<sup>102</sup> Among the many ramifications of Guatemala's thirty-six years of internal conflict is a *cultura de silencio* (culture of silence). This culture developed as a means of survival from the sheer fear, terror and repression forced upon innocent civilians during nearly four decades of civil war. During the many decades of Guatemalan armed conflict, no one in society could be trusted. Silence continues to permeate throughout modern Guatemalan communities. This partially explains why individuals are reluctant to seek help from the state. Moser & McIlwaine, *supra* note 72 at 4.

<sup>103</sup> John Doe Aff., *supra* note 1 at ¶ 48.

Moreover, John Doe's experience of abuse at his father's hands place him at heightened risk for continued persecution should he be forced to return. Domestic abuse experts have noted a batterer's central objective in abusing his victim is to exert power and control over her.<sup>104</sup> John Doe's father's actions have the same purpose: to dominate his offspring and punish any challenge to his authority. John Doe's father would target John Doe if he returned to Guatemala because this is the only way he can reassert his power over his son. The U.S. Department of Justice has acknowledged that past physical abuse in a domestic situation typically indicates the likely continuation of the physical abuse in the future: "[I]n relationships involving domestic violence, past behavior is a strong predictor of future behavior."<sup>105</sup> Domestic violence is generally cyclical and repetitive<sup>106</sup> and "centers on power and control over the victim."<sup>107</sup> According to Prof. Social Work Expert, a social worker with over forty years of experience in the field of child welfare, and who has extensive knowledge of the child welfare system in Guatemala, "if John Doe is forced to return to Guatemala, he will have a very uncertain future with little chance of escaping violence from [] his father..."<sup>108</sup> Thus, the most

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<sup>104</sup> New York State Office for the Prevention of Domestic Violence, OPDV Bulletin 6 (1994) (The "Power and Control Wheel," which was developed by the Domestic Abuse Intervention Project of Duluth, Minnesota and modified by the New York State Office for the Prevention of Domestic Violence, shows the many techniques batterers use to achieve power and control), attached hereto as Exhibit 50; *See also*, Carole Warshaw & Anne L. Ganley, *Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* 23-24 (2d ed. 1996), ("Domestic violence is purposeful and instrumental behavior. The abuse is directed at achieving compliance from or control over the victim....[T]he perpetrators' intent is to get something from the victims, to establish domination over them"), sections cited attached hereto as Exhibit 51.

<sup>105</sup> Asylum and Withholding Definitions, 65 Federal Register, *supra* note 33 at 76,595 (Dec. 7, 2000) (*citing* United States Department of Justice, *Understanding Domestic Violence: A handbook for Victims and Professionals*)

<sup>106</sup> Erin L. Han, *Mandatory Arrest and no-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. Third World L.J. 159, fn. 50 (2003) (Citing Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present*, reprinted in *Battered Women and the Law* 65 (Clare Dalton & Elizabeth M. Schneider eds., 2001)).

<sup>107</sup> Maria Lugones, *Violence Against Women in the International Community*, 7 Cardozo J. Int'l & Comp. L. 205, 318 (1999).

<sup>108</sup> Prof. Social Work Expert Aff., *supra* note 32 at ¶ 9.

compelling evidence of the possibility of John Doe’s future persecution is the physical and psychological violence he endured at the hands of his father in Guatemala.

**C. John Doe’s decision to flee his father’s persecution places him at grave risk of further violence if he is forced to return to Guatemala.**

In cases involving family violence, “when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control.”<sup>109</sup> According to the Department of Justice, “the risk of lethality to the victim is typically greatest when [the victim] attempts to escape the abuse, and in contrast to other persecution cases where the persecutor’s desire to harm the victim may wane if the victim leaves, the victim’s attempt to leave typically increases the abuser’s motivation to locate and harm [him].”<sup>110</sup> Victims of domestic violence who have fled their abusers face an increased risk of being found by their abuser because the close nature of their relationship likely means that the abuser possesses or has access to information about where the victim would most likely flee.<sup>111</sup>

Similarly, John Doe’s decision to flee his tormentor places him at a higher risk of harm should he be returned to Guatemala, within reach of his abuser. John Doe’s father has explicitly told him that should he return to Guatemala, he will find John Doe no matter where he is.<sup>112</sup> Moreover, there is no need to speculate about what would happen to John Doe if his father has the chance to exact retribution. Dad’s threats, assaults, and verbal abuse of Cindy Doe provide a picture of the danger John Doe would face if he returned to Guatemala. Although John Doe’s sister fled her abusive household, had a

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<sup>109</sup> Asylum and Withholding Definitions, 65 Federal Register, *supra* note 33 at 76,595 (Dec. 7, 2000).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> John Doe Aff., *supra* note 1 at ¶¶ 41, 43

common law husband, children of her own, and became an adult, her father still pursued her, threatened her, and tried to force her back into the household.

Although John Doe's brother, Tom Doe, continued to live with his father, Tom Doe chose to remain silent about his father's abuse. He did not openly challenge his father's authority, either by verbalizing his opposition to the abuse or by fleeing his father as Cindy Doe and John Doe have. In fact, John Doe has encouraged Tom Doe to leave Guatemala but his brother has said he cannot because he is afraid of what their father would do if he tried to leave.<sup>113</sup> John Doe's father's past violent and disproportionate responses to his son's challenge of his father's abuse suggest that his retaliation for John Doe's escape will also be violent.

John Doe merits a grant of asylum because despite his decision to escape his abuser he will never be able to dissolve the relationship between himself and his father, regardless of his age or actions. John Doe will always be his father's son, and thus always a target of his abusive domination.

**IV. JOHN DOE SUFFERED PAST PERSECUTION AND HAS A WELL-FOUNDED FEAR OF FUTURE PERSECUTION ON ACCOUNT OF HIS VIEWS AGAINST CHILD ABUSE AND NEGLECT WHICH CONSTITUTE A POLITICAL OPINION.**

The evidence in this case shows that John Doe's long history of abuse at the hands of his father was the result not only of his status as the persecutor's son but also

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<sup>113</sup> John Doe Aff., *supra* note 1 at ¶49.

due to John Doe's outspoken opposition to his father's behavior. An asylum applicant does not bear the unreasonable burden of demonstrating the exact motive for the persecution. *Matter of S-A*, 22 I&N Dec. at 1328, *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1998). Where a persecutor has multiple motives to harm the applicant, only one of these must be on account of one of the five statutory grounds. *Matter of S-P-*, Int. Dec. 3287, at 12 (BIA 1996); *see also* Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2000) (“[I]t is not necessary for an applicant to show that his or her possession of a protected characteristic is the sole reason that the persecutor seeks to harm him or her.”) (citations omitted).

Although there is no commonly accepted definition of political opinion, in general, courts have not limited the concept to matters of governmental criticism or membership in a political party or group. In fact, the notion of a political opinion has been defined to include *opinions based on social issues* as well. The Third Circuit, for example, has held that *feminism* qualifies as a political opinion within the meaning of the relevant statutes. *Fatin*, 12 F.3d at 1242. The Ninth Circuit has held that a woman who resisted violence by an intimate companion was expressing a political opinion when she fled the country. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987). And the Seventh Circuit has stated that “political opinion” language in the asylum and withholding of deportation statutes is not necessary limited to traditional associations with one political party or faction.” *Sanon v. INS*, 52 F.3d 648, 652 (7th Cir. 1995).<sup>114</sup> Since he was a young child, John Doe possessed a deeply held belief that his father's

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<sup>114</sup> *See also e.g. Pellumb Qorraj v. Ashcroft*, 2004 U.S. App. LEXIS 1423 (U.S. App., 2004) (interpreting the concept of "political opinion" broadly); *Moghaddam v. INS*, 1996 U.S. App. LEXIS 15134 (U.S. App., 1996) (We note, however, that "feminism" more appropriately refers to a political opinion than a particular social group and analyze the claim as such.)

behavior was wrong and intolerable. He believed that his father had no right to abuse his children.<sup>115</sup> This belief was so deeply entrenched in his identity that he risked his physical safety rather than remain quiet.<sup>116</sup> To obtain asylum based on well-founded fear of future persecution due to political opinion, an applicant must show evidence that (1) he has been a victim of persecution; (2) he holds a political opinion; (3) his political opinion is known to his persecutor; and (4) the persecution has been or will be on account of this political opinion. *INS v. Elia-Zacarias*, 502 U.S. 478, 117 L. Ed. 2d 38, 112 S.Ct. 812 (1992). John Doe meets all these criteria and should be granted asylum.

According to the UNHCR, “what makes an action or opinion political or non-political is the social structure and therefore depends on the social context within which the action in question is deemed to take place. The concept has been well-established in refugee studies.”<sup>117</sup> John Doe’s active opposition to his father’s abuse in the context of a society and culture that condones such practices constitutes a political opinion. As in the case of women who oppose culturally or religiously imposed restrictions on their basic human rights, John Doe’s opposition to his father’s abusive domination is political.<sup>118</sup>

John Doe’s father was aware of his son’s political beliefs and persecuted him on this account. Courts have recognized that a political opinion can be expressed by action, including failure to comply with norms or rules. *See e.g. Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994). John Doe’s

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<sup>115</sup> John Doe Aff., *supra* note 1 at ¶ 11.

<sup>116</sup> *Id.* at ¶ 11,12, 36

<sup>117</sup> Immigration Appellate Authority, *Asylum Gender Guidelines* at 35 fn. 83 (Nov. 2000) (citing a letter from Patrick Tigere, Legal Adviser Standards and Legal Advice Section, Department of International Protection UNHCR Geneva to IAA dated 20 February 2000).

<sup>118</sup> *See e.g.* Office of the General Counsel, United States Immigration and Naturalization Service, United States Department of Justice, *Considerations for Asylum Officers Adjudicating Claims from Women* (May 16, 1995) (recognizing that a woman who “demonstrate[s] a well-founded fear of persecution on account of her beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion.”), attached hereto as Exhibit 52.

deep convictions about his right to live free of abuse and his right to express his opinions even as a young child are an integral part of his identity and were an obvious trait in his daily life in Guatemala. His repeated challenges to his father's brutal imposition of authority and neglect of his children, as well as his bold refusal to turn over his wages despite the surety of a beating were more than mere adolescent rebellion.<sup>119</sup> These were the unique ways John Doe expressed his disapproval of culturally sanctioned notions of parental authority from which there was no safe refuge within Guatemala. His eventual flight from his home country was his last audacious assertion of independence and statement of rejection of continued subjugation to his father's will. *See Matter of A and Z*, A72-190-893, A72-793-219 (EOIR, Arlington, VA, Dec. 20, 1995) (granting asylum to woman fleeing domestic violence on the bases of both social group and political opinion).<sup>120</sup>

James Doe persecuted John Doe "on account of" his political opinion; when John Doe resisted his father's complete authority, his father often beat him. The pattern and predictability of the beatings demonstrates the causal connection between John Doe's expression of his political opinion and persecution by his father. [\*Jahed v. INS\*, 356 F.3d 991, 999 \(9th Cir. 2004\)](#) (Petitioner's evidence viewed in its totality clearly establishes a causal connection between the persecution, the fear of future persecution, and Petitioner's political opinion.) Mr. Doe beat his son when John Doe resisted giving his father all of his earnings, and when John Doe told his father that he should support his family and not spend money on drinking and cards. John Doe's testimony shows a causal connection

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<sup>119</sup> This is particularly true in this case where John Doe was a child who made extremely bold statements through his actions at a young age; *See e.g. Children's Guidelines*, *supra* note 69.

<sup>120</sup> *IJ Grants Asylum to Woman Based on Spousal Abuse*, *INS Guidelines Imminent 72 Interpreter Releases* 521 (Apr. 17, 1995) (discussing *Matter of A- and Z-*, A72-190-893, A72-793-219 (IJ Arlington, Va. Dec. 20, 1994), attached as Exhibit 53.

between his past persecution at the hands of his father, and his expression of his political beliefs.

John Doe cannot return to Guatemala and live safely according to his conscience. His father is aware of John Doe's views and has the will to control his children by any means. John Doe is certain his father will retaliate for his leaving and there is no place that he can return to in Guatemala and be safe.

**V. JOHN DOE HAS ESTABLISHED A CLEAR PROBABILITY OF FUTURE PERSECUTION AND IS THUS ENTITLED TO WITHHOLDING OF REMOVAL.**

In order to qualify for withholding of removal under 8 U.S.C. §1253(h), an applicant must show that he or she faces a “clear probability of persecution.” *Stevic*, 467 U.S. at 430. To meet this standard, the applicant must show “it is more likely than not that [he or she] would be subject to persecution” in the country in which the applicant would be returned. *Id.* at 429-430. Unlike a grant of asylum, withholding of removal is mandatory relief once the applicant meets the statutory test. If an applicant meets the statutory test for withholding of removal, then he or she cannot be deported to the country in which persecution is claimed. *See Maldonado-Cruz v. I.N.S.*, 883 F.2d 788, 793 (9th Cir. 1989).

John Doe is entitled to withholding of removal because of the very strong likelihood that he will be persecuted, both physically and emotionally, if forced to return to Guatemala. The past persecution John Doe experienced at the hands of his father on account of his membership in the “particular social group” of children of the John Doe family and his political opinion supports a presumption of the continuing threat of persecution. The physical beatings suffered by John Doe and his siblings, as well as his

father's continued harassment and intimidation of John Doe's sister Cindy Doe, support the fact that John Doe will suffer future persecution if he returns to Guatemala. Thus, if this Court declines to exercise discretion in favor of asylum relief, it should grant John Doe withholding of removal.

## **VI. JOHN DOE SURVIVED LONG YEARS OF SEVERE ABUSE AND SHOULD BE GRANTED ASYLUM ON HUMANITARIAN GROUNDS**

### **A. John Doe's Past Persecution was severe and merits a grant of asylum on humanitarian grounds.**

If this Court finds that John Doe's fears are no longer well-founded it should still grant him asylum for humanitarian reasons. Asylum may be warranted for humanitarian reasons even in cases where there is little likelihood of future persecution. 8 C.F.R. § 208.13 (b)(1)(iii)(A) states that "[a]n applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past, [even] in the absence of well-founded fear of persecution...[if] [t]he applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution." As the Seventh Circuit has explained, "[t]he experience of persecution may so scar a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution." *Bereza v. INS*, 115 F.3d 468, 472 (7th Cir. 1997).

John Doe's persecution began from the time he was a young child, between eight (8) and nine (9) years of age. This fact is critical in assessing the severity of his

persecution<sup>121</sup> and the merits of his claim for humanitarian relief. John Doe's father used his fists and belt to beat John Doe in order to take the money he earned.<sup>122</sup> John Doe's father beat John Doe on his head, his face, his back and on occasion kicked him while he lay helpless on the ground.<sup>123</sup> Later, while still a young adolescent, John Doe lived with an aunt who verbally abused him and also demanded money. Even if the violence inflicted upon John Doe would not rise to the level of 'atrocious' if inflicted upon an adult, because of the young age during which John Doe was persecuted, the abuse resulted not only in severe physical pain but also very deep emotional and psychological scars.

Returning to Guatemala would reopen countless psychological wounds for John Doe. The trauma of being a young child and adolescent who was often hungry and was beaten and berated for believing his father had no right to abuse him would be ever present and unavoidable. The memories of being a young child who had no mother to protect him and was left to fend for himself would be constantly revisited.

The memories of these life long experiences will not be easily erased and forgotten by this young man. To cope with the memories of his years of abuse John Doe has been receiving mental health services at The Pillars Community Services since December 2002.<sup>124</sup> John Doe's therapist has stated that John Doe has displayed many symptoms consistent with Post-Traumatic Stress Disorder and Depression.<sup>125</sup> She noted that John Doe has suffered flashbacks, depression, and severe anxiety.<sup>126</sup>

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<sup>121</sup> *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004) ("age...may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution").

<sup>122</sup> John Doe Aff., *supra* note 1 at ¶¶ 11,12.

<sup>123</sup> *Id.* at ¶12.

<sup>124</sup> Therapist Aff., *supra* note 16 at 1.

<sup>125</sup> *Id.* at 2.

<sup>126</sup> *Id.*

The mental trauma resulting from John Doe’s removal to Guatemala will be exacerbated by the fact that he will have no access to mental health services there. Youth in Guatemala have little access to basic needs such as health services and education.<sup>127</sup> Although Elizabeth Gibbons, UNICEF representative in Guatemala, has called on non-governmental organizations and civil society to push for policies expanding education and health services for youth, Gibbons has stated that these efforts have clearly been inadequate.<sup>128</sup> Thus, psychological counseling in Guatemala is not a realistic possibility for John Doe. John Doe has made progress in his recovery in large part due to a stable family and home environment here in the United States.<sup>129</sup> In Guatemala, without this support system, his mental state would decline markedly.<sup>130</sup>

The deep emotional and psychological pain inflicted upon John Doe can only be healed through therapy, and a safe and non-threatening environment. Thus, in light of the indelible mark left by many years of abuse, this court should grant John Doe asylum for humanitarian reasons.<sup>131</sup>

**B. John Doe has a reasonable possibility of suffering other serious harm upon removal to his home country.**

This court may grant John Doe asylum for humanitarian reasons in light of his past persecution and the reasonable possibility of his suffering *other* serious harm upon removal pursuant to 8 C.F.R. § 208.13 (b)(1)(iii)(B).

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<sup>127</sup> Celina Zubieta, IPS, *UNICEF Rates Guatemala Last in Region*, (Dec. 1999), attached hereto as Exhibit 54.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *In the Matter of D-S-*, *supra* note 28 at 42 (noting that in light of the applicant’s past suffering, “a favorable exercise of discretion is warranted on the basis of his youth and the *trauma he has suffered at the hands of someone who should have been his main caretaker.*”) (emphasis added).

A close look at John Doe's past experiences reveals that it is a realistic possibility that he will be targeted for serious harm upon his return to Guatemala. John Doe would never be able to live in peace with the knowledge that he is within his father's reach. John Doe would have to attempt to conceal his whereabouts from an abusive father who (as evidenced by John Doe's older sister's experience) has demonstrated an unyielding desire to terrorize his runaway offspring. John Doe would neither be safe with relatives, nor on his own.

An alternative for John Doe is to attempt to survive in the streets of Guatemala where he would face very serious danger. First, John Doe would face the grim reality of not finding employment in a country where "half of [the] population is younger than 18 and...most of those people have no hope of getting a job."<sup>132</sup> In addition, youths in their late teens and early twenties face the grave danger of vigilante justice on the streets of Guatemala. The bleak prospects for a homeless youth in John Doe's home country have been extensively documented. For example, Casa Alianza, a non-governmental organization that works with street children in Guatemala has documented 747 youths murdered in 2003, an increase from 465 in 2002. *The majority of these youths murdered were between the ages of eighteen (18) and under twenty-three (23).*<sup>133</sup> In addition, gang violence has become increasingly prevalent in Guatemala and other Central American countries. Since the wars ended in the 1990s, Central America has become fertile ground for gangs: Central American countries have very young populations, rampant poverty and

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<sup>132</sup> Mary Jordan, *Pit Stop on the Cocaine Highway; Guatemala Becomes Favored Link for U.S.-Bound Drugs*, Washington Post, Oct. 2004, at A20, attached hereto as Exhibit 55.

<sup>133</sup> Guatemala Human Rights Update, *747 Youth Murdered in 2003*, vol. 16 at 4 (April 2004), available at <http://www.ghrc-usa.org/Publications/Vol16no07-8.pdf>, attached hereto as Exhibit 56.

unemployment, and hundreds of thousands of leftover weapons.<sup>134</sup> In 1999, the Inter-American Court of Human Rights held the Guatemalan government responsible for the 1990 deaths of five street youth ranging in age from fifteen (15) to twenty (20).<sup>135</sup> The court noted that the officers' actions in the case were consistent with a *pattern* of illegal acts against street children that included threats, arbitrary arrest, cruel, inhuman, and degrading treatment, and extrajudicial execution.<sup>136</sup> Due to the lack of investigations, and even fewer convictions, however, little is known about those who are guilty.<sup>137</sup> If John Doe attempted to live the life of a Guatemalan street youth, his age and gender would make him the target of violence. The fact that John Doe is now over 18 does not free him from the very real possibility of future harm. In fact, as a young adult in the streets there is a reasonable possibility that John Doe would be killed.<sup>138</sup>

In addition, even if John Doe attempted to live on his own in order to keep his whereabouts concealed from his father, it is very likely that he would eventually gravitate towards his family and thus put himself squarely within the reach of his father. As the Treehouse support network for survivors of child abuse notes, “It is common for abuse survivors and people in general to gravitate toward the familiar.”<sup>139</sup> Even if John Doe initially attempted to make a life on his own, the trauma of attempting to survive in the

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<sup>134</sup> Kevin Sullivan, *Spreading Gang Violence Alarms Central Americans*, Washington Post, Dec. 1, 2003, at 1, attached hereto as Exhibit 57.

<sup>135</sup> Human Rights Watch, *Children in Conflict with the Law* (2001), attached hereto as Exhibit 58.

<sup>136</sup> *Id.*

<sup>137</sup> Oxfam Netherlands, *747 Children and Youth Murdered in Guatemala in 2003*, attached hereto as Exhibit 59.

<sup>138</sup> Prof. Social Work Expert Aff., *supra* note 32 at ¶ 9 (there is “little chance” John Doe would escape violence in the streets).

<sup>139</sup> Treehouse, *Strategies For Feeling Safe*, at <http://www.survivors-treehouse.net/Strategies%20for%20When%20Feeling%20Unsafe.htm> (last visited July 6, 2005), attached hereto as Exhibit 60.

economically harsh landscape of Guatemala would compel him to return to the people he is familiar with. Thus, his father would easily find him and exact retribution.

Thus, if John Doe returned to Guatemala, there is a reasonable possibility that John Doe would suffer serious harm upon removal and this court should grant John Doe asylum for humanitarian reasons.

### CONCLUSION

For all the reasons stated above, John Doe's request for asylum, and/or withholding of removal should be granted.

Dated: \_\_\_\_\_

Respectfully submitted,

Vanessa Melendez Lucas  
Attorney for John Doe

**NOTE: Asylum was granted on particular social group grounds. The IJ adopted the arguments in their entirety and relied heavily on the social worker's opinion regarding the unique dynamics of intra-familial violence.**



SAMPLE SUPPLEMENTAL DOCUMENTS

Sample Index of Documentation  
**In Support of the Asylum Application of  
Juvenile seeking asylum due to intra-familial violence  
(In Order of Memorandum Reference)**

**VOLUME I of II**

*Affidavit of John Doe in Support of His Application for Asylum and/or Withholding of Removal, dated July 7, 2005.*

*Affidavit of Jamie Doe, sister of John Doe, dated May 13, 2005 (original in Spanish, certified English translation provided)*

*Affidavit of Marie Smith, maternal aunt of John Doe, dated May 13, 2005 (original in Spanish, certified English translation provided)*

*Birth Certificate of John Doe (original in Spanish, certified English translation provided)*

*Form I-589 Application for Asylum and for Withholding of Removal originally filed with the Court on September 20, 2002.*

*Map of Guatemala*

*Affidavit of N.H., therapist of John Doe with Curriculum Vitae attached*

- Reporting that John Doe has a long history of child abuse by his father resulting in symptoms consistent with Post-Traumatic Stress Disorder (PTSD) and Depression.
- At the outset of therapy in 2003 and through 2004, John Doe presented as severely depressed with feelings of anger, sadness and confusion. Symptoms of PTSD included: intense fear and helplessness, recurrent and intrusive thoughts, memory lapses, flat affect and crying spells, among others.
- John Doe has made progress due to long-term therapy and needs continued access to this support and a safe environment to complete the healing process.
- Stating that John Doe is still “truly scared” of his father and what he would do if he were to return to Guatemala.

*Inforpress Centroamericana, Domestic Violence in Guatemala (Aug 1998)*

*In the Matter of E.S.A.M. (EOIR, Phoenix, AZ, Mar. 20, 2003)*

- Granting asylum to a Guatemalan youth who had been abused by her mother and stepfather and holding that the applicant had been persecuted due to her membership in the social group comprised by her “immediate family.” The immigration court reasoned the applicant was targeted simply due to her familial association as there was “no evidence [she] would have been abused by her mother or stepfather if she were not part of her family.”

*In re Jose (EOIR, San Francisco, CA, Feb. 12, 2003)*

- Respondent was an adolescent from El Salvador who had suffered child abuse at the hands of his own father. He was beaten, starved, forced to quit school and forced to work for money. The

physical, emotional and verbal abuse against him was recognized as persecution. Asylum granted on account of his membership in the social group “made up of himself and of members of his family, specifically his siblings and mother.”

In re C.E.L.T et al (*EOIR, Memphis, TN, Oct. 7, 2004*)

- Granting asylum to two Guatemalan sisters, the eldest of whom had been sexually abused and who belonged to the social group of “daughters of [father] who have been or are at risk of being sexually molested by him,” reasoning that kinship ties are immutable and thus a nuclear family can be a particular social group.

In the Matter of Dennis Reyes-Diaz (*EOIR Los Angeles, CA, Aug. 2, 2001*)

- Asylum was granted to a Honduran street child who was beaten, struck with electric cords, and prevented from going to school by an aunt. The physical abuse was found to be persecution on account of his status as an “immediate family member.” Similarly, John Doe’s repeated beatings (which included slaps, punches, whippings with a belt and kicks), forced labor and denial of schooling were persecution.

In the Matter of D- S- (*EOIR, York, PA Dec. 28, 2001*)

- Asylum granted to Indian adolescent who was subjected to years of beatings, food deprivation and inferior schooling. The court reasoned that the child had no realistic access to government protection from the abuse mainly because it was *parental* abuse and therefore it was persecution. Similarly, John Doe suffered for years the abusive domination of his father without the possibility of government protection, thus he should be granted asylum.

*Affidavit of Professor C.B.W., L.C.S.W., Expert on child welfare in the United States and Guatemala.*

- Confirming that the situation in Guatemala regarding child abuse is “dismal,” and that Guatemala has ignored its international obligation by failing to enact legislation that truly protects children.
- Reporting that child abuse is seldom prosecuted despite the common incidence of physical, sexual and emotional abuse of minors and the “routine” abandonment of children – facts acknowledged by government officials.
- Stating that Guatemala lacks all necessary systems to offer protection to children victims of abuse and that the primary responsibility for reporting such abuse belongs to adults in the child’s life. Moreover, in Professor W’s professional opinion, “[i]n Guatemala it is inconceivable that a complaint by a child would occur or be accepted by authorities as most children are subject to physical punishments and are considered the property of adults.”
- Providing her professional opinion that John Doe, as a victim of child abuse, has “very little chance of escaping” future violence at the hands of his father.

*Asylum and Withholding Definitions, 65 Federal Registrar 76,588 (Dec. 7, 2000)*

*Dane Holbrook, Protecting Immigrant Child Victims Through U.S. Asylum Law, Kansas Journal of Law and Public Policy, (Winter 2003)*

*In re M- T- (EOIR, San Francisco, CA Dec. 19, 2002)*

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## **Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children**

Christopher Nugent and Steven Schulman [FN1]

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78 NO. 39 Interpreter Releases 1569

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Report and analysis of immigration and nationality law

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The INS detains more than 4,700 unaccompanied children annually at more than 90 facilities, the majority of which are secure juvenile detention centers. These children, most of whom are in their teens, but some as young as infants, come from all over the world, fleeing poverty, hardship, or persecution. Some of the children are apprehended immediately at ports of entry, such as airports, for lack of proper documentation; others are detained after crossing the border without inspection, sometimes years after entry.

Once children are detained, they are placed in immigration removal proceedings before the Executive Office for Immigration Review (Immigration Court, EOIR). [FN1] These proceedings are administrative and adversarial, pitting detained children with limited education and English language skills against trained INS attorneys. The children have no right to government-appointed counsel or guardians ad litem, and are held to the same standard of proof as adults in their claims for relief from removal. The stakes of these proceedings are tremendous for children, literally life and death in some instances. Without government-appointed counsel, the majority of children in removal proceedings go unrepresented. Those children fortunate enough to find representation, usually through a pro bono attorney, are more than four times as likely to be granted asylum by an Immigration Judge (IJ). [FN2]

Detained alien children pose a host of unique challenges for practitioners, the INS, and the EOIR to ensure their rights to due process are protected and, ultimately, to see that justice is done in their immigration cases. [FN3] Detained children are not and should not be treated as "adults in miniature," as they have unique vulnerabilities and special needs related to their collective condition and individual backgrounds as children. [FN4] Children in INS custody are distinguished from adults by their common experience of displacement or separation from a central, primary adult caregiver, and also frequently lack a competent caregiver in the first instance (if abused, abandoned, or orphaned, for example).

Children have an almost universal psychoemotional and developmental need for a primary caregiver to provide for their basic needs, to ensure their well-being and maturation, and to serve as a positive role model. The absence of a consistent, familiar adult caregiver for a child while in INS custody is, at best, a disruptive event, and, at worst, a traumatic event in the child's

life, which can affect the child's overall disposition and active involvement in her or his proceedings. On an individual basis, children differ greatly in their abilities even to understand their legal situation and meaningfully participate in their legal proceedings, depending on age, education, and stage of sociocognitive skills and linguistic development; their physical and mental health history, status, and reactions to stressful situations; and their gender and cultural differences. [FN5] Finally, child refugees may be traumatized by conditions of persecution they are fleeing and may be retraumatized by their conditions of confinement. [FN6]

The immigration legal system, however, treats children as aliens first and foremost, subject to the framework of immigration law. [FN7] Additionally, few practitioners and few INS or EOIR staff have academic or practice background in children's law or child welfare issues. [FN8] Practitioners who lack familiarity or background in working with alien children may have a diminished ability to advocate zealously for their client's rights and defenses. [FN9] Further, the INS and the EOIR have not developed uniform, comprehensive policies and procedures vis-à-vis detained children in proceedings or provided standardized training regimens for their personnel. [FN10] This has resulted in a variety of local practices in different jurisdictions, some arguably more conducive than others to protecting children's rights and their meaningful participation in removal proceedings. [FN11]

Detained alien children deserve, and justice dictates, augmented care from the bench, the INS, and the bar in treating them first and foremost as children in the course of their detention, representation, and hearing processes. [FN12] This article discusses the salient challenges and strategies for solutions for practitioners representing detained children. The article then addresses children's potential remedies from removal. By focusing on methodology and then on substantive rights and remedies, this article reflects the premise that for lawyers to be effective, zealous advocates for these children, they must first master and apply a holistic, child-centered approach and gain relevant skills related to working with children in proceedings. [FN13] Through such an approach, lawyers may better understand and interpret the client's situation from a child's perspective, and then apply that understanding to the immigration law framework in order to prepare and represent them in their options for legal status. [FN14] A child-centered process throughout the advocacy experience may better guarantee a successful outcome in the child's case than approaching the child from an immigration law perspective from the outset.

## THE ADVOCATE'S ROLE

As with lawyers for children in other civil proceedings, lawyers for detained immigrant and refugee children often contend with questions (if not some confusion) about their fundamental role in representing a child. For example, should an attorney secure removal for a child who claims that he wishes to be ordered removed when the attorney believes that it is in fact in the child's best interests to pursue an asylum claim in the U.S.? Indeed, the proper role of a child's lawyer has been the topic of great academic debate, generating differing opinions and two advocacy models: advocacy of the expressed wishes of the child (the traditional attorney model) and advocacy of the best interests of the child (the "guardian ad litem" model). [FN15]

The academic debate has not, however, altered the governing ethical canons, which still abide by the traditional attorney model, requiring that the attorney represent the child's expressed

legitimate wishes as directed by the child and abide by the client's decisions concerning the objectives of the representation. [FN16] When a child client's decision-making appears inadequate, a lawyer is still charged with maintaining the traditional attorney-client relationship as best as possible, but may seek the appointment of a guardian or other representative if the client cannot act in the client's own interests. [FN17] Thus, a lawyer representing a detained child is ethically obligated to treat a child client like any other client and recognize the child's capacity for informed decision-making, and have undivided loyalty to the child's expressed interests over other considerations, particularly those of other family members, even if they have retained the attorney for the child. Moreover, the attorney is not to substitute his or her judgment for the child even in the case of a child with limited competency. [FN18] These ethical constraints do prove challenging to many attorneys (especially attorneys who are parents accustomed to children in a subordinate role) because they place significant authority in the child to shape and direct a legal course of action even when the child lacks the same maturity as an adult. The traditional model, however, does empower the child to participate in the representation, and thereby encourages the attorney to adopt a more child-centered approach to the representation.

## EFFECTIVE CHILD CLIENT INTERVIEWING AND PSYCHOSOCIAL AND ETHICAL ISSUES AFFECTING CHILDREN IN INS CUSTODY

### • Understanding the Child Client in Terms of Child Development

Effective child client interviewing of children in INS custody requires a basic understanding of child development and how children interact, understand, and respond differently in terms of their discrete developmental stages. The child's chronological age, physical and emotional health, physical, psychological, and emotional development, societal status and cultural background, cognitive process and educational experiences all affect the child's developmental stage. Age is not determinative, however, as many children may be older than their assumed developmental stage due to external or internal causes (e.g., disruptive events such as warfare, a mental or physical disability, or malnutrition). The three major stages of development group children through age five, then ages six through 12, and finally 13- through 18-year-olds. [FN19]

In working with a child through age five, an attorney should be attentive to the following salient developmental characteristics:

- The child is dependent upon adults for care and protection and is capable of developing trust. Loss of a caregiver at this age can significantly impact trust in the outside world.
- The child is capable of describing an event factually but without capacity to interpret its meaning or significance.
- The child's capacity for moral reasoning is limited to understanding actions in terms of absolute good and bad.
- As the child approaches age five, the child identifies moral reasoning in terms of obeying adults in positions of authority.
- The child cannot distinguish gradations in feelings and tends to feel intensely and totally one way or another.

- The child can have difficulty appreciating the differences between fantasy and reality, given evolving skills in logic.
- Traumatized children will, through play, reenact an event or scene they have witnessed or experienced. [FN20]

For children age six to 12, an attorney should take into account the following developmental considerations:

- The child is in a phase of mastery over inferiority whereby experiences can have an effect on the child's self-esteem and perception of competence.
- The child has the capacity for social ties and bonds beyond the primary caregiver, such as teachers, and friends in school or in their neighborhood/village, and is sensitive to peer cruelty.
- The child develops the mental capacity for abstraction with increased understanding of right and wrong for him- or herself independent from adult authority, but lacks awareness of more relative areas of morality.
- The child readily assumes blame for events beyond the child's control and is vulnerable to physical and sexual abuse, believing that he or she is responsible or deserves the treatment.
- The child's logical reasoning allows her or him to better understand time and space, past and future, and cause and effect, but the fear of punishment can lead to inconsistent responses regarding specific events. [FN21]

For children age 13 to 18, the majority of children in INS custody, attorneys should realize that their developmental features include:

- The child's experience of puberty, including physical change and growth, psychoemotional development, volatility of emotions and feelings, and increased interest in sex and sexuality.
- The child's development of a sense of identity in the world independent of family, and his or her realization that the world is complex and beyond the child's individual control.
- The child's possible experience of culturally and religiously circumscribed rites of passage to adulthood, e.g., female genital mutilation, expectations of labor and contribution to the family economy, sex with a prostitute.
- The child's growing capacity for abstract, logical, and moral reasoning, including understanding of individual responsibility to a larger social system, "human rights," "oppression," and "evil." [FN22]

One significant caveat: these Western-based schema do not apply perfectly across cultures where the sociocultural construction of childhood may be different. Additionally, different gender norms and traumatic events can distort, accelerate, or arrest development in certain areas. [FN23] By familiarizing himself or herself with the child's cultural and socioeconomic background and related treatment and socialization processes, a lawyer can better determine which developmental stage is most applicable to the client. One valuable and readily available resource for this research is the Department of State's Country Reports on Human Rights Practices, each of which includes a section on children. In addition, Human Rights Watch

provides links to child-oriented websites on its own web page, [FN24] and the office of the United Nations High Commissioner for Refugees (UNHCR) in Washington, D.C., can provide country of origin information, advisory opinions, and guidance on how children's claims should be adjudicated.

Having identified the possible developmental stage of the child, the practitioner can then adapt client-interviewing techniques accordingly to develop the trust and rapport necessary to represent the child fully. Furthermore, in working with older children, the practitioner may want to reflect back to the developmental stage the child was in during the period relevant to the legal case, thereby providing a better understanding of the child's experience of an event at that time.

- Interviewing Children in INS Custody

The crucial element of any attorney-client relationship, but particularly one with a child, is trust and openness. A rapport predicated on trust and respect will facilitate the child's truthful disclosures, and accordingly lead to better representation. In order to build a trusting relationship, the attorney should adopt child-centered interviewing techniques from the outset. This section discusses child-centered interview methodologies, and then presents suggestions for the setting and subjects of the initial attorney-client interview.

Interviewing methodologies. Interviewing children in INS custody can pose extraordinary challenges, given the often remote locations and security-related policies and procedures of the more than 90 facilities on contract to hold children. Some facilities are located outside metropolitan areas, requiring most attorneys to drive several hours to visit the child client. Other facilities reportedly have limited access for attorney visitation, do not have adequately confidential interviewing areas, do not provide for free phone calls to pro bono attorneys, present the children for interviewing in shackles, and even subject the children to strip-searches after every visit. [FN25] The INS detention standards, which were adopted in November 2000 to systematize access to counsel and uniform treatment, do not apply to children's facilities. [FN26]

These challenges, in addition to the child's vulnerability as a juvenile and as a refugee, demand child-centered techniques in order to build trust. The child-centered methodologies discussed below range from the interview environment to the words the attorney uses to explain the law.

Despite the logistical challenges of interviewing children in INS custody, attorneys should consider that in-person interviews and appearances in immigration court hearings are preferable over more cost-effective telephonic or videoconferencing when practicable. Personal contact helps to develop the child's trust and confidence in the advocate, candor in testimony, and ability to confer with counsel during the proceedings. Knowing the child through personal meetings also aids the advocate's full understanding of the child's facts and circumstances and fosters zealous advocacy. Indeed, ethical standards arguably would require in-person interviews and representation by counsel at least for master calendar and individual hearings. [FN27]

In conducting interviews, the attorney should be attentive to the child's potentially limited attention span and need for breaks for food or the bathroom. An attorney cannot reasonably

expect that a child will be able to concentrate through a three-hour interview; if a long interview is scheduled, the attorney should try to be flexible enough to reschedule if the client is tired or becomes less responsive. Ideally, it is preferable to schedule a number of shorter interviews with a child rather than fewer long interviews as this further demonstrates to the child the attorney's commitment to the child's case.

Throughout the discussion and interview, the attorney should ask open-ended, follow-up questions to test the child client's comprehension. Open-ended questions such as "What am I here to do for you?" are preferable to narrow questions such as "Do you understand?" which merely elicit affirmative or negative responses, but do not reveal the child's comprehension.

Additional child-friendly interviewing techniques include:

- Avoiding legalese and using legal terms only when extremely relevant in a simple, straightforward fashion. For example, in describing the Notice to Appear as a charging document, the attorney may explain that this is the paper the INS uses with the judge to explain who you are, how you came to the U.S. and why, and the reasons they do not think you can stay here. In explaining relief forms like asylum, one can explain it as a way to be able to stay in the U.S. if there are people who hurt or want to hurt you back home and you are afraid of returning.
- Avoiding the use of abstract concepts.
- Choosing easy words over hard ones, e.g., "help" rather than "assist"; "show" versus "demonstrate."
- Breaking down long sentences into short sentences with one main idea for each sentence.
- Confirming comprehension of the words used by asking children to define words you are using and have defined, e.g., "Tell me what asylum is."
- Avoiding references to the client's "story" because "story" is ambiguous and can be construed as fact or fiction.
- Being redundant. The more repetition of both the attorney's phrases and the child's statements, the better to ensure intelligibility and comprehension.
- Using open-ended questions rather than narrow yes/no questions to elicit more detailed disclosures.
- Demonstrating respect and empathy by affirming the child's responses when appropriate. For instance, it is appropriate to thank the child when sharing sensitive information and to state that the attorney will not share this information with anyone else unless the child agrees. As a corollary, avoid any display of ridicule or negative judgments on the child's behavior as this can repress the child's candor and stigmatize the child.
- Avoiding leading questions as children are predisposed to respond to try to please the attorney.
- Explaining and reminding the child of the context for the questions, i.e., why you are asking detailed questions about a past incident and how it is relevant to his or her claim for relief.
- Remembering that not all children can remember or give reliable estimates of time, speed, distance, size, height, weight, color, or relationships, including kinship. As a corollary, do not dismiss a child client's allegation as specious for lack of detail. Children

should be told that it is okay not to remember everything and to state that they do not know or cannot remember.

- Explaining why the child may be questioned repeatedly about the same matter and that this repeated questioning is not because people think that he or she was lying or that the first answer was somehow wrong or bad.
- Being aware of your and the child's body language and nonverbal reactions. The attorney's demeanor and gestures of being attentive, relaxed, and caring as opposed to distracted, stern, or pressed for time will help facilitate the child's trust and candor. The child's body language in turn can display any reaction such as displeasure, mistrust, fear, anger, hope, or even trauma. [FN28]

The initial attorney-client interview. In arranging the initial interview, the attorney should, if practicable, be accompanied and introduced by a trusted adult figure who already knows and has worked with the child-possibly an attorney or representative from a nonprofit service provider who has screened and referred the child's case-as a prelude to exploring facts directly related to possible substantive claims to relief, as the child may be reluctant to discuss difficult subjects with a stranger. [FN29] Ideally, the first interview should be viewed as a "get-acquainted" session rather than a fact-finding mission. Even when introduced by a trusted person, the first interview should as much as possible focus on building this trust rather than exploring the child's legal claims in depth, even when logistical challenges might put time at a premium. [FN30] Without having established a relationship of trust, it may be impossible to understand the child's legal claims in their entirety.

Even before meeting the client, the attorney should be sensitive to the interview environment, paying particular attention to anything that might appear to identify the attorney with the facility staff or the INS. For instance, when arriving at the facility, the attorney might ask to use an interviewing room that is not identified with or used by facility staff. The room should, of course, have adequate protections for confidentiality and allow for a contact visit. Similarly, the attorney should only display a cordial rapport and brief interaction with the facility staff in view of the child lest the child misperceive an affiliation. [FN31]

In order to start to build this relationship, the attorney should explain the purpose of the representation and its scope. The attorney should make clear the attorney's independence from the government, and explain that his or her job is to defend the rights and represent the child's express legal interests before the INS and the Immigration Court. As the child interacts with many different authority figures while in INS custody, it is helpful for the attorney to explain and distinguish his or her role and assistance from that provided by other authority figures, such as the deportation officer, social worker, INS trial attorney, and IJ. [FN32] The lawyer cannot overemphasize the attorney-client privilege protecting the confidentiality of communications with the attorney. [FN33] The child should be advised that no other official with whom the child interacts can guarantee confidentiality and that information obtained from anyone other than the child's attorney may be used against the child in court proceedings. [FN34]

The attorney should also clarify the attorney's responsibilities and child's rights vis-à-vis the attorney, including the right to receive information promptly regarding the case and to have phone calls returned; to have the attorney behave in a friendly, patient manner and to listen

carefully to the child client; to allow the child to take breaks or stop interviews when needed; to control the legal strategy; to have the attorney assist the child in any welfare needs while detained; and to retain and discharge the attorney at will if the child is dissatisfied with his or her performance. [FN35] In explaining the purpose of the interview, the attorney may consider explaining that he wants to get to know the child and his background and current circumstances, and to discuss his legal case and options, including release from INS custody. If the attorney is to take notes during the interview, he or she should explain why he or she is doing so, and emphasize the confidentiality of those notes.

When using an interpreter, the attorney should also explain to the child the purpose and role of the interpreter. Even before retaining an interpreter, the attorney should take care to evaluate the interpreter's expertise and background, any U.S. or foreign governmental affiliation, and capacity to interpret in the dialect of the child. The attorney must also ensure that the interpreter understands the ethical duty to maintain confidentiality of the information. The child client should be informed of his right to consent to or refuse the interpreter. The attorney may also want to advise the interpreter to translate in the first person only the words actually spoken and not add or omit any information, a frequent occurrence with community-based interpreters.

After the introduction, in order to build rapport, the attorney should focus the discussion on the child's background and circumstances. Before approaching any difficult topics (which often are the crux of the legal case), the attorney should begin by asking friendly questions about the child's country, culture, and cuisine; biographical and educational background; his well-being in INS custody; and favorite activities and pastimes. When possible, the attorney should refrain during the entire first interview from questions that are particularly sensitive to the child's case or that could adversely affect the child's self-esteem. For instance, asking an illiterate orphan about his family and educational background at the first meeting might jeopardize a positive rapport. The attorney should respond positively and in a nonjudgmental, affirming manner to the child's disclosures.

For rapport-building purposes, the attorney might also ask the child to ask the attorney questions about the attorney's own life or background to further humanize the attorney. In responding, however, the attorney should be particularly sensitive to the child's underlying psychological motivations for certain questions and try to avoid detrimental psychological processes of client transference toward the attorney, or attorney counter-transference toward the client, which could lead attorney and client to distort their professional roles and relationships. These processes occur in all professional relationships, but experts caution that they escalate in direct relation to the level of the client's neediness or anxiety, the amount of stress or conflict, and the degree of threat involved in the matter.

Given the combination of an asylum seeker's intense fear of return and the particular vulnerability of children, such transference and counter-transference may happen more readily with detained immigrant and refugee children than in other representations. [FN36] Thus, if the child asks to know about the attorney's family, the attorney should provide only basic information sufficient to humanize the attorney but then shift the focus back on the child client. The attorney should emphasize that he or she is first and foremost there to help the child. Revealing personal information is necessary, but should be done with a degree of caution. On the

one hand, some children cling to even a scintilla of personal data about professionals, sometimes to their psychological benefit, that the professional has displayed sincerity and trust in the child with the information; on the other hand, some children use this information to their psychological detriment, such as feeling inadequate vis-à-vis the attorney's shared facts. The attorney should try to gauge the impact such responses are having on the child and finally attempt to interpret the child's assimilation of the information.

During the interview, the attorney must be wary of creating false or unrealistic expectations of his or her power, authority, and influence over the ultimate outcome in the child's case. [FN37] Expectations that do not come to fruition could ultimately jeopardize the child's trust in the attorney. Because the attorney cannot guarantee a particular outcome, he or she should refrain from giving a child even percentages of the likelihood of success, as comforting as such words might seem to be. As long as the child knows and sees that the attorney will do everything within his or her limited power to help the child, the client should be satisfied by the process and more accepting of the result.

After establishing some basis for a trusting relationship with the client, preferably after the first interview, the attorney may turn to discussing the legal proceedings and questions related to surfacing the child's claims to ultimate relief from removal. In discussing the legal proceedings, the attorney will need to take particular care in ensuring the intelligibility and comprehension of all the information provided. As a guiding principle, the attorney should aim for simplicity and clarity consistent with the child's conceptual and linguistic capacities. Communicating at a second grade level of literacy and communication might be optimal for most school-aged children, even teenagers. [FN38] However, if the communication is too simple, it could be denigrating to a teenage client with a strong educational background. In that case, the attorney may clarify the rationale for the simplicity, i.e., that immigration law is extremely complicated, even for attorneys and the courts. Visual aids might help the attorney describe the court proceedings and the child's history and situation, such as a hand-drawing of the courtroom where the attorney and child identify the locations and roles of the respective parties; a map to trace the child's trajectory from his or her home country to the U.S. and current location, as well as the location of potential relatives where the child could be released; the creation of a family tree to understand all the people in the child's life; and magazines or photographs from the child's country. [FN39]

Keeping these techniques in mind, the attorney should describe the framework of immigration law and give a basic, simple description of pertinent relief forms with a variety of concrete, non-identifying examples before focusing the interview on facts most relevant to the options for relief. [FN40] Sometimes, in addition to the use of open-ended questions, the act of hearing about the cases of other similarly situated children will trigger a willingness to disclose this most personal and confidential information. [FN41] This is particularly true with regard to experiences of family or sexual abuse, or in connection with socially stigmatized identities, such as people with disabilities, certain ethnic minorities, and gays and lesbians. Given children's susceptibility, attorneys need to explain the caveat that these examples are not exhaustive and all their responses will need to be true and should not be invented because the child needs to tell the truth to the attorney and cannot lie to the court. [FN42]

## PROTECTING THE RIGHTS AND SECURING THE RELEASE OF A CHILD FROM INS CUSTODY

While advocates typically want to race to the merits of a client's immigration case—understandably, because the client's ultimate relief is at stake and the Immigration Court's schedule often sets a demanding pace—all immigration clients, but particularly children, also need zealous advocacy to protect their rights to fair treatment while in INS custody and to secure their release from custody, if appropriate. The INS's treatment of children in its custody is governed by the landmark settlement in the *Flores v. Reno* class action. [FN43] The *Flores* settlement agreement governs the conditions of custody and the terms of release of all persons under the age of 18 who are in the legal custody of the INS. [FN44]

The policy behind the *Flores* settlement agreement is that minors shall be placed "in the least restrictive setting appropriate to the minor's age and special needs," provided that the placement is consistent with ensuring that the minor appears at immigration proceedings, is safe, and does not harm others. [FN45] Accordingly, the agreement establishes a "general policy favoring release" pending immigration proceedings, and, for minors not released from INS custody, a preference for low-security placements.

This section outlines the provisions in the *Flores* settlement agreement that govern the release of children from INS custody, the placement and transfer of children in INS custody into INS-contracted detention facilities of different security profiles, the standards of care applicable to these facilities, and other standards relating to INS custody, including the right to attorney-client visits and facility inspections. [FN46]

### • The Release of Children from INS Custody

While the INS may detain unaccompanied alien children in removal proceedings, the *Flores* settlement agreement establishes a "general policy favoring release" of juveniles pending removal. [FN47] This general policy favoring release places on the INS the obligation to "release a minor without necessary delay" upon finding that detention is not "required either to secure his or her timely appearance before the INS or immigration court, or to ensure the minor's safety or that of others." ¶ 14. This obligation continues as long as the INS detains a minor. ¶ 18 (the INS "shall make and record the prompt and continuous efforts on its part toward family reunification and release of the minor pursuant to Paragraph 14"); see also ¶ 19 (a minor may be placed "temporarily" in an INS detention center "until such time as release can be effected in accordance with Paragraph 14").

Because children, unlike some adults in INS custody, may not be released on their own recognizance, the *Flores* settlement agreement provides for the transfer of the legal custody of minors to a variety of individuals, in the following order of preference:

- a parent;
- a legal guardian;
- an adult relative (brother, sister, aunt, uncle, or grandparent);

- an adult individual or entity designated by the parent or legal guardian in a declaration or other document as capable of caring for the child;
- a licensed program (e.g., foster care) willing to accept legal custody;
- an adult individual or entity seeking legal custody.

The release of juveniles is left to the INS district director and staff, and may be subject to a home study, which can take several months. [FN48] While the INS appears to make its own attempts to reunite children with parents, the release to another custodian, even a close relative, often requires advocacy. The child's attorney can help find a suitable legal custodian (including state-funded foster care), and prepare Form I-134, the Affidavit of Support and accompanying documents to submit to the appropriate district director.

The transfer of a child's legal custody is not without significant obstacles and pitfalls. There have been numerous reports that, in at least some districts, undocumented relatives who seek custody of an unaccompanied child are served with a Notice to Appear and placed in removal proceedings upon identifying themselves to the INS. [FN49] Other districts have required that proposed custodians post thousands of dollars in bond before custody is transferred. A child's attorney must also be careful that the proposed custodian (even if that person is a relative) is not working in cooperation with smugglers who could seek to put the child to work to recover a debt. If the INS refuses to release a child who has entered the U.S. lawfully or illegally, the attorney may seek a bond redetermination hearing before an IJ and secure an order of release on recognizance or under bond, but the INS, acting as guardian in loco parentis, would still need to approve the sponsor to authorize the child's release. [FN50] The INS's objections to a potential sponsor can be litigated under the Flores agreement.

- Safeguarding the Treatment of Children in INS Custody

As long as the INS retains custody of a child, Flores provides several substantive rights to the child. First, the settlement agreement requires that the child be placed in a non-secure licensed program unless a more secure placement is required by the minor's needs or for the safety of others. [FN51] Thus, the advocate for a child in INS custody must protect the client's right to be placed in the least restrictive setting appropriate. Second, a child who is represented by counsel has a right to have his or her attorney notified before being transferred from any INS facility. Third, a child in a shelter or medium-secure facility has the right to be housed according to certain operating standards applicable to those facilities. [FN52]

The placement of children in non-secure and secure facilities. If the INS is unable to transfer custody of a child pursuant to Paragraph 14, the Flores settlement agreement requires that the child be placed in a " licensed program," defined as a state-licensed program for dependent children, such as residential, group, or foster care that meets certain standards set forth in the agreement. [FN53] The exception to this rule is in the case of an "influx" of minors into the U.S.-i.e., where the INS has more than 130 minors eligible for placement in a licensed program under ¶ 19. [FN54] In the case of an influx (which appears to be a permanent status now, given the number of children in INS custody), the INS may place minors in secure facilities while it finds a placement in a licensed program "as expeditiously as possible." [FN55] Children

in INS custody placed in secure facilities may not be commingled with juvenile offenders. [FN56]

Once a minor is placed in a licensed facility, he or she should remain in that licensed program unless the INS has specific reasons for transferring the minor to a more secure facility. The Flores settlement agreement requires the INS to find a less restrictive alternative, such as a medium-secure facility or another licensed program, before resorting to transfer to a secure facility. [FN57]

The INS is permitted to transfer a child in its custody to a secure facility if the child is charged with, is chargeable, or has been convicted of a crime or delinquent offense, not including isolated nonviolent offenses (e.g., vandalism) and petty offenses (e.g., shoplifting, joy-riding); has committed or threatened to commit violence while in INS custody; has engaged in conduct "that has proven to be unacceptably disruptive of the normal functioning of the licensed program"; is an escape risk; [FN58] or needs secure confinement for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct the child. [FN59]

In addition, a child who is represented by counsel may not be transferred to any new facility (whether more secure or not) without prior notice given to the attorney, "except in unusual and compelling circumstances." [FN60] In such circumstances, the INS must notify the attorney within 24 hours of the transfer. While the Flores settlement agreement does not set a timeframe for prior notice, in order for "prior notice" to have any substantive meaning, the attorney should be given enough notice prior to the proposed transfer to allow the decision to be challenged, at least administratively, if not in court.

Requirements for licensed facilities. All licensed programs into which children in INS custody are detained must comply with all applicable state child welfare laws and regulations, in addition to specific requirements set forth in Exhibit 1 of the Flores settlement agreement. To summarize Exhibit 1, a licensed program (including a "medium security" facility) must provide:

- Physical care, including accommodations, food, clothing and personal grooming;
- Routine medical and dental care, family planning services, and emergency medical care, including a complete medical examination upon admission;
- An individualized needs assessment, including information relating to family residing in the U.S. to assist with family reunification; [FN61]
- Educational services focusing on basic academics and English language skills;
- One hour each of daily outdoor activity and structured leisure activity;
- Individual counseling sessions once per week, and group counseling at least twice per week; [FN62]
- Acculturation and adaptation services;
- Comprehensive orientation to the licensed facility upon admission;
- Access to religious services of the minor's choice;
- Visitation and contact with family members, regardless of immigration status;
- A reasonable right to privacy, including wearing his or her own clothes, and having a space for personal items.

In addition, any facilities that detain children in INS custody, whether licensed or secure, may not strip-search the children, even upon admission to the facility and after contact visits, without a "reasonable suspicion" that such a search will yield weapons or contraband. [FN63]

Redressing noncompliance under Flores. The Flores settlement agreement provides but one remedy for a child who believes that the INS has violated his or her right to be placed in a licensed facility or that the licensed or medium-secure facility is not complying with the standards set forth in Exhibit 1: federal court litigation. [FN64] Prior to initiating litigation, the child and/or the child's attorney must first confer with the appropriate U.S. Attorney's office to attempt to resolve the matter. The better course may be to raise the concerns, in writing, with the appropriate regional juvenile coordinator, and with the INS Juvenile Affairs Director in Washington, D.C., if necessary, before approaching the U.S. Attorney's office, which will likely have no immediate insight into the matter. Of course, the seriousness of the violation may not allow for negotiation with the INS before federal court litigation is commenced.

Violations of a child's constitutional right to be free from strip-searches absent reasonable suspicion may be remedied through private civil rights lawsuits. Violations of the right to prior notice to counsel may also be subject to private civil suits.

## CHILDREN'S REMEDIES FROM REMOVAL

Detained children have a wide range of substantive immigration remedies that advocates can pursue on their behalf. While some remedies are within the EOIR's exclusive jurisdiction, others are coterminous with the jurisdiction of the INS and yet others lie within the exclusive jurisdiction of the INS. Some forms of relief too have important implications for placement and benefits eligibility. This section briefly outlines children's common remedies and their basic requirements, with an emphasis on preparing and representing children in claims for asylum/withholding and protection under the United Nations (U.N.) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT). [FN65]

- Asylum/Withholding of Removal and Protection under the United Nations Convention Against Torture

As half of the world's refugees are children, it is not surprising that many detained children may have cognizable claims to asylum, withholding of removal, and protection under Article 3 of the CAT. [FN66] Children are subject to the same burden of proof as adults for these forms of relief. [FN67] To be eligible for asylum or withholding, a child must meet the statutory definition of refugee: a "person who is unable or unwilling to return to his or her country of origin or last habitual residence because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." [FN68] The child must prove that he or she has been persecuted in the past or has a well-founded fear of being persecuted in the future based on an individualized threat or membership in, and that the persecution is on account of the child's membership in, one of the five enumerated grounds of race, religion, nationality, membership in a particular social group or actual or imputed political opinion. [FN69] Additionally, the child must demonstrate that the

experienced or feared persecution is at the hands of the government or of an agent that the government is unable or unwilling to control. [FN70]

Children may experience similar forms of persecution to those of adults, or the persecution may be related to the child's status as a child. Attorneys should be attentive to and probe for persecution specific to children such as infanticide, conscription as a child soldier, child abuse, incest, female genital mutilation, bonded/hazardous child labor, child sale, child marriage, homelessness, deprivation of education, trafficking, and religious, sexual, or other servitude. [FN71] Attorneys should examine carefully all potential governmental and nongovernmental agents of persecution, including any adult with whom the child might have interacted—the police, army, doctors, teachers, religious personnel, guerrillas, death squads, gangs, peers, and even family members. When asking about possible problems the child might have had with such agents, to increase client comfort and candor, the attorney should make assurances that problems or bad experiences will not impact the attorney's perception of the child. The attorney should be attentive to the fact that the harm of experiences might be attenuated or accentuated in the eyes of the child or that the child might be oblivious to the actual harm, accepting the treatment as fair or deserved or perhaps using acceptance as a coping device. Furthermore, the attorney should take particular care that the mere retelling of such experiences and reliving their vivid details can cause retraumatization of the child. If the child shows extreme reticence or discomfort, the attorney might postpone questioning. [FN72]

In recent years, several successful children's asylum theories have emerged, including:

- Persecution in the form of being sold as a child bride and subject to domestic violence that the government has condoned. [FN73]
- Persecution on account of the membership in the particular social group of the family as a victim of domestic violence without the authorities' willingness to intervene. [FN74]
- Persecution as a member of the social group of abandoned street children subject to paramilitary and police social cleansing operations. [FN75]
- Persecution by the authorities as a suspected gang member or persecution as a defector from gangs the government cannot control. [FN76]
- Persecution as a child based on sexual orientation. [FN77]
- Persecution as an anti-governmental young activist. [FN78]
- Persecution in the form of forced labor by the family. [FN79]
- Persecution as an illegal offspring in China and thus denied education and health care, and subjected to prosecution and incarceration as persecution for illegal exit. [FN80]
- Persecution in the form of forced, illegal conscription. [FN81]
- Persecution on account of the severe disability of autism. [FN82]
- Persecution has also been found in the severe emotional and developmental injury including loss of childhood, religion and culture arising from the assassination of family members. [FN83] As persecution could also occur if the child has a serious mental or physical disability, [FN84] the attorney should focus questioning regarding the child's school, mental health or physical performance toward identifying whether the child might suffer from a disability.

Relief under the Convention Against Torture may be a more difficult remedy, given its limited success rate. [FN85] In order to qualify for CAT protection, the alien must prove that it is more likely than not that the applicant will be tortured by a government official or with governmental acquiescence. This burden is difficult for children if they solely fear nongovernmental agents of persecution and if the feared harm lacks the severity of torture. [FN86]

In addition to helping the client to choose the appropriate substantive remedies, the attorney should also advocate for child-friendly court procedures. The guiding principle is to minimize the child's time in court and possible retraumatization from testifying about harms incurred or feared. [FN87] In order to limit the child's testimony, the attorney can use informal or formal pretrial conferences with the INS trial attorney and/or IJ to stipulate to material issues when practicable. [FN88]

In order to set a standard for a child-friendly hearing, the attorney may urge the court to follow the INS guidelines for children's asylum claims. [FN89] While these guidelines are not binding on the court, they do provide for child-friendly procedures. Specifically, the attorney can work to ensure that the conditions of the courtroom facilitate the child's opportunity to participate in the proceedings. [FN90] The attorney might request, for example, that the staff give the child a tour of the courtroom before the hearing so as to increase the child's comfort. The attorney might also request that the child be allowed to remain seated next to the attorney when testifying rather than being required to take the witness stand. In some cases the treatment of the child by the INS may warrant a request for adjournment, if the conditions of confinement, transport, use of shackles and presence of any other party in the courtroom besides the child-including the facility staff, INS deportation or transportation officer, and witnesses-affect the child's opportunity to participate in the proceedings and/or due process.

The order of presentation may also differ for a child rather than an adult asylum seeker. The attorney might begin the testimony with a mental health expert who can testify first about the client's mental health condition and effects of persecution, particularly where the child client's condition might affect his or her testimony. [FN91] The attorney could also offer the testimony of an expert on country conditions, who can explain human rights conditions specific to similarly situated children because there is a dearth of data available on children's human rights relative to adults. [FN92] The attorney might have these witnesses testify first to expedite the proceedings and narrow the number of issues for examination of the child witness. [FN93]

The principles outlined above for child client interviewing apply equally to direct examination: keep the questions simple, chronological, and fact-based, with little to no leading questions, and avoid probing for graphic details of harm if this might retraumatize the client. For instance, when the child claims he or she was raped and it hurt, the attorney need not ask for a blow-by-blow account of the rape, but rather should ask circumstantial questions surrounding the rape to further corroborate the event, e.g., duration, where it hurt, and medical treatment afterwards. [FN94]

Likewise, a child's attorney should seek to protect the client from retraumatization during

cross-examination by the INS trial attorney. While the child's attorney should try to discuss child-friendly procedures with the INS trial attorney before the hearing, objecting to improper or overly aggressive questions may be the only means to protect the client. Typical objections include relevance, privilege, hostility to the witness, question beyond the scope of the child's testimony, form of the question (e.g., compound questions), mischaracterizing prior testimony, misstating prior testimony, and improperly proffered or obtained evidence. [FN95]

On re-direct and re-cross, the attorney should work to minimize any inconsistencies that might have arisen during the child's testimony. The attorney should recognize the factors that might give rise to inconsistencies in testimony, including: the way the question was phrased or ordered; a literal interpretation of the question by the child; the desire of a child to answer a question he or she does not fully understand; the child's underdeveloped ability to reason logically from one idea to another; the psychological and social atmosphere of questioning; and stress arising from the intimidating layout of the courtroom, fear of public speaking, and insensitive questioning techniques. [FN96]

Attorneys should present legal arguments in written briefs before the hearing (or sometimes after, if ordered by the IJ), and use the closing argument to summarize the witnesses' credible testimony along with corroborating and background evidence at bar, describe how the child has met the statutory burden of proof element-by-element in accordance with published and unpublished case law, and explain why the case merits a favorable exercise of discretion. [FN97] The attorney may cite to the Guidelines for Children's Asylum Claims in support of the claim and advocate for a child-centered interpretation of "well-founded fear" and definition of "persecution." [FN98] If credibility is at issue, the attorney may highlight how the child lacks the sophistication to lie convincingly, how the lack of exaggeration of a particular fact renders the fact more believable, and how other witnesses have corroborated the child's testimony. The attorney may also dispel inconsistencies as in fact not inconsistencies, immaterial to the child's claim, or arising due to the factors described above but not necessarily undermining credibility in toto. [FN99]

If the client is granted relief, the attorney should attempt to negotiate with the INS trial attorney to waive appeal because, if the case is appealed, the child will be subject to continued detention of an average of more than six months and even transfer to and placement in a secure facility as an alleged flight risk. [FN100] If the child is denied relief, the attorney may consider immediately pursuing a motion to reopen or reconsider before the IJ within 30 days of the decision, if warranted. [FN101] If such a motion is denied and the client wants to appeal or if the INS ultimately appeals, the attorney may still advocate for release to a licensed foster-care program where the child is considered to be in the Service's constructive custody. [FN102] If appealed, the attorney may file motions to expedite, given that the case involves a child in INS custody, and may request oral argument and solicit amicus curiae if and when the case presents novel or complex issues as children's asylum claims often do.

If the child is granted relief with no INS appeal, the attorney should assist the child until he or she is placed in a foster care program and has secured asylee benefits through the Office of Refugee Resettlement of the Department of Health and Human Services. [FN103] A child asylee is eligible for an array of educational, medical, and financial benefits before turning age 18 that

will continue through age 21. It is crucial that the child's case be entirely completed, including appeal, by age 18, in order to access these benefits. [FN104]

- Other Remedies

The other potential EOIR-based remedies for attorneys to consider for their child client include the following:

- U.S. citizenship resulting in termination of proceedings available in certain instances, such as when a child has a parent or grandparent who was a U.S. citizen; when he or she is a permanent resident under the age of 18 if his or her parents naturalized to become U.S. citizens; or when adopted by a U.S. citizen; [FN105]
- Family-based immigration through adjustment of status if lawfully admitted to the U.S. with an immediate visa number; [FN106]
- Three-year cancellation of removal resulting in lawful permanent residence under the Violence Against Women Act (VAWA) [FN107] with the requisite showing that the child is a victim of domestic violence, defined as battery or extreme mental cruelty by a U.S. citizen or permanent resident parent, and would face extreme hardship if removed; [FN108]
- Ten-year cancellation of removal if in the U.S. unlawfully and able to prove exceptional and extremely unusual hardship to a U.S. citizen or permanent resident parent, spouse, or child; [FN109]
- A motion to suppress evidence of alienage derived from an unconstitutional stop in violation of the Fourth Amendment and consequent termination of proceedings (resulting in the child's required release from custody to a designated, approved adult); [FN110]
- Voluntary departure for a child who has effected a lawful or illegal entry to the U.S.; and [FN111]
- Withdrawal of the child's application for admission to the U.S. if the child has not entered the U.S. but was apprehended upon arrival at a port of entry. [FN112]

Other administrative remedies outside the immigration court for the child are INS-based including, but not limited, to:

- Temporary Protected Status (TPS) providing temporary permission of up to an initial 18 months and work authorization to people from designated countries afflicted by strife or disaster; [FN113]
- Special Immigration Juvenile Status providing for legal permanent residence for abused, neglected, or abandoned children; [FN114]
- T and U nonimmigrant visas with the possibility of adjustment of status for victims of serious alien trafficking, and for victims and witnesses of a serious crime, both conferring benefits eligibility; [FN115]
- V nonimmigrant visas under the Legal Immigration Family Equity Act of 2000 (LIFE Act) for an unmarried child under 21 with an immigrant visa petition filed

by a lawful permanent resident parent before December 21, 2000, who has been waiting at least three years for the issuance of a visa; [FN116]

- K-4 nonimmigrant visas under the LIFE Act for an unmarried child under 21 of a parent/step-parent who as the spouse of a U.S. citizen qualifies as a K-3 nonimmigrant visa applicant, i.e., is a beneficiary of a pending immigrant visa petition; [FN117]
- Deferred action to allow the child to remain in the U.S. for emergency reasons; [FN118] and
- Removal as an alien who has fallen into distress. [FN119]

In the case of a child who has entered the U.S., it is preferable to pursue voluntary departure instead of removal when practicable so as to protect the child from the consequences of a formal removal order, i.e., a 10-year bar on reentering the U.S., the threat of prosecution for reentry after removal and subsequent reinstatement of removal. Voluntary departure allows the child to reenter lawfully after one year if he or she can obtain a visa. [FN120] If granted voluntary departure, however, the child is statutorily required to have the funds necessary for repatriation and could be required to post bond. [FN121] These requirements may disqualify most children unless the attorney, family members, or others assist in raising funds. Likewise, in the case of a child who is an arriving alien apprehended at a port of entry, it is preferable to pursue withdrawal of the child's application for admission rather than a removal order when the child has the means to depart so as to protect the child against the consequences of removal if the client seeks to return, or returns, to the U.S. For aliens who have fallen in distress, the INS incurs the expense but this relief results in a permanent (though potentially waivable) bar to reentry. [FN122]

If the child is entitled to no U.S. immigration relief and is to be repatriated, the attorney might consider the scope of representation to include ensuring repatriation to his family by contacting the family and coordinating with the INS and the foreign consulate the travel arrangements that will help the child reach home or a stable living environment. [FN123]

Special Immigrant Juvenile Status (SIJS) is an ideal vehicle for detained children who have been abused, neglected, or abandoned to secure lawful permanent residence in the U.S. [FN124] The process is three-tiered. First, the advocate must secure INS consent to the jurisdiction of the state or local court to conduct dependency proceedings. Second, the state or local court must determine that the child has been abused, neglected, or abandoned, whether it is in the child's best interests to remain in the U.S., and whether the child is eligible for long-term foster care. Third, presented with these findings, the INS will entertain an SIJS application and if granted, the child will receive lawful permanent residence. The child will be permanently barred from immigrating his or her parents even after naturalization. [FN125]

Since its enactment in 1990, there has been a lack of clarity or consistency in the INS District Directors' decisions to grant or withhold consent or the time period when the INS can confer consent. Some districts consider whether the child is in fact abused, neglected, or abandoned in addition to his or her admissibility under SIJS before conferring consent. Other districts consider only the child's admissibility under SIJV before conferring consent and let the state or local court decide on the question of abuse, neglect, or abandonment. [FN126] The latter

approach is clearly more consistent with the letter and intent of the statute, and the relative expertise of the INS and the state and local courts. [FN127] In the case of children with both potential asylum and SIJS claims, it may be advisable to advocate with the INS for SIJS consideration before subjecting the children to adversarial proceedings on the asylum claim, because these proceedings can retraumatize the child. Furthermore, lawful permanent residence as a remedy is usually preferable to asylum, given the greater rights and privileges it confers and the fact that it is now reportedly taking approximately eight years for asylees to adjust status to permanent residence under the cap of 10,000 visa numbers per year allocated to asylees.

Many children may qualify for T and U visas, as 50,000 women and children are reportedly trafficked into the U.S. for illicit purposes annually. These are nonimmigrant visas of a three-year duration with the ultimate possibility of adjustment of status to permanent residence. [FN128]

For a T visa, the child must prove to the INS that he or she has been a victim of a severe form of trafficking, including sex trafficking, recruitment, harboring or transportation of a person for labor services, involuntary servitude, slavery, or debt bondage, through the use of force, fraud, or coercion. The child will be required to show that he or she: (1) has been a victim of a severe form of trafficking in persons; (2) is physically present in the U.S. on account of the trafficking; (3) has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or has not attained 15 years of age; and (4) would suffer extreme hardship involving unusual and severe harm if removed from the U.S. [FN129] These visas may be most appropriate for Chinese children from certain provinces who are often trafficked into the U.S. under debts of \$50,000 to \$70,000 and subject to indentured servitude or other indignities to pay off the debt. [FN130] Attorneys may be aware that securing children's cooperation in these cases against their smugglers will be difficult, given the fear of possible reprisals against themselves and family members.

U visas are available to a different class, those who are victims of a serious crime, and have been or will be helpful in the investigation and prosecution of the crime. The applicant must establish that: (1) he or she has suffered substantial physical or mental abuse as the result of being a victim of serious criminal activity occurring in the U.S. or its territories, including domestic violence, rape, incest, abusive sexual contact, prostitution, kidnapping, abduction, extortion, or serious assault; (2) the applicant or, if under age 16, the child's parent, guardian, or next friend possesses information about this criminal activity; and (3) the applicant or, if under age 16, the parent, guardian, or next friend, has or will be helpful in the investigation or prosecution of criminal activity as certified by a judge, prosecutor, or other official. [FN131] While final regulations have yet to be codified on these remedies, the statutes are in effect and attorneys should pursue them with the INS for any potentially eligible detained immigrant and refugee child contemporaneous to other relief in removal proceedings. [FN132]

If the child client qualifies solely for an INS-based remedy while in removal proceedings, the advocate can seek an adjournment or motion for administrative closure with INS agreement, or termination of the proceedings where appropriate to allow for the INS adjudication of the specific form of relief.

## CONCLUSION

Through holistic, child-centered advocacy, attorneys play a critical role in helping to ameliorate the plight of unrepresented children in INS custody and securing their release and/or other remedies from removal. Legal representation further helps improve the likelihood that the child client's special needs will be met and that the conditions of her or his confinement will be improved. But only systemic and permanent reform can ensure children's full access to counsel and due process rights. The Unaccompanied Alien Child Protection Act of 2001, now pending in Congress, provides a blueprint for change. [FN133] Through this legislation, detained children would be provided with competent counsel and guardians ad litem. Control over the children's affairs would also be transferred from the INS to an independent unit in the Department of Justice, thereby eliminating a perceived conflict of interest for the INS acting simultaneously as the guardian of the children and their prosecutor. Children languishing in juvenile detention centers without lawyers cannot wait for policy change to come from Washington, however. As we await reform, zealous legal representation can help bring justice to the individual lives and collective treatment of detained immigrant and refugee children.

## NOTES

[FN1]. Christopher Nugent is Director of the American Bar Association (ABA) Immigration Pro Bono Development and Bar Activation Project in Washington, D.C. The Project has undertaken the Detained Immigrant and Refugee Emergency Pro Bono Representation Initiative to galvanize pro bono representation efforts for children in INS custody nationwide. To volunteer, please contact Christopher at (202) 662-1008, email: [nugentc@staff.abanet.org](mailto:nugentc@staff.abanet.org). Steven Schulman is National Pro Bono Counsel at the law firm of Latham & Watkins and resident in the firm's Washington, D.C., office. Latham & Watkins is working on INS detained children's issues as a comprehensive national signature pro bono project. As part of the project, the firm is counsel to the Women's Commission for Refugee Women and Children and co-counsel to the Center for Human Rights and Constitutional Law on the Flores v. Reno class action settlement, discussed below. The authors thank the many experts in the field cited in this article and the tireless advocates on the front lines of defending children in INS custody, whose wisdom and insights have shaped this article and have inspired the authors in their own work. The views and opinions expressed herein do not necessarily represent the policies of the American Bar Association unless specifically adopted as such.

[FN1]. The EOIR is the administrative body within the Department of Justice that oversees immigration adjudication. EOIR includes the immigration courts and the Board of Immigration Appeals (BIA). It is a separate entity from the INS.

[FN2]. Pritchard, Helton, and Magruder, "The American Dream Betrayed: The Plight of Detained Immigrant and Refugee Children," 30 Int'l Law News 1 (2001); Barnett, "Dark Discoveries, New Hope: The ABA Aids Immigrant Detainees Facing Uncertain Futures," A.B.A. J., Feb. 2001, at 8; Martin and Schoenholtz, "Asylum in Practice: Successes, Failures, and the Challenges Ahead," 14 Geo. Immigr. L.J. 589, 595 n.34 (2000) (citing EOIR, Immigration Court Asylum Decisions: FY 1999); Finkel, "Voice of Justice: Promoting Fairness through Appointed

Counsel for Immigrant Children," 17 N.Y.L. Sch. J. Hum. Rts. 1105 (2001); Tulsy, "Asylum Seekers Face Lack of Legal Help," San Jose Mercury News, Dec. 30, 2000, at A12.

[FN3]. See, e.g., Rahill, Office of the Chief Immigration Judge, "What Child is This? How Immigration Courts Respond to Unaccompanied Minors," Institute for Court Management: Court Executive Development Program Phase III Project (May 2000); Driscoll, "Six Years Old and in Court: Thousands of Unaccompanied Children End Up in Detention in the United States," 1 Refugees 15 (UNHCR 2001), an edition dedicated to refugee children.

[FN4]. Bhabha and Young, "Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New United States Guidelines," 11 Int'l J. Refugee L. 84 (1999).

[FN5]. See "Working with Refugee and Immigrant Children: Issues of Culture, Law and Development," Lutheran Immigration and Refugee Service (1998), a unique, essential primer for immigrant and refugee children's advocacy that may be ordered through Susan Schmidt, Director of Children's Services at the Lutheran Immigration and Refugee Service (LIRS), e-mail: [sschmidt@lirs.org](mailto:sschmidt@lirs.org), phone: (410) 230-2700.

[FN6]. See, e.g., Bersani, "Flores v. Meese: Playing Hide and Seek With the Right to Physical Freedom-Children Teach the INS the ABCs of Due Process," 43 Syracuse L. Rev. 867, 900, n.115 (1992), referring to physical and psychological impact of detention of children; Silove, Steel, Mollica, and Sultan, "Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development," The Lancet, vol. 357, issue 9266 (May 5, 2001); Keller, Written Testimony in Support of the Refugee Protection Act, before the Senate Judiciary Committee's Subcommittee on Immigration, May 3, 2001 (Congressional Testimony by Federal Document Clearinghouse); Lawton, "Facilities Review Panel v. Coe: The West Virginia Supreme Court of Appeals Adopts an Objective Approach to Deciding Pretrial Detention of Accused Juveniles," 95 W. Va. L. Rev. 505, 507 (Winter 1992/1993) (discussing traumatic impact of detention on children and "overwhelmingly negative physical, psychological and legal consequences").

[FN7]. This alien-centered approach to unaccompanied or separated children is in marked contrast to Western European and Canadian systems. Employing the "best interests of the child" as a guiding principle for the care and treatment of the children, these systems rarely detain unaccompanied or separated children in the first instance but place them through their child welfare systems. They further provide the children with government-appointed counsel and/or guardians to help them navigate the legal process. Immigration law nonetheless governs and has ultimate decision-making authority over the children. See, e.g., binder from Transatlantic Workshop on Unaccompanied or Separated Children: Comparative Policies and Practices, June 18-19, 2001, Washington, D.C., sponsored by Georgetown University's Institute for the Study of International Migration with support from the German Marshall Fund of the United States, copy on file with authors. On comparative practices, see also Secretariat of the Inter-Governmental Consultation on Asylum, Refugee and Migration Policies in Europe, North America and Australia, "Report on Unaccompanied Minors: Overview of Policies and Practices in IGC Participating States" (July 1997); Save the Children/UNHCR, "Separated Children in Europe Programme: Statement of Good Practice" (2000). On international norms, see also "Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum"

(UNHCR 1997); and "Refugee Children: Guidelines on Protection and Care" (UNHCR 1994).

[FN8]. The absence of relevant child welfare/training is regrettably common in other domestic legal systems adjudicating the rights of children. See, e.g., "A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings," in 1995 ABA Juv. Just. Center, Juv. L. Center & Youth L. Center 6-7; Weinstein, "And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System," 52 U. Miami L. Rev. 79 (1997).

[FN9]. See, e.g., Model Rules of Prof'l Conduct R. 1.1 (Competence); R. 1.2 (Scope of Representation); R. 1.3 (Diligence); R. 1.4 (Communication); and Preamble: A Lawyers' Responsibilities (2001); see also ABA Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases (reprinted in 29 Fam. L. Q. 375 (1995)); and Robert E. Shepherd, Jr., ed., IJI-ABA Juvenile Justice Standards Annotated, A Balanced Approach (1996).

[FN10]. See Rahill, *supra* note 3, at 6, clarifying that "[n]either the Immigration Court nor the Service has a designated set of specific procedures for handling cases of unaccompanied minors in removal proceedings. Rather, responding to a variety of experiences over time, the two agencies have attempted to fashion some accommodations to the unique problems posed by these aliens. Even so, many IJs and children's rights advocates believe that more can be done to improve the way these cases are handled."

[FN11]. See Memorandum from the Office of Chief IJ Michael Creppy to Steven Lang, Pro Bono Coordinator, regarding the ABA pro bono initiative for minors in Immigration Court, June 11, 2001, at 5, on file with authors, indicating that "two recent Immigration Judges' conferences featured special sessions on juvenile issues" and that "decisions on 'child-friendly techniques' are left to the individual judge." See also Rahill, *supra* note 3, at 18.

[FN12]. See, e.g., ABA President Robert E. Hirshon, Letter to the Editor, Washington Post, Aug. 29, 2001, on file with authors, emphasizing the immediate need for meaningful, permanent reform in the treatment of children in INS custody as would be provided by the Unaccompanied Alien Child Protection Act of 2001, introduced in the Senate by Sens. Dianne Feinstein (D-Cal.) and Lincoln Chaffee (R-R.I.) (S. 121) and in the House by Reps. Chris Cannon (R-Utah) and Zoe Lofgren (D-Cal.) (HR. 1094). For a summary of this proposed legislation, see 78 Interpreter Releases 404 (Feb. 26, 2001).

[FN13]. There is a wide body of literature on lawyering for children from other areas of domestic law proceedings (e.g., abuse/neglect proceedings, family law, and juvenile justice) with lessons relevant to practitioners representing children in immigration proceedings. See, e.g., Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (1997); Federle, "The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client," 64 *Fordham L. Rev.* 1655 (1996); Buss, "Confronting Developmental Barriers to the Empowerment of Child Clients," 84 *Cornell L. Rev.* 895 (1999); Wizner and Berkman, "Being a Lawyer for a Child Too Young to be a Client: A Clinical Study," 68 *Neb. L. Rev.* 330 (1989). For consideration of holistic client advocacy using an interdisciplinary approach to meeting clients' legal and nonlegal needs (e.g., through lawyers

working with social workers), see, e.g., Cervone and Mauro, "Ethics, Cultures and Professions in the Representation of Children," 64 *Fordham L. Rev.* 1975, 1987 (1996). See also *What I Wish I'd Learned in Law School: Social Science Research for Children's Lawyers* (ABA 1997). Additionally, the Equal Justice Network's Project for the Future of Equal Justice provides links to information and resources of collaborative, holistic lawyering strategies at [http://www.equaljustice.org/innovative/holistic\\_advocacy\\_links.htm](http://www.equaljustice.org/innovative/holistic_advocacy_links.htm).

[FN14]. The ABA Section of Litigation's Immigration Summit for the Training of Pro Bono Attorneys in the Representation of Unaccompanied Children (ABA Summit) was predicated on a skills-building child advocacy approach. The summit, designed in cooperation with many ABA entities, LIRS, and the Women's Commission for Refugee Women and Children, was held in Chicago on August 5, 2001, and attracted more than 100 attorneys from 25 states and the District of Columbia. See "More than 100 Attorneys Answer Call to Provide Pro Bono Counsel to Immigrant Children," *PR Newswire*, Aug. 7, 2001; Amandon, "Standing in the Gap: Pro Bono Attorneys Help Unaccompanied Immigrant Children Find Asylum," 15 *Chic. B. Ass'n Rec.* 46 (Sept. 2001). To order the ABA Summit's video and written training materials, contact Catherine Krebs, phone: (202) 547-3060, e-mail: [catherinekrebs@prodigy.net](mailto:catherinekrebs@prodigy.net).

[FN15]. See, e.g., Hallstrom, "The Ethical Challenges of Representing Children," 46 *L.A. Bar J.* 488 (1999); Duquette, "Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required," 34 *Family L. Q.* 441 (2000); Kell, "Voices Lost and Found: Training Ethical Lawyers for Children," 73 *Ind. L. J.* 635 (1998); and Eames, "

[FN16]. Model Rules of Prof'l Conduct R. 1.2(a) (2001).

[FN17]. Model Rules of Prof'l Conduct R. 1.14, regarding representation of a client under a disability. Indeed, in the commentary to Rule 1.14, "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Notably, however, "there is no explicit authority for appointment of a guardian ad litem or any other form of personal representative in Immigration Court proceedings." See Rahill, *supra* note 3, at 14. See also *Calero v. INS*, 957 F.2d 50 (2d Cir. 1992) (finding no due process right to a guardian for 15-year-old Salvadoran in proceedings, and citing *Johns v. Department of Justice*, 624 F.2d 522 (5th Cir. 1980), for proposition that "in isolated, unusual and egregious circumstances" due process might require a guardian for a minor in proceedings (in *Johns*, guardian was appointed for five-year-old Mexican child with no one to represent her interests adequately)). *Calero* is summarized in 69 *Interpreter Releases* 1335 (Oct. 19, 1992).

[FN18]. Hallstrom, *supra* note 15, at 490.

[FN19]. "Working with Refugee and Immigrant Children," *supra* note 5, at 6-7; Shepherd, "Developmental Psychology and the Juvenile Justice Process," 14 *Crim. Just.* 42 (1999).

[FN20]. "Working with Refugee and Immigrant Children," *supra* note 5, at 7-8.

[FN21]. *Id.* at 8-10.

[FN22]. *Id.* at 10-11.

[FN23]. *Id.* at 11-12.

[FN24]. See, e.g., Country Reports on Human Rights Practices, Dep't of State Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/g/drl/rls/hrrpt/2000>; Human Rights Watch's children's links at <http://www.hrw.org/children/child-links.htm>; Guebre-Christos, "Aid for Aliens," *A.B.A. J.*, May 2001, at 14 (explaining that volunteer attorneys may contact the UNHCR legal counseling unit for assistance in Washington, D.C. by e-mail at [usawa@unhcr.ch](mailto:usawa@unhcr.ch), or phone (202) 296-5191).

[FN25]. For a discussion of children's conditions of confinement and attorney access issues, see, e.g., Amon, "Access Denied: Children in INS Custody Have No Right to a Lawyer, Those Who Get One Risk Retaliation," *Nat'l L.J.*, Apr. 16, 2001, at A1; Cuadros, "Ramon's Journey," *Time.com*, June 7, 2001 (chronicling the plight of Ramon Zapeda, a persecuted Nicaraguan street child granted asylum in the U.S.); Sullivan, "INS Still Jails Foreign Children, Experts Say," *Oregonian*, Sept. 1, 2001; "Bill Addresses Conflict in INS Responsibilities," *Associated Press*, Sept. 2, 2001; Fagen, "Bill Seeks Better Deal for Detained Immigrant Children," *CQ Daily Monitor*, May 29, 2001; Martin, "Immigrant Kids Denied Rights, Says Commission: Advocacy Group to Tour Martin Hall, Where Children Are Detained," *Spokesman-Review*, Aug. 29, 2001; Sanchez, "Legal Help for Juvenile Immigrants Urged," *San Diego Union Tribune*, Feb. 17, 2001; Becker, "The Other Immigrant Children," *Miami Herald*, Jan. 7, 2000; Human Rights Watch, *Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration and Naturalization Service* (Dec. 1998); and Human Rights Watch, *Slipping Through The Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service* (Apr. 1997), available at <http://www.hrw.org/pubweb>. See also *Zhen v. INS*, No. 99-71331, 2001 WL 312433 (9th Cir. Mar. 30, 2001) (involving a Chinese boy seeking asylum who was detained in Arizona but represented by counsel in Guam, demonstrating how legal access obstacles can thwart effective client preparation and raise due process concerns). In *Zhen*, the Ninth Circuit held that the IJ did not abuse his discretion by denying a motion to change the child's venue to Guam to allow for direct attorney-client contact during preparation of the child's asylum application. The court reasoned that the INS, not the IJ, had authority to redetermine the child's conditions of custody and that there was little to no chance that the INS would actually transfer custody to Guam. The court held, however, that the IJ abused his discretion by denying counsel's request for a first continuance to prepare his client's asylum claim, thereby effectively depriving *Zhen* of his statutory right to present evidence. Supporting this conclusion, the court considered *Zhen's* youth and reasonable conduct in retaining counsel, as well as counsel's reported inability to communicate with his client in Arizona and counsel's reasonable attempts to secure his client's transfer or release from the INS to Guam in order to complete the asylum application.

[FN26]. For a discussion of the detention standards, see 77 Interpreter Releases 1637 (Nov. 20, 2000). The full text of the standards is available online at <http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm>. See also Pritchard, "The INS Issues Detention Standards Governing The Treatment of Detained Immigrants and Asylum Seekers," *Refugee Reports*, Feb. 2001, at 6; ABA, *INS Detention Standards Implementation Initiative*

(2000), on file with authors.

[FN27]. See, e.g., Hanley, "INS Use of Remote Testimony Via Videoconferencing: A Case For Preserving Live, In-Person Hearings for Asylum Seekers" (2000), on file with authors; Kim, "Videoconferencing and INS Youth Detainees: The Dangers of Violating Due Process Rights" (2000), on file with authors. See also DeConcini, "CLINIC Urges Objections to Merit Hearings by Video," Detention Watch Network News, Summer 2001, at 14, referring to CLINIC's efforts to coordinate practitioners on this issue and model pleadings for motions for in-person hearings, available at <http://www.cliniclegal.org>. Contact Traci Hong, phone: (202) 742-5609, e-mail: [thong@ailf.org](mailto:thong@ailf.org) of the American Immigration Law Foundation for support in appellate work on the videoconferencing issues. Regarding ethical considerations, consider the practice guidelines from the Report of the Working Group on Interviewing and Counseling, Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, reprinted in 64 Fordham L. Rev. 1351, 1353 (1996), which advise that "[e]very child should be seen by the lawyer, except in the rare circumstance where it is a physical impossibility." Even with the caveat that removal cases might constitute the physical impossibility precluding an attorney from seeing the child, the Working Group advises that there be telephone contact and communication. Indeed, lack of direct, in-person communication could conceivably thwart the lawyer's ethical requirements to provide competent representation to the child client, negotiate the scope of representation with the client, and ensure effective communication with the client. See also *supra* note 9.

[FN28]. See, e.g., Walker, Handbook on Questioning Children: A Linguistic Perspective (1999), available through the ABA Center on Children in the Law at <http://www.abanet.org/child>; "Best Practices: Techniques for Interviewing Children," Detention Watch Network News, Apr./May 2000, at 8, available at <http://www.lirs.org>. These techniques are consistent with recommendations of the Report of the Working Group on Interviewing and Counseling, *supra* note 27, at 1359-60.

[FN29]. Recommendation of Meredith Linsky, Coordinator, South Texas Asylum Pro Bono Representation Project (ProBAR), Harlingen, Texas, and Sarah Bronstein, of the Catholic Legal Immigration Network, Los Angeles, at the ABA Summit, *supra* note 14. The Working Group on Interviewing and Counseling advises, however, that the lawyer should ensure that "no person will be present who could jeopardize the attorney/client privilege when discussing potentially confidential matters," *supra* note 27, at 1351.

[FN30]. See *supra* note 9. See also Report of the Working Group on Interviewing and Counseling, *supra* note 27, at 1359-60.

[FN31]. Recommendation of Christine Kleiser, Children's Advocate, Florida Immigrant Advocacy Center, Miami, Florida, at the ABA Summit, *supra* note 14. Recently, one of our colleagues arrived for a client interview from another INS facility in an INS van, resulting in some momentary confusion by the client as to the lawyer's affiliation. Fortunately, the client raised the issue, and the record was set straight.

[FN32]. Many innovative resources have been created to enhance legal service delivery efforts and explain the law to children, such as the Florida Immigrant Advocacy Center's "Know Your

Rights" presentation format; Detention Resource Project (Philadelphia, Pa.) Blue Folder; Midwest Immigrant & Human Rights Center's (Chicago, Ill.) Immigration and You: A Manual for Children (1999) (on file with authors).

[FN33]. According to the Report of the Working Group on Interviewing and Counseling, *supra* note 27, at 1360, "the lawyer should explain confidentiality to the client" and "show the lawyer's confidentiality obligations and their limits."

[FN34]. The lack of confidentiality between children and detention facility staff under contract with INS was raised as an issue by several trainers at the ABA Summit, *supra* note 14. In the case of licensed social workers or physicians working with the children, patient-client privilege arguably should attach despite their contractual relationship with INS. See, e.g., Lawrence and Kirpius, "Legal and Ethical Issues Involved When Counseling Minors in Nonschool Settings," *J. Counseling & Dev.*, vol. 78, issue 2 (Apr. 1, 2000).

[FN35]. See, e.g., Save the Children, *Seeking Asylum in the U.K.: For Adults Supporting Unaccompanied Children With Legal Representation and the Asylum Process* 6 (1999) (on file with authors). As detained immigrant and refugee children tend not to be familiar with their rights in general vis-à-vis attorneys, including their specific rights to both retain and discharge counsel if necessary, a retainer agreement that clarifies the client's rights and attorney's duties might be advisable even if the child client is being represented pro bono.

[FN36]. See, e.g., Silver, "Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship," 6 *Clinical L. Rev.* 259 (1999); Nugent, "Out From Oppression: Immigration Cases Forge a Bond Between Lawyers and Clients," *Los Angeles Daily Journal*, Nov. 7, 1996.

[FN37]. "Working with Refugee and Immigrant Children," *supra* note 5.

[FN38]. See, e.g., "Ben's Guide to U.S. Government for Kids K-2," <http://bensguide.gpo.gov/k-2/index.html>.

[FN39]. Various pro bono service providers, including Juanita Kirsche and Joe Cackley of the Detention Resource Center (Philadelphia, Pa.), use visual aids to orient children.

[FN40]. See, e.g., *Model Rules of Prof'l Conduct, Preamble: A Lawyer's Responsibilities* (2001), defining lawyer's educational role to "provide client with informed understanding of client's legal rights and obligations and their practical obligations," and *id.*, R. 1.4, on communication requiring that the "lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," and noting that "adequacy of communication depends in part on the kind of advice or assistance involved." According to the Report of the Working Group on Interviewing and Counseling, *supra* note 27, at 1360, "The lawyer should use concrete examples, hypotheticals, and road mapping in discussing the case."

[FN41]. This technique admittedly works better with more developmentally mature children capable of identifying and differentiating themselves from others.

[FN42]. The Report of the Working Group on Interviewing and Counseling, *supra* note 27, at 1360, however, cautions that "children are easily led and questions need to elicit information from the child without suggesting answers."

[FN43]. The parties settled after the Supreme Court rendered a decision in the case. *Reno v. Flores*, 507 U.S. 292 (1993) (discussed in 70 Interpreter Releases 433 (Mar. 29, 1993)). The Flores settlement agreement is available online at <http://www.centerforhumanrights.org>. The detention of adults is governed by INS regulations at 8 CFR Part 236 (which also address the detention of juveniles to a limited extent), and by the INS detention standards available at <http://www.ins.usdoj.gov/graphics/lawsregs/guidance.htm>. As of the date of publication, the INS had not published regulations codifying the Flores settlement agreement, though proposed rules were published in 63 Fed. Reg. 39759-63 (July 24, 1998). See 75 Interpreter Releases 1020 (July 27, 1998) (discussing and reproducing proposed rule).

[FN44]. The Flores settlement agreement gives the INS some latitude in determining whether an alien is a juvenile or an adult. See ¶ 13 ("If a reasonable person could conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance").

[FN45]. Flores Settlement Agreement ¶ 11.

[FN46]. This section outlines only those elements of the Flores settlement agreement most relevant to an advocate for a child in custody, and does not discuss other important provisions, such as the standard for initial INS custody of a child during the first 72 hours of detention.

[FN47]. See Flores Settlement Agreement § VI ("General Policy Favoring Release").

[FN48]. *Id.* ¶ 17 ("A positive suitability assessment may be required prior to release to any individual or program pursuant to Paragraph 14"). Thus far, home studies are only mandated for special populations, e.g., all Indian and Chinese children as they are often smuggled and trafficked into the U.S. for illicit purposes. LIRS and the U.S. Catholic Conference are responsible for these home studies and three months of follow-up services after release, pursuant to a contract with the INS.

[FN49]. See Pritchard and Schulman, "Children as Bait and Bond: INS Release Policies and Practices for Children," *Detention Watch Network News*, Summer 2001, at 6.

[FN50]. See, e.g., 8 CFR § 236.1 and the Flores Settlement Agreement ¶ 24A ("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").

[FN51]. See Flores Settlement Agreement ¶ 11 ("The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs"); ¶ 23 ("The INS will not place a minor in a secure facility...if there are less restrictive alternatives that are available and appropriate").

[FN52]. Other standards applicable to facilities housing juveniles, such as state and federal laws and industry standards such as those issued by the American Correctional Association, are not addressed in this article.

[FN53]. See Flores Settlement Agreement ¶ 6 & Exh. 1.

[FN54]. Id. ¶ 12. According to the INS, its current population of minors in custody averages more than 400 on any given day, thereby creating a "permanent influx," which may be exacerbated by the INS's failure to release children promptly pursuant to ¶ 14 of the Agreement.

[FN55]. Id. ¶ 12.A.3.

[FN56]. Id. ¶ 12.

[FN57]. Id. ¶ 23.

[FN58]. The Flores settlement agreement sets forth a series of factors for the INS to consider in determining whether a child is an "escape risk," including whether the minor is under a final order of removal or exclusion; has a history of breach of bond or removal or is indebted to smugglers for transport; and has previously attempted to abscond from INS custody. Id. ¶ 22. While the agreement identifies these as factors, some INS districts reportedly have a policy of transferring all children under final order of removal or exclusion to secure facilities, regardless of the child's behavioral history in INS custody.

[FN59]. Id. ¶ 21.

[FN60]. Id. ¶ 27.

[FN61]. In some districts, the INS has reportedly used children in its custody as a means of obtaining information about, and even custody of, undocumented relatives living in the U.S. A child would therefore be well advised to decline to disclose to the INS the identity of family members in the U.S. unless the child knows that the relatives have legal status.

[FN62]. While the Supreme Court has recognized that patient-psychotherapist communications in the course of diagnosis or treatment are privileged, *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), attorneys for children in some INS districts have reported that INS trial attorneys have obtained and used information gathered in counseling sessions for purposes of cross-examination in removal proceedings. A child client should therefore be cautioned of the possibility that statements in group therapy sessions could be used in removal proceedings.

[FN63]. See *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988) (holding strip searches absent reasonable suspicion violate the Fourth Amendment).

[FN64]. *Flores v. Reno Settlement Agreement* ¶ 24 ("Any minor who disagrees with the INS's determination to place that minor in a particular type of facility, or who asserts that the licensed

program in which he or she has been placed does not comply with the standards set forth in Exhibit may seek judicial review in any U.S. District Court with jurisdiction and venue"). To the authors' knowledge and to the knowledge of the plaintiffs' counsel in *Flores v. Reno*, no suits have been brought under this provision.

[FN65]. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985). This section is intended as an overview only. For more comprehensive information on asylum and other remedies, see, e.g., Germain, *AILA's Asylum Primer* (AILA 2d ed. 2000); Divine, *Immigration Practice* (LEXIS Pub. 2000 ed.).

[FN66]. "The World of Children at A Glance," 1 Refugees 7 (UNHCR 2000).

[FN67]. For a critique, see Nogosek, "It Takes a World to Raise a Child: A Legal and Public Policy Analysis of American Asylum Legal Standards and Their Impact on Unaccompanied Minor Asylees," 24 *Hamline L. Rev.* 1 (2000).

[FN68]. INA § 101(a)(42)(A), 8 USC § 1101(a)(42)(A).

[FN69]. INA §§ 208, 243(h); 8 USC §§ 1158, 1253(h). See implementing regulations at 8 CFR § 208.16.

[FN70]. See, e.g., *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990) (summarized in 67 *Interpreter Releases* 1197 (Oct. 22, 1990)).

[FN71]. Bhabha and Young, *supra* note 4, at 101-103.

[FN72]. Regarding the relevance of children's heightened subjective fear of harm to the finding of persecution, consider, e.g., *United Nations Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶¶ 37, 52 (Geneva 1979), stating that "the evaluation of the subjective element is inseparable from an assessment of the personality of the applicant since psychological reactions of different individuals may not be the same in identical conditions" and "due to the variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary." On unaccompanied children's mental health issues, psychological reactions to traumatic events, and indicia of signs of trauma and disorders such as post-traumatic stress disorder, see, e.g., "Working with Refugee and Immigrant Children," *supra* note 5, at 14-19; Action for the Rights of Children (ARC), *Working with Children 11-14* (2000). See also Whitcomb, Shapiro, and Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* (National Institute of Justice 1985).

[FN73]. *Matter of* [name not provided], A76 512 001 (IJ Oct. 18, 2000) (Chicago, Ill.) (IJ Zerbe), discussed in 77 *Interpreter Releases* 45 (Nov. 20, 2000).

[FN74]. *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001), discussed in 78 *Interpreter*

Releases 599 (Apr. 2, 2001).

[FN75]. Matter of Zapeda-Campos, A76 707 613 (BIA Oct. 3, 2001) (represented by Milagros Cisneros, of Bryan Cave, Phoenix, Arizona) (copy on file with authors); Matter of [name not provided], [number not provided] (BIA Jan. 20, 1999) (copy on file with authors); Bucio, "Where the Streets are Mean and Brutal," *Houston Chronicle*, Jan. 22, 2001, at A18; Pinkerton, "Judge Grants Orphan Twins Asylum After Hearing About Abuse by Family," *Houston Chronicle*, Feb. 9, 2000, at A15; see also Amon, Cuadros, and Sanchez, *supra* note 25.

[FN76]. Ibrahimian, "To Protect a Child: Antonio's Story," *Detention Watch Network News*, Apr./May 2000, at 6, available at <http://www.lirs.org>.

[FN77]. 1999 oral decision by IJ in Boston, represented by Anthony Pelino, e-mail: [pelinoesq@aol.com](mailto:pelinoesq@aol.com), phone: (520) 868-0123. On working with lesbian, gay, and bisexual youth, see Ryan and Futterman, "Social Developmental Challenges for Lesbian, Gay and Bisexual Youth," 29 *SIECUS Rep.* 518 (Apr. 1, 2001). Regarding sexual orientation-based asylum claims, see Heartland Alliance and Lesbian and Gay Immigration Rights Task Force, *Preparing Sexual Orientation-Based Asylum Claims: A Handbook for Advocates and Asylum Seekers* (2000), available via April Herms, Lesbian and Gay Immigration Rights Task Force, at (212) 573-6075, or [info@lgirtf.org](mailto:info@lgirtf.org), <http://www.lgirtf.org>.

[FN78]. See *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000), summarized in 77 *Interpreter Releases* 1630 (Nov. 20, 2000); *Li Wu Lin v. INS*, 238 F.3d 239 (3d Cir. 2001), summarized in 78 *Interpreter Releases* 744 (Apr. 30, 2001). In *Li Wu Lin*, the court held that potential punishment of a year and a half of incarceration and forced labor for a 15-year-old who voiced opposition to the Chinese government was sufficiently severe to qualify as persecution for asylum and to support withholding of removal.

[FN79]. See, e.g., Amon and Sanchez, *supra* note 25, regarding Edwin Munoz's asylum claim.

[FN80]. Unpublished oral decision in York, Pa., represented by Kenneth H. Zucker of Pepper Hamilton, phone: (610) 640-7816, e-mail: [zucker\\_k@pepperlaw.com](mailto:zucker_k@pepperlaw.com). For information on Pepper Hamilton's pro bono signature project for detained Chinese children, see also Sherwin, "Pepper Lawyers Speak for the Silenced: Firm Pledges to Aid Chinese Held in INS Detention Center," *Legal Intelligencer*, Apr. 27, 2001, at 7.

[FN81]. Matter of Aristides Luna-Lorenzано, C3/31/98 (16-year-old Guatemalan illegally conscripted and tortured as member of the cognizable particular social group of "underage males forcibly recruited and illegally conscripted into the military who have been subjected to physical, social and emotive abuse"), press release, Children and Family Justice Center of Northwestern University Legal Clinic.

[FN82]. See 78 *Interpreter Releases* 604 (Apr. 2, 2001); Deardorff, "Mom Wins Asylum for Son with Autism: INS Agrees Boy Faced Persecution in Pakistan Because of His Disability," *Chicago Tribune*, Feb. 21, 2001, at A1; All Things Considered: U.S. Immigration and Naturalization Service Grants Asylum to Pakistani with Autism (National Public Radio

broadcast, Mar. 2, 2001), available at <http://www.npr.org/programs/atc>.

[FN83]. *Kahssai v. INS*, 16 F.3d 323 (9th Cir. 1994) (case of 16-year-old Ethiopian girl), discussed in 71 *Interpreter Releases* 535 (Apr. 18, 1994).

[FN84]. On disability-based asylum claims, see, e.g., Kanter, Chisam, and Nugent, "The Right to Asylum and Need for Legal Representation of People with Mental Disabilities in Immigration Proceedings," 25 *Mental & Physical Disability L. Rep.* 511 (2001); Kanter, "The Right to Asylum for People with Disabilities," 73 *Temple L. Rev.* 1117 (2000).

[FN85]. Only six percent of all applicants, including adults, were granted relief under the Convention Against Torture in fiscal year 2000. See Dep't of Justice, Executive Office for Immigration Review, *Statistical Yearbook 2000*, § R, at 37 (Jan. 2001), available at <http://www.usdoj.gov/eoir>. Regarding the Convention Against Torture, see Sklar, "Implications of the New Implementing Statute and Regulations on Convention against Torture Protections," 76 *Interpreter Releases* 265 (Feb. 22, 1999); Rosati, "The United Nations Convention Against Torture: A Detailed Examination of the Convention as an Alternative for Asylum Seekers," 97-12 *Immigration Briefings* (Dec. 1997).

[FN86]. In two unpublished decisions, however, the Board of Immigration Appeals upheld protection under the Convention Against Torture to applicants who respectively experienced and feared police rape and beatings while incarcerated. See 77 *Interpreter Releases* 1224 (Aug. 28, 2000), discussing *Matter of [name not provided]*, [number not provided] (BIA Aug. 9, 2000), and *Matter of Opku*, A75 794 878 (BIA Aug. 7, 2000). Children in certain circumstances also experience and rightfully fear this type of treatment by authorities, e.g., street children subject to mistreatment by the authorities, including incarceration, and Chinese children subject to prosecution and incarceration for their illegal departure. On illegal departure theories, see *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996), *Chang v. INS*, 119 F. 3d 1055 (3d Cir. 1998).

[FN87]. Recommendation of Holly Cooper, Children's Attorney, Florence Immigrant and Refugee Rights Project, Florence, Arizona, at the ABA Summit, *supra* note 14. See also Goodman et al., "Testifying in Criminal Court," in 57 *Monographs of the Society for Research in Child Development* 1-2 (1992); Myers et al., "Child Abuse: Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony," 28 *Pac. L.J.* 3, 17, 74-75 (1996), substantiating the correlation between testimony and deleterious psychological consequences for children. Also, consider *Maryland v. Craig*, 497 U.S. 836 (1990), finding the state's compelling interest to protect abused children from the trauma and embarrassment arising from their testimony. This article does not address how to represent an incompetent child in proceedings other than recognizing the need for a guardian ad litem or representative to represent the child's best interests, see *supra* note 17. On the question of competency, see, e.g., Lyon, "Child Witnesses and the Oath: Empirical Evidence," 73 *S. Cal. L. Rev.* 1017 (2000); Coonan, "Tolerating No Margin for Error: The Admissibility of Statements by Alien Minors in Deportation Proceedings," 29 *Tex. Tech L. Rev.* 75 (1998); Kanter, Chisam, and Nugent, *supra* note 84.

[FN88]. See 8 CFR § 3.21, providing that the Immigration Judge can schedule prehearing conferences at his or her discretion to narrow issues, obtain stipulations, exchange information voluntarily, or simplify the proceedings.

[FN89]. "Guidelines for Children's Asylum Claims," INS Memorandum from the Office of International Affairs (Dec. 10, 1998), discussed and reproduced in 76 Interpreter Releases 1 (Jan. 4, 1999); see also Bhabha and Young, *supra* note 4; Creppy memorandum, *supra* note 11, at 5 (clarifying that while the Immigration Court should not be bound by INS policy statements such as the Guidelines, "we obviously encourage immigration judges to consider these and other materials as they handle cases involving unaccompanied minors").

[FN90]. ABA Immigration Pro Bono Development and Bar Activation Project correspondence to Chief IJ Creppy, June 29, 2001, on file with authors, referring to IJ's ability to refuse to hear cases if the conditions in the courtroom or the children's conditions of confinement adversely affect their meaningful participation in the proceedings and thus, their due process rights. See also Goodman, Quas, Buckley, and Shapiro, "Innovations for Child Witnesses: A National Survey," 5 *Psych., Pub. Pol'y, & L.* 255 (1999); Rahill, *supra* note 3, at 37-43, discussing the different, discretionary courtroom procedures used by some IJs, including establishing separate dockets for juvenile cases; removing the robe, and sitting at counsel table with the child; limiting how testimony is presented and preventing non-parties in the courtroom. For discussions of child-friendly practices from other courts, see Grasso, *A Judge's Guide to Improving the Legal Representation of Children* (State Justice Institute, ABA 1997); Rauber, *A Judge's Guide: Making Child-Centered Decisions in Custody Case* (State Justice Institute, ABA 2001); Howze, *Making Differences Work: Cultural Context in Abuse and Neglect Practice for Judges and Attorneys* (ABA 1996).

[FN91]. The INS guidelines for children's asylum claims, *supra* note 89, for example, recognize the utility of reports from child psychologists to help determine past or future persecution and indicate that trauma may have a significant impact on the ability to present testimony. See *supra* note 66, at 13-14.

[FN92]. Sample expert witness affidavits are provided in the manual from the ABA Summit, *supra* note 14.

[FN93]. Additionally, while *Matter of Mogharrabi*, 19 I&N Dec. 439 (1987), established that an asylum applicant's testimony alone may be sufficient, without corroborative evidence, in light of recent BIA case law it is advisable to submit as much corroborating evidence and testimony as possible in the child's case even if it consists of letters from people familiar with the child's facts and circumstances. For a discussion of *Matter of Mogharrabi* and its progeny, see Taylor, "The Mogharrabi Rule in 1998: A Review of Recent BIA Asylum Decisions," 75 *Interpreter Releases* 901 (July 6, 1998).

[FN94]. While the guidelines for children's asylum claims, *supra* note 89, are silent on this specific issue, the gender asylum guidelines explicitly recognize that "[i]t should not be necessary to ask precise details of the sexual abuse; the important thing is establishing whether it has occurred and the apparent motive of the perpetrator." See "Considerations for Asylum

Officers Adjudicating Asylum Claims from Women," INS Memorandum from the Office of International Affairs (May 26, 1995), discussed and reproduced in 72 Interpreter Releases 771 (June 5, 1995).

[FN95]. Comments of Milagros Cisneros, of Bryan Cave, Phoenix, Arizona, at the ABA Summit, *supra* note 14. Improperly proffered or obtained evidence refers to evidence proffered by the INS without the ability to cross-examine the affiant, e.g., disciplinary or other records pertaining to the child's experience in INS custody or medical/mental health records without the client's consent for disclosure, thereby violating the physician-patient or social worker-patient privilege.

[FN96]. Buckley and Sandt, eds., *A Judicial Primer on Child Sexual Abuse* 16- 18, 23, 31, 35, 37-38 (ABA Center on Children and the Law 1994).

[FN97]. See *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987) (specifying youth as a relevant humanitarian consideration supporting the favorable exercise of discretion), summarized in 64 Interpreter Releases 991 (Aug. 24, 1987), amended opinion discussed in 65 Interpreter Releases 137 (Feb. 8, 1988).

[FN98]. See "Guidelines for Children's Asylum Claims," *supra* note 89.

[FN99]. See, e.g., Vieth, "When A Child Testifies: Getting the Jury to Believe the Victim," 17 *ABA Child L. Prac.* 22-24 (1998); Schneider, "Challenging An Incredibility Finding on Appeal: An Incredibility Paradigm," 27 *Wm. Mitchell L. Rev.* 2375 (2001); and "Guidelines for Children's Asylum Claims," *supra* note 89, at 13.

[FN100]. *Supra* note 58.

[FN101]. 8 CFR § 3.23. A motion to reopen/reconsider does not stay the period for filing a notice of appeal with the Board of Immigration Appeals, however.

[FN102]. Holistic, child-centered advocacy extends beyond the confines of the courtroom and warrants the attorney's assistance post-hearing to ensure the child's ultimate, optimal placement. As noted above, the INS contracts with LIRS and the U.S. Catholic Conference for long-term foster care placements.

[FN103]. See, e.g., Office of Refugee Resettlement's description of services in their unaccompanied minors program, available at [http:// www.acf.dhhs.gov/programs/orr/urm.htm](http://www.acf.dhhs.gov/programs/orr/urm.htm). These programs also are administered by LIRS and the U.S. Catholic Conference.

[FN104]. After age 18, as an asylee, he or she will still be eligible for a lesser package of benefits given the Office of Refugee Resettlement's policy change of June 15, 2000, recognizing asylee eligibility for refugee resettlement program benefits. The asylee applies for benefits with his or her state refugee coordinator within 31 days of the grant of asylum. See ORR State Letter #00-12 (June 15, 2000) and State Letter #00-15 (Aug. 3, 2000), discussed in 77 Interpreter Releases 863 (June 30, 2000). For a listing of state coordinators, see

<http://www.acf.dhhs.gov/programs/orr/StateRef.htm> #STATE.

[FN105]. See the Child Citizenship Act of 2000 (CCA), H.R. 2883, Pub. L. No. 106-395, 114 Stat. 1631 (effective February 27, 2001), discussed in 77 Interpreter Releases 1562, 1564 (Nov. 6, 2000). See also 78 Interpreter Releases 1065 (July 2, 2001) (INS interim rule on CCA); 78 Interpreter Releases 495 (Mar. 12, 2001) (INS guidance on CCA).

[FN106]. INA § 201(b)(2)(A)(I), 8 USC § 1151(b)(2)(A)(I); INA § 203(a), 8 USC § 1153(a); INA § 101(b)(1), 8 USC § 1101(b)(1).

[FN107]. The VAWA was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

[FN108]. INA §§ 204(a)(1)(A)(iv), 204(b)(iii). There is also a self-petitioning process under VAWA before the INS that does not require three years of physical presence in the U.S. See 77 Interpreter Releases 1562, 1563 (Nov. 6, 2000). Contact Gail Pendleton of the National Immigration Project of the National Lawyers Guild, (617) 227-9727, e-mail: [nipgail@nlg.org](mailto:nipgail@nlg.org), for expertise in the area of the VAWA and registration on her domestic violence listserve.

[FN109]. INA § 240A(b). See Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), discussed in 78 Interpreter Releases 805, 807 (May 14, 2001).

[FN110]. See, e.g., *Sandoval-Rubio v. INS*, 246 F.3d 676 (9th Cir. 2000) (unpublished) (text available at 2001 WL 1523064) (successful suppression of alienage warranting termination of removal proceedings in illegal, race-based stop); *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999), summarized in 76 Interpreter Releases 1328, 1332 (Sept. 3, 1999); *United States v. Jiminez-Medina*, 173 F.3d 752 (9th Cir. 1999), summarized in 76 Interpreter Releases 1328, 1332 (Sept. 3, 1999); *Matter of Perez*, A73 128 867 (BIA Apr. 28, 2000) (finding that information on Form I-213, Record of Deportable Alien, obtained through INS officer coercion or duress rendered I-213 unreliable and thus, inadmissible to proving alienage), discussed in 77 Interpreter Releases 692, 693 (May 26, 2000); Johnson, "The Case Against Race Profiling in Immigration Enforcement," 78 Wash. U. L.Q. 675 (2000); Coonan, *supra* note 87. Lynn Coyle of the Lawyer's Committee for Civil Rights under Law in Texas, phone: (915) 532-3370, e-mail: [lawyerscommittee.elpaso@attglobal.net](mailto:lawyerscommittee.elpaso@attglobal.net), has applicable pleadings and expertise in this area. Even if proceedings are terminated, INS often asserts its role as legal and physical custodian of the child and will not relinquish custody until another custodian is designated. The agency's continued detention of the child, however, may be challenged as unlawful through habeas corpus.

[FN111]. See 8 CFR § 240.26, clarifying the authority of the IJ to grant voluntary departure under INA § 240B(a) and 8 CFR § 240.25, providing authority to the INS to grant voluntary departure before proceedings and stipulate to terminate removal proceedings to grant voluntary departure.

[FN112]. See 8 CFR § 240.1(d), conferring jurisdiction on the IJ to allow an arriving alien (i.e., arrested upon arrival at a port of entry) to withdraw an application for admission once the issue

of inadmissibility has been resolved and usually with the concurrence of the INS when the grant would be in the interest of justice. The INS has concurrent jurisdiction to grant withdrawal of an application for admission. INA § 235(a)(4), 8 USC § 1225(a)(4); 8 CFR § 235.4. The child will have to demonstrate, however, the intent and means to depart immediately, i.e., a return plane ticket or the cost thereof.

[FN113]. INA § 244, 8 USC § 1254a. See <http://www.ins.gov> for a list of countries designated for TPS.

[FN114]. INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J). See Brady, Special Immigrant Juvenile Status (ILRC 2001 ed.), and related update, packet and training video, available through <http://www.ilrc.org>, as well as related list-serve for practitioners interested in SIJV; see also Yale-Loehr and Hoashi-Ernhardt, "Special Juvenile Immigrants," 6 Bender's Immigration Bulletin 658 (July 1, 2001).

[FN115]. INA § 101(a)(15)(T), (U); 8 USC §§ 1101(a)(15)(T), (U); INA § 214(n), 8 USC § 1184(n); INA § 245(i)(1), (3); 8 USC § 1255(i)(1), (3). See infra note 129 for a discussion of the interim rule implementing the new T and U visa provisions.

[FN116]. Section 1102 of the Legal Immigration Family Equity Act of 2000 (LIFE Act), Pub. L. No. 106-553, 114 Stat. 2762 (effective Dec. 21, 2000), implemented by interim rule published in 66 Fed. Reg. 46697-705 (Sept. 7, 2001). See 78 Interpreter Releases 1478 (Sept. 17, 2001) (discussing interim rule); 78 Interpreter Releases 1440 (Sept. 10, 2001) (reproducing interim rule).

[FN117]. See 66 Fed. Reg. 42587-95 (Aug. 14, 2001) (interim rule), discussed and reproduced in 78 Interpreter Releases 1337 (Aug. 20, 2001); State Department cable, K-3 Visa Implementation (no. 2001-State-167548) (Sept. 27, 2001), to be published in a forthcoming issue of Interpreter Releases. After INS approval of the I-129F form filed in Chicago, the applicant is subject to consular processing abroad and all grounds of inadmissibility including INA § 212(a)(9)(B), unlawful presence of more than 180 days in the U.S., which can be waived. The applicant must then leave the country for visa issuance.

[FN118]. Operations Instruction (OI) § 242.1(a)(22), which might be warranted for sympathetic factors including age.

[FN119]. INA § 250, 8 USC § 1260.

[FN120]. INA § 212(a)(9)(A)(i), (ii); 8 USC § 1182(a)(9)(A)(i), (ii), providing for 10-year bar on reentry for aliens ordered removed and a five-year bar for arriving aliens ordered removed. INA § 276, 8 USC § 1326, provides for a two-year penalty and \$1,000 fine for illegal reentry after removal.

[FN121]. INA § 240B(a), 8 USC § 1229c(a); 8 CFR § 240.25.

[FN122]. Supra note 119. This esoteric provision provides for removal at government expense

but bars the alien "to apply for or receive a visa or other documentation for readmission, or to apply for admission to the U.S. except with the prior approval of the Attorney General."

[FN123]. The INS's repatriation practices regarding children do not ensure the child's actual arrival at a final destination other than the foreign country's airport where they are transferred to governmental custody.

[FN124]. Special immigrant juvenile status is a legal benefit for alien children who are dependents of a juvenile court. See INA § 101(a)(27)(J).

[FN125]. *Supra* note 114.

[FN126]. See, e.g., Chen, "Elian or Alien? The Contradictions of Protecting Undocumented Children Under The Special Immigrant Juvenile Statute," 27 *Hastings Const. L.Q.* 597 (2000); and "Federal Judge Orders INS District Director to Consent to Juvenile Court Proceeding," 15 *Immigrants' Rts. Update* 12 (Nat'l Immigration Law Center 2001). There has been some successful litigation to compel INS consent, on file with authors.

[FN127]. Latham & Watkins memorandum of law, on file with authors.

[FN128]. See Lobe, "U.S. Congress Passes Sweeping Labor Anti-Trafficking Law," *Inter Press Service*, Oct. 13, 2000, referring to CIA report on 50,000 women and children trafficked into the U.S. on an annual basis for illicit purposes; Hernandez, "Children's Sexual Exploitation Underestimated, Study Finds," *New York Times*, Sept. 10, 2001, estimating more than 325,000 children a year are subject to sexual exploitation in the U.S., including prostitution, pornography, and molestation, among them 11,500 foreign-born documented or undocumented children.

[FN129]. *Supra* note 115. Thus far, the Departments of Justice and State have published an interim rule on trafficking, 8 CFR Part 1100, Protection and Assistance for Victims of Trafficking, but have yet to publish final regulations. The interim rule, which implements § 107(c) of the Trafficking Victims Protection Act of 2000, Div. A, Pub. L. No. 106-386, is discussed and reproduced in 78 *Interpreter Releases* 1239 (July 30, 2001). On July, 18, 2001, the Office of Refugee Resettlement (ORR) further issued a letter describing benefits eligibility for victims of severe trafficking including children, see <http://www.acf.dhhs.gov/programs/orr/sl01-13.htm>. Interim rules or regulations for the U visa have yet to be issued.

[FN130]. See, e.g., McCarthy, "The Long, Harsh Odyssey of a Chinese Illegal Smuggled from Fujian Province to New Jersey," *Time Magazine*, May 1, 2000, at 42; Hubler, "A Young Stowaway's Quest for the American Dream," *Los Angeles Times*, Jan. 24, 2000, at B1; Bhabha, "Lone Travelers: Rights, Criminalization and the Transnational Migration of Unaccompanied Children," 7 *U. Chi. L. Sch. Roundtable* 269 (2000).

[FN131]. *Supra* note 115.

[FN132]. Even in the absence of regulations, consider, e.g., 78 *Interpreter Releases* 1239, 1242 (July 30, 2001), and Dan Eggen, "Ashcroft Intervenes to Shield Thai Boy: U.S. Agencies

Ordered to Halt Efforts to Deport Ill Child Used as Decoy," Washington Post, July 24, 2001, at A3, describing a case where Attorney General John Ashcroft directly intervened on behalf of Phanupong (Got) Khaisri, a four-year-old abandoned Thai boy living with HIV who had been trafficked into the U.S. and who the INS sought to remove. The Attorney General stated that "[s]tories like Got's can't help but move us. Human trafficking victims are too often people like Got: too young, too frightened and too trapped in their circumstances to speak for themselves." Got is represented by the Center for Human Right and Constitutional Law. Dorothea P. Kraeger, of Phoenix, Arizona, is representing Got's grandparents in Thailand who seek custody of the child.

[FN133]. See 78 Interpreter Releases 404 (Feb. 26, 2001) (introduction of Unaccompanied Alien Child Protection Act, S. 121, in Senate); 78 Interpreter Releases 1035, 1038 (June 18, 2001) (introduction of companion House bill, H.R. 1904). For more on this proposed legislation, see [http:// www.wcrwc.org](http://www.wcrwc.org).