Chapter 5 - Asylum and Related Relief

IMPORTANT NOTICE REGARDING CHANGE IN UAC ASYLUM POLICY, EFFECTIVE JUNE 10, 2013

Chapter 5, Asylum and Related Relief, was released prior to the advent of a key USCIS policy change that extends to any child designated by the Department of Homeland Security as an Unaccompanied Alien Child (UAC) the right to use special UAC filing procedures to have an asylum application adjudicated in the Asylum Office. This beneficial policy extends to many children who are over 18 or living with a parent after entering the US as UAC. For more information, please contact your KIND mentor, and see: USCIS, *Memorandum: Updated Service Center Operations Procedures for Accepting Forms I-589 Filed by Unaccompanied Alien Children* (June 4, 2013), *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/service-ctr-ops-proced-accepting-form-i589-unaccompanied-alien-children.pdf. Also, watch this space for an updated version of this Asylum chapter of the KIND manual.

Disclaimer

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

How can unaccompanied children qualify for asylum?

Asylum is a form of protection and relief from removal available to unaccompanied children who have suffered persecution in their home country and fear returning to their home country because of such persecution.

U.S. law,[1] as well as international law, provides individuals fleeing persecution the right to seek asylum.[2] Asylum is a fundamental right rooted in both domestic and international law.

[1] U.S. asylum law is codified at United States Code (USC), Title 8, Chapter 12, Section 1158 and Section 208 of the Immigration and Nationality Act (INA). The principle of nonrefoulement is codified in U.S. law under the name "Withholding of Removal" and can be found at 8 USC § 1231(b)(3), INA § 241(b)(3).

[2] On July 25, 1951, the United Nations adopted the Convention relating to the Status of Refugees, which formalized the international principles of **(1) asylum** (whereby a country could provide legal status to a person with a well-founded fear of

Many attorneys are familiar with the basic concepts of asylum and may even have represented an adult client in an asylum proceeding. However, it is important to understand that children's asylum claims are different in many ways, and attorneys must be aware of such differences when proceeding with the representation of children.

Eligibility
To qualify for asylum, the applicant must prove that she meets the U.S. definition of a refugee, merits a favorable exercise of discretion, and is not statutorily barred from being recognized as a refugee and being granted asylum in the United Status.

What are the particular considerations for children seeking asylum?

The Homeland Security Act of 2002 defines an unaccompanied alien child as a person under 18 years of age, who has no lawful immigration status in the United States, and who either has no parent or legal guardian in the United States or has no parent or legal guardian in the United States who is available to provide care and physical custody.[3]

The U.S. government recognizes that unaccompanied children require special procedural and substantive considerations when applying for asylum. In 1998, legacy INS issued Guidelines for Children's Asylum Claims.[4] These guidelines outline procedural as well as substantive considerations for adjudicators reviewing child asylum claims. You should review these guidelines when preparing to file an asylum application on behalf of a child.

What are the eligibility requirements for asylum?

Gaining asylum in the United States, for adults and children alike, requires that the applicant meet four general requirements:

- The applicant must be present in the United States.[5]
- The applicant must prove that she meets the legal definition of a "refugee."[6]
- The applicant must prove that she is not statutorily barred from receiving asylum.
- The applicant must demonstrate that she merits a grant of asylum as an exercise of the adjudicator's discretion.[7]

Who has initial burden of establishing asylum eligibility?

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persecution on account of a protected ground) and **(2) nonrefoulement** (whereby a country is under an obligation not to return a person to a country where his life or freedom would be threatened).
In 1967, the UN adopted the Protocol relating to the Status of Refugees, which expanded asylum and nonrefoulement protection (the U.S. acceded to the Protocol in 1968).

[3] Sec. 462 of the Homeland Security Act of 2002; 6 U.S.C. §279(g)(2).

[4] INS OFFICE OF INTERNATIONAL AFFAIRS MEMO: GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS, Dec. 10, 1998.

[5] Asylum seekers apply for asylum if they are physically located in the United States. Individuals who are outside of the U.S. apply for status as refugees under the U.S. Refugee Program (USRP). If approved, refugees are then resettled in the United States. Both asylum seekers and refugees must prove that they meet the definition of a "refugee" under the INA 101(a)(42)(A).

[6] INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)A).

[7] INA § 208(b)(1)(A); 8 U.S.C. § 1208(b)(1)(A).

The burden of proof is on the child to establish her claim for asylum.[8] However, to meet this burden, the child need only establish that there is a "**reasonable possibility**" of persecution.[9]

Child Practice Pointer:

Domestic and international policies recommend that adjudicators be mindful of a child's maturity level when assessing a child's credibility and fear of persecution. For example, U.S. asylum officers are encouraged to take into consideration the effects of the child's age, maturity, ability to recall events, and potentially limited knowledge of the asylum process when assessing the child's eligibility.[10]

In addition, the United Nations High Commissioner for Refugees (UNHCR) Handbook on Procedures and Criteria for Determining Refugee Status states that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution.[11]

Who is a refugee?

In order to be granted asylum in the United States, the child must establish that she meets the definition of a refugee, irrespective of age.[12] A refugee is defined under INA § 101(a)(42)(A) as:

> [A]ny 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.

It should be noted that the statute provides the basic definition and legal requirements for asylum; in order to fully understand these requirements, it is critical that you become familiar with the asylum regulations, codified at 8 C.F.R. § 208.

Children cannot include their parents as derivatives on their asylum application.[13]

How does an applicant prove persecution?

To be eligible for asylum, your child client must prove that she has suffered past persecution or has a well-founded fear of future persecution. Note that past persecution and a well-founded fear of future

[8] INA § 208(b)(1)(B); 8 U.S.C. § 1108(b)(1)(B); 8 CFR § 208.13(a) .
[9] INS v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987).
[10] See USCIS Asylum Division, AOBTC Lesson Plan: Guidelines for Children's Asylum Claims – March 21, 2009, found at: http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson29_Guide_Children%27s_Asylum_Claims.pdf
[11] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("U.N. Handbook"), para. 219 (the Handbook is intended to provide guidance to government officials charged with the adjudication of refugee claims), see also Matter of S-M-J-, 21 I&N Dec. 722, at 739 (BIA 1997)(Rosenberg, L., concurring).
[12] Ibid, para. 213.
[13] Matter of A-K-, 24 I&N Dec. 275 (BIA 2007)(holding that there is no statutory basis for a grant of derivative asylum status to a parent based on the grant of asylum to his or her child).

persecution are independent bases for asylum.[14] Thus, if a child is able to prove either basis, the child will meet that element of the refugee definition.

Proving persecution requires a careful and thorough fact-based case analysis. It is your job to argue that the child's past trauma and history (as well as potential for future trauma) does in fact rise to the level of persecution.

What does it mean to suffer from past persecution?

While no exact definition of persecution exists, the administrative agency responsible for reviewing an immigration judge's interpretation of the refugee definition, the Board of Immigration Appeals (BIA), has defined persecution as, "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim."[15] Further, federal circuit courts and the BIA have described persecution as "the infliction of harm or suffering upon those who differ in a way that is regarded as offensive."[16]

Generally speaking, threats to life or freedom are uniformly found to be persecution. Further physical abuse even when not life threatening is considered persecution. A finding of persecution does not necessarily require that the child suffer bodily harm or a threat to life or freedom.[17]

Further, actions that individually do not constitute persecution may cumulatively rise to the level of persecution. Such examples include:

- Relegation to substandard living conditions.
- Denial of a passport or travel documents.
- Constant surveillance.
- Interference in the child's private life, invasion of privacy.
- Impeding or barring access to school or institutions of higher learning.

Actions that are unfair, unjust, or even unlawful, including mere harassment or discrimination, may not rise to the level of persecution.[18] In general, the BIA does not consider harsh conditions shared by many, or general civil strife, anarchy, or criminal punishment for violating laws (such as exit laws or military conscription) persecution.[19] However, a fear of general violence does not necessarily negate a particular fear of persecution based on a protected ground.[20]

Is the government the only agent who can inflict persecution?

[14] 8 CFR 208.13(b)(which states, "[t]he applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution."); see also *Matter of Chen*, 20 I.&N. Dec.16 (BIA 1989); *Shehu v. Gonzales*, 443 F.3d 435, 440 (5th Cir. 2006).
[15] *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996); see also *Matter of Mogharrabi*, 19 I.&N. Dec. at 446.
[16] *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir 1998).
[17] *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998); Bhatt v. Reno, 172 F.3d 978, 981 (7th Cir. 1999).
[18] *Ciorba v. Ashcroft*, 323 F.3d 539, 545 (7th Cir. 2003).
[19] *Matter of Sanchez and Escobar*, 19 I&N Dec. 276, 284 (BIA 1985).
[20] *Eduard v. Ashcroft*, 379 F.3d 182, 190-1 (5th Cir. 2004).

No. The asylum seeker must prove that the persecution was inflicted by the government or by a group that the government was unable or unwilling to control.

For example, in the case of gang-based asylum, often it is a gang that is the persecutor, not the government. However, because the government is unable to control the gang or protect citizens from gang violence, such persecution may still qualify for protection.

Child Practice Pointer:

For a child asylum seeker, the harm a child fears or suffered may be relatively less than an adult and still qualify as persecution.[21] Further, several federal circuit courts of appeals have recognized that certain events, when perceived or endured by a child applicant, particularly when harm is caused to the child's family, may rise to the level of persecution:

- *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006)(finding that where the applicant "was a child at the time of massacres and thus necessarily dependent on both his family and his community . . . This combination of circumstances [displacement – initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community").

- *Kholyavskiy v. Mukasey***,** 540 F.3d 555, 571 (7th Cir. 2008)(holding that the adjudicator should have considered the "cumulative significance" of events to the applicant that occurred when he was between the ages of eight and thirteen. The applicant was subjected to regular "discrimination and harassment [that] pervaded his neighborhood." Such harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as Jewish, being called slurs, and being physically abused in his neighborhood).

- *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004)(while finding that persecution did not take place, the court stated, "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted…There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult").

- *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007) (finding that a "child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting . . . [I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child." In the case of Hernandez-Ortiz, two brothers aged seven and nine fled to Mexico due to the Guatemalan army's arrival at their village, the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army).

- Reinhardt, J. concurring opinion in *Kahssai v. INS***,** 16 F.3d 323, 329 (9th Cir. 1994)(stating that the effects of losing one's family as a child can constitute serious harm. "The fact that she did not suffer physical harm is not determinative of her claim of persecution: there are other equally

[21] See INS Guidelines for Children's Asylum Claims (although note that an asylum officer or immigration judge is not bound by these Guidelines); see also UNHCR Handbook, para. 52 (stating that "due to 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.")

serious forms of injury that result from persecution. For example, when a young girl loses her father, mother and brother — sees her family effectively destroyed — she plainly suffers severe emotional and developmental injury").

Under international law, specifically the United Nations' Convention on the Rights of the Child,[22] the violation of the fundamental rights of children may rise to the level of persecution. Such rights include the right to be registered with authorities upon birth and to acquire a nationality (Art. 7.1), to remain with one's family (Art. 9.1), to receive an education (Art. 28), and to be protected from economic exploitation (Art. 32).

Is proving a child suffered past persecution enough to be granted asylum?

It depends. If the child proves she has suffered past persecution, there is a rebuttable presumption that the child's life or freedom would be threatened in the future on the same basis.[23] As a result, the burden shifts to the government to show:

- There has been a fundamental **change in circumstances** such that the child no longer has a well-founded fear on the basis of a protected ground[24]; or

- The child could avoid persecution by **relocating to another part of the country**, and that it would be **reasonable** to expect the child to do so.[25]

Relevant factors when determining the reasonableness of internal relocation include, but are not limited to, whether the child would face other serious harm; ongoing civil strife; administrative, economic or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social/familial ties.[26]

If the child has established past persecution, or the persecutor whom the child fears is the government or is government-sponsored, there is a presumption that internal relocation would not be reasonable.

However, if the child has not established past persecution, or the persecution she fears is not by the government or government-sponsored, the child bears the burden of proving that internal relocation would not be reasonable.[27]

Finally, if the government rebuts the presumption of a well-founded fear, and proves that the child lacks a basis for present or future persecution, a child may still be granted asylum if: (1) the severity of the past persecution was such that there are compelling reasons for her to be unwilling or unable to return to her home country; or (2) there is a reasonable possibility that she may suffer other serious harm if returned.[28]

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[22] U.N. Convention on the Rights of the Child (CRC). G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989, found at: http://www1.umn.edu/humanrts/instree/k2crc.htm The United States has signed but not ratified the CRC.
[23] 8 CFR § 208.13(b)(1); *Matter of Chen*, 20 I&N Dec.16 (BIA 1989).
[24] Even if the government is able to demonstrate changed country conditions, an applicant can still prevail by demonstrating that there are "compelling reasons" for being unwilling or unable to return to his or her country or that he or she would suffer "serious harm" upon return. 8 CFR § 208.13(b)(1)(iii).
[25] 8 CFR § 208.13(b)(1)(i).
[26] 8 CFR § 208.13(b)(3).
[27] Id; see also *INS v. Ventura*, 437 U.S. 12 (2002 (per curiam)(where the U.S. Supreme Court reiterated that the applicant bears the burden of proving countrywide fear when the persecutor is not the government stating, "an individual who can relocate safely within his home country ordinarily cannot qualify for asylum").
[28] 8 CFR § 208.13(b)(1)(iii).

Child Practice Pointer:

An unaccompanied child may have special factors associated with her situation that makes relocation unreasonable. For example, if the child's family is located in her hometown, no one would be able to take care of the child should she relocate to another part of the country.

If my client has not suffered past persecution, is she still eligible for asylum?

Yes, if you can establish that your client has a well-founded fear of future persecution then your client is still eligible for asylum. A child who has not suffered persecution in the past may still establish her eligibility for asylum based on a well-founded fear of persecution in the future.

- It is not necessary to prove that it is more likely than not that the person will be persecuted.
- The U.S. Supreme Court recognized that **even a ten percent chance** of persecution would satisfy the well-founded fear requirement.[29]

What are the requirements for establishing a well-founded fear of persecution?

In *Matter of Mogharrabi*, the BIA laid out a four-part test for establishing asylum eligibility based on a **well-founded fear**:[30]

1. The applicant possesses a belief or characteristic that a persecutor seeks to repress in others by means of punishment of some sort.
2. The persecutor is already aware, or could become aware, that the respondent possesses this belief or characteristic.
3. The persecutor has the capacity to punish the respondent.
4. The persecutor has the inclination to punish the respondent.[31]

How does the child establish a well-founded fear?

A child must establish that her fear is both subjectively real and objectively reasonable.[32] The subjective requirement goes directly to the applicant's state of mind. The child must show that she fears returning to her country of origin and that this fear is genuine.[33]

To meet the objective requirement, the child must demonstrate that, given the evidence presented, a reasonable person in similar circumstances would experience a fear of persecution.[34]

In addition, it is not necessary to establish that there is a reasonable possibility that the child would be singled out individually for persecution as long as the child can establish (1) that there is a pattern or

[29] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); see also Kratchmarov. Heston, 172 F. 3d 551, 553 (8th Cir. 1999).
[30] *Matter of Mogharrabi*, 19 I&N 439, 441 (BIA 1987).
[31] Id at 445.
[32] See also *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
[33] Id.
[34] *Matter of Mogharrabi*, 19 I. & N. Dec. at 444.

practice of persecution of a group of persons similarly situated to the child (on account of a protected ground); and (2) that her inclusion in, and identification with, that group is such that her fear is reasonable.[35]

Child Practice Pointer:

It may be more difficult for children to demonstrate both the objective and subjective requirement because a child may not be able to articulate her own fear or know she should be afraid.[36]

The UNHCR Handbook suggests that children under the age of 16 may lack maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.[37] "Minors under 16 years of age . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult."[38] Further, a child's subjective fear should be evaluated within the context of the child's situation or her personal, family, and cultural background.[39]

> A well-founded fear of persecution may be supported by mistreatment of a child's family in the home country. The First Circuit concluded that evidence of mistreatment of one's family is probative of a threat to the applicant.[40] Conversely, if the child's family does not relocate and is not harmed, the likelihood of an objectively reasonable fear may be reduced. The failure to relocate may nonetheless be overcome when it is due to a parent's conflict of interest rather than a decreased threat to the child.
>
> The circumstances of a child's arrival in the United States may provide evidence as to whether the child has a well-founded fear of persecution. If the child arrives in the company of other asylum seekers (including family members) who have been found to have a well-founded fear of persecution, this may help to establish that the child's fear is well-founded.[41]

What else is needed to establish persecution?

In addition to demonstrating that the harm a child has suffered amounts to persecution, the **applicant must also show that such persecution is on account of** one of five protected grounds: her race, religion, nationality, membership in a particular social group, or political opinion. This requirement is often referred to as the nexus requirement.

Persecution that is not perpetrated on account of one of these grounds is not sufficient to qualify an applicant for asylum.

What if my client is also being persecuted for a reason that is not a protected ground?

[35] 8 CFR § 208.13(b)(2)(iii).
[36] *See Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004)(overturning the IJ finding that a 9-year- old applicant expressed only a "general ambiguous fear," noting that young children may be incapable of articulating fear to the same degree as adults.)
[37] AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), pg. 40.
[38] UNHCR Handbook, para. 215.
[39] Id at 216. But see See *Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996)(per curiam)(it is possible for a child to express a subjective fear of persecution, without that fear being objectively reasonable).
[40] *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); see also UNHCR Handbook, para. 43; *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).
[41] AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), pg. 42; see also See 8 CFR § 208.13(b)(2); UNHCR Handbook, para. 217.

The evidence may demonstrate that there are multiple reasons why the persecutor harmed or seeks to harm the child. When the persecutor has mixed motives for harming the child, the child does not need to prove that the persecution was perpetrated solely on account of a protected ground.[42] However, with the passage of the REAL ID Act of 2005,[43] INA § 208(b)(1)(B)(i) was amended to state that asylum applicants must demonstrate that one of the enumerated grounds was, or will be, "at least one central reason" for their persecution.[44]

When the child is unable to identify all relevant motives, a nexus can still be found if the objective circumstances support the child's claim that at least one central reason for the past or future persecution is a protected ground.[45]

Proving persecution is on account of one of the five protected grounds

There are five grounds upon which a claim to asylum may be made. The burden is on the child to establish that she belongs to the protected group on account of which she has suffered or fears suffering persecution. Because children may lack, or have limited access to, evidence that helps to establish their relationship to one of the protected grounds, testimony alone can be sufficient to establish a claim where the applicant credibly testifies that she is unable to procure documents.[46]

The grounds of membership in a particular social group and political opinion tend to be broader categories that often require more factual development and provide for somewhat greater leeway in their definitions.

The five enumerated grounds for asylum are:

1. **Race.** Race should be interpreted in a broad sense that includes, "all kinds of ethnic groups that are referred to as 'races' in common usage."[47]

2. **Religion.** Religious persecution includes the "prohibition of membership in a particular religious community, of worship in private or in public, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community."[48] Note that an applicant may be persecuted on account of her religion even though she may not in fact be particularly religious. The case law on religious-based persecution is rich and diverse. Given establishing a new social group claim before the BIA is challenging, you should explore the possibility of creatively crafting religious-based arguments instead. For example, an applicant fleeing domestic violence has made a successful asylum claim based on religious-based persecution.[49]

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[42] *Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994).
[43] Div. B. of the Emergency Supplemental Appropriations Act for Defense
[44] The BIA has held that the standard in mixed motive cases has not been radically altered by the Real ID Act of 2005's amendments. *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007). Pre-REAL ID Act case law requiring the applicant to present direct or circumstantial evidence of a motive that is protected under the Act still stands. Id. The protected ground cannot play a minor role in the past mistreatment or future mistreatment: it cannot be incidental, tangential, superficial, or subordinate to another reason for harm; it must be a—although not necessarily the—central reason. Id.
[45] INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996)
[46] *See Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).
[47] UNHCR Handbook at ¶ 68.
[48] Ibid at ¶ 72.
[49] *Matter of S-A-*, 11 I & N. Dec 1328 (BIA 2000). In this decision, the BIA overturned the denial of an asylum claim of a 20-year-old Moroccan woman who had been seriously beaten on several occasions by her father. She was a member of the Muslim faith, as was her father. She testified that over several years she had been subjected to severe physical mistreatment, isolation and

3. **Nationality.** Nationality includes citizenship, as well as "membership in an ethnic or linguistic group."[50]

4. **Membership in a Particular Social Group.** This category is the broadest and most undefined of the given protected grounds for asylum. This is where some of the most creative lawyering on protecting non-conventional refugee claims has been developed. While this category is open to broad interpretation, there are certain criteria you must establish for your client to prevail on a social group claim. The UNHCR Handbook defines "particular social group" as "persons of similar background, habit or social status."[51] Such characteristics can include age, geographic location, class or ethnic background, family ties, and sexual orientation.

   Under U.S. law, you must show that a child's persecution based on membership in a particular social group meets a two-part test.

   (1) First, the BIA held, in the seminal social group case *Matter of Acosta* that members of a particular social group must "share a common immutable characteristic…[which]… the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[52] Some examples of such characteristics include sexual orientation, age, color, familial ties, and shared past experiences. Social group claims often overlap with one or more of the other protected grounds. However, if a group is large or amorphous it is less likely to qualify as a particular social group;[53] and

   (2) Second, the BIA has recently taken the position that a social group must be "socially visible"[54] – meaning recognizable and distinct.[55]

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deprivation of freedom by her father. She stated that she would be subjected to future persecution at the hands of her father because of the differences in their religious views, especially related to the place and treatment of women in Islam. The BIA found that she had suffered past persecution and had a well-founded fear of future persecution at the hands of her father on account of religion. Her religious beliefs differed from those of her father concerning the proper role of women in Moroccan society.

[50] UNHCR Handbook at ¶ 74.

[51] UNHCR Handbook at ¶ 77.

[52] *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985); *see also Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

[53] *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 75 (BIA 2007).

[54] *Matter of E-A-G,* 24 I. & N. Dec. 591 (2008) and *Matter of S-E-G*, 24 I. & N. Dec. 579 (2008). In S-E-G, the BIA held that the social group of young men resisting gang recruitment is insufficiently socially visible. The BIA stated that social visibility requires that "the shared characteristic of the group should generally be recognizable by others in the community." The BIA reasoned that there is little evidence that "Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population."

[55] However, in an amicus curiae brief to the BIA, UNHCR argues that the (interpretive but nonbinding) 2002 UNHCR Guidelines on Membership of a Particular Social Group do not require that the protected characteristic of the group be socially perceivable (i.e., visible). Rather, the Guidelines adopt two alternative approaches: either (1) that the group shares a common protected characteristic; or (2) that society views/perceives the group as sharing a common protected characteristic. A copy of the brief is available at http://www.unhcr.org/refworld/pdfid/4b03eb182.pdf. For more on how to argue for a group's social visibility, refer to the May 2007 memo prepared by the Pennsylvania Law School Law Clinic, discussing the BIA's analysis in Matter of A-M-E and J-G-U (BIA 2007). The memo is available at: http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_1_General_Asylum_Information/SocialVisibilityMemo.pdf.

5. **Political Opinion**. To have a political opinion for purposes of asylum, it is not necessary for the child to necessarily be involved in politics or be a member of a political party. Political opinion may include non-political activities, beliefs or associations that have a political context or effect. The persecution must be based on the victim's political opinion, not the persecutor's political opinion.[56] However, the victim does not have to profess an actual opinion; a political opinion may be imputed to the victim.[57]

   When a child claims persecution or a well-founded fear of persecution on the basis of political opinion, the age and maturity of the child must be taken into account. A young child may be unable to articulate her political opinion. However, age alone does not prevent a child from holding political opinions for which she may have been or will be persecuted.[58] It is also possible that a child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.[59]

Creative legal arguments for children seeking asylum

Lawyers have been the most successful in winning asylum for children by arguing that their child client belongs to a particular social group worthy of refugee protection. The following are examples of the types of social groups that have been successful for child applicants.

Gang-based persecution
Asylum claims based on gang persecution, harassment, recruitment, and victimization are common, especially among children from Central America. However, the success of these claims in immigration courts across the country has varied. In addition, many federal circuits have refused to recognize individuals fleeing gang persecution as constituting a particular social group.

On July 30, 2008, the BIA published two decisions affecting gang-persecution asylum claims: Matter of E-A-G,[60] and Matter of S-E-G.[61] These two cases now mark the standard in gang-based asylum, establishing that a particular social group must have **social visibility** in which "the shared characteristic of the group should generally be recognizable by others in the community." Based on this reasoning, the BIA found that those fleeing gang recruitment and/or gang violence do not constitute a particular social group as they lack social visibility.

For a gang-based claim to prevail, your child client must show **two c**riteria to meet the social group definition:

[56] *INS v. Elias Zacarias*, 502 U.S. at 478.
[57] *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987); UNHCR Handbook, ¶¶ 80-83.
[58] *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998)(while affirming the underlying denial of asylum, the First Circuit criticized the immigration judge's presumption that youth "are unlikely targets of political violence in Haiti."); see also *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam)(where the Ninth Circuit overturned a BIA ruling where the BIA held it was implausible that the petitioner had been vice president of a branch of an opposition movement at the age of eighteen.)
[59] *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996); see also *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066,1076 (9th Cir. 2004)(evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).
[60] 24 I&N Dec. 591 (BIA 2008).
[61] 24 I&N Dec. 579 (BIA 2008).

(1) First, the child must show that she belongs to a social group as defined by the BIA in *Matter of Acosta.*[62] Specifically, the child must be a member of a group that has a common immutable characteristic which the child is unable to change, or should not be required to change because it is fundamental to the child's identity or conscience; and

(2) Second, that the group is socially visible as defined by the BIA in the decisions Matter of E-A-G and Matter of S-E-G.

Gang-based asylum claims can still be successful, if the argument is carefully crafted. You will have to use creativity and distinguish the specific facts of the child's claim from the underlying facts in the BIA decisions of *Matter of S-E-G* and *Matter of E-A-G*.

In a case in the Sixth Circuit, *Urbina-Mejia v. Holder*[63], the court held that while being a member of a gang may not be considered to be a social group, being a former gang member is a trait that an asylum applicant cannot simply "cast off." Advocates are also finding success by shifting the protected ground from particular social group to that of persecution based on account of religion or political opinion.

Domestic violence

Both children and adults may claim asylum based on domestic violence although the law regarding domestic violence-based claims is still unsettled. In 1995, legacy INS issued the INS Gender Guidelines to assist asylum officers in their determinations of gender-based asylum claims, including such issues as domestic violence, rape, sexual violence, female genital mutilation, and honor killings – issues which have a greater tendency to take place in the private realm, as opposed to the public. In issuing the Guidelines, the INS recognized that under certain circumstances, persecution that occurs in the private realm is a basis for asylum.

Further, in 1996, an immigration judge granted asylum to Rodi Alvarado, a Guatemalan woman who had fled years of significant abuse and domestic violence at the hands of her husband. She had tried numerous times to escape him and to obtain help from the authorities – all to no avail. In granting asylum to Alvarado, the immigration judge found that she had suffered persecution on account of her actual and imputed political opinion, as well as membership in a particular social group. The INS appealed the grant of asylum, and the BIA overturned the immigration judge's decision, stating that the respondent had failed to demonstrate that the persecution she suffered was on account of a protected ground.[64] Alvarado subsequently appealed the BIA's decision and in 2008, the Attorney General certified the case and ordered the BIA to reconsider it.

Meanwhile, as the result of a request from Alvarado's attorneys in a joint motion with DHS, the BIA remanded the case back to the immigration judge in order for Alvarado to present evidence regarding the social visibility of her proposed social group, in light of recent case law (*Matter of E-A-G-* and Matter of *S-E-G-*).

In late 2009, Alvarado was finally granted asylum based on membership in a social group consisting of "married women in Guatemala who are unable to leave the relationship", after a fourteen year legal battle.[65]

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[62] 19 I&N Dec. 211 (BIA 1985).
[63] *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); see also *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)(a former member of a particular gang is a member of a social group).
[64] *See Matter of R-A-*.Int. Dec. 3403 (BIA 1999).
[65] *See* http://cgrs.uchastings.edu/campaigns/alvarado.php.

While the *Matter of R-A-* was pending, in 2000 the federal government proposed regulations to address adjudicating gender-based asylum claims and the social group nexus.[66]

In 2009, the Obama administration opened the way for foreign women who are victims of severe domestic beatings and sexual abuse to receive asylum in the United States.[67] The Administration laid out its position in an immigration appeals case in which a Mexican woman, identified as "L.R.", had been repeatedly raped at gunpoint by her husband, whom she feared would murder her should she return to her home country. The administration presented a narrow set of circumstances in which an abused woman may qualify for asylum if (1) the abused woman could demonstrate that women are viewed as subordinate by their abuser, and that (2) domestic abuse is widely tolerated in the applicant's country. Under such circumstances, victims of severe physical or sexual abuse could be deemed to qualify as a particular social group.[68]

Female genital mutilation

Female genital mutilation (FGM) "is the collective name given to a series of surgical operations, involving the removal of some or all of the external genitalia, performed on girls and women primarily in Africa and Asia."[69] Evidence of FGM may serve as the basis for an asylum claim, withholding of removal, or a claim under the Convention Against Torture (CAT). [70]

Specifically, most federal circuits and the BIA recognize FGM as a form of persecution.[71] The BIA, for example, has characterized FGM as a form of "sexual oppression ... to ensure male dominance and exploitation," practiced in order to "overcome sexual characteristics of young women . . . who have not been, and do not wish to be, subjected to FGM."[72]

Alternatively, asylum claims may be based on a well-founded fear of persecution based on the fear that a daughter will suffer FGM upon arrival at the applicant's home country.[73] Often in these claims, the child's mother was previously subjected to the experience, and a strong case can be made based on the mother's mental and physical reaction to the procedure.

Gender alone does not constitute a social group and is not sufficient to establish asylum status. However, a narrowly tailored social group, such as "women opposed to FGM who belong to an ethnic group that practices FGM" has been successful.[74]

In cases involving FGM, a person subjected to the practice can claim past persecution as well as a well-founded fear of future persecution because FGM has been deemed a continuing harm. While the

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[66] *See* http://cgrs.uchastings.edu/documents/legal/proposed_regs_12-00.pdf
[67] *See* Julia Preston, "U.S. Opens Path to Asylum for Victims of Sexual Abuse," The New York Times (July 16, 2009).
[68] *See* http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php.
[69] *See Abankwah v. INS*, 185 F.3d 18, 23 (2d Cir. 1999). For a comprehensive description of female genital mutilation, see Eliminating Female Genital Mutilation, an interagency statement, February 2008, available at http://www.unhcr.org/refworld/docid/47c6aa6e2.html; see also World Health Organization, Female Genital Mutilation, Trends, available at http://www.who.int/reproductive-health/fgm/trends.htm. FGM is recognized in U.S.criminal statutes, at 18 U.S.C. §116. Additionally, Congressional Resolution, H. RES. 32 (10/9/2007) unanimously condemns FGM as a "barbaric practice."
[70] *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Abede v. Gonzales*, 432 F.3d 1037, 1041-43 (9th Cir. 2005).
[71] *Kasinga* at 365; *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004).
[72] *Kasinga* at 366-367.
[73] *Nwaokolo v. INS*, 314 F.3d 303, 307-311 (7th Cir. 2002) (Stay granted on BIA denial of motion to reopen under CAT where USC daughter might suffer female genital mutilation).
[74] *Kasinga* at 365; *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (holding that for purposes of FGM, a social group can be defined by both gender and tribal membership); In re Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985); *Mohammed v. Gonzales*, 400 F.3d 785, 796-98 (9th Cir. 2005) (In cases involving FGM, membership in a particular social group may be defined by clan or as all Somali females given the widespread practice.)

continuing harm principal has been tested, current case law holds that despite the permanent and irreversible nature of FGM, the harm of the act can be considered ongoing due to continued physical and psychological issues and is therefore a continuing form of harm.[75]

Note that although the FGM may rise to the level of persecution, in order to qualify for asylum, the applicant must still prove a prima facie case, specifically that the applicant has a well-founded fear of persecution in her home country on account of race, religion, nationality, membership in a social group, or political opinion.[76]

Street children

Although a child may be forced to live on the streets for a number of reasons, many street children are unable to live at home due to violence or abuse. Their stories are among the most compelling because individuals responsible for the child's well-being have abused or neglected the child.

Advocates have had varying degrees of success with arguing street children are refugees and eligible for asylum in the United States. The asylum claims are typically based on the child's membership in a particular social group, e.g., the social group of "Honduran street children." Street child claims are sometimes coupled with asylum claims based on the child's membership in a family, and abuse the child has suffered as a result of being part of that family. For example, a child may have suffered past persecution based on her membership in a family in the form of domestic violence. That persecution may have led the child to live on the streets, or it may be the reason the child cannot return home. As a result, if the child were returned to her home country, she would be forced to live a life on the streets.

In most jurisdictions, no binding precedent exists that would prohibit an immigration judge or asylum officer from granting an asylum claim based on a street child social group. The only exception is the Third Circuit where there is unfavorable precedent. The Third Circuit Court of Appeals in *Escobar v. Gonzales* held that Honduran street children do not constitute a particular social group.[77] The court reasoned that "[p]overty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected group within the scope of the Immigration and Naturalization Act."

The BIA has not yet issued a published opinion on street child asylum claims. The BIA has, however, issued two unpublished decisions finding that street children can constitute a social group.[78] The BIA decisions, as well as numerous immigration judge decisions (not published) can be submitted when briefing the issue. Although not binding, the decisions may serve as persuasive authority.[79]

What are the legal bars to being granted asylum?

[75] See *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008).
[76] For more guidance on FGM as an asylum claim, see UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009, available at: http://www.unhcr.org/refworld/docid/4a0c28492.html.
[77] *Escobar v. Gonzales*, 417 F.3d 363 (3rd Cir. 2005).
[78] See In re Brus Wilson Fuentes Ortega (BIA Nov. 6, 2001)(considering social group of "abandoned street children in Nicaragua"); In re Juan Carlos Martinez-Mejia (BIA Jan. 20, 1999)(considering social group of "minors without resources who have been abused by a custodial parent/guardian").
[79] For copies of unpublished BIA and immigration judge decisions on street children, visit: http://uscri.refugees.org/site/PageNavigator/Resource%20Library/Asylum_Research_street_children. In addition, view the following law review article for background information on street children and a recent review of the available jurisprudence: Wexler, Laura P., *Street Children and U.S. Immigration Law: What Should Be Done*? 41 CORNELL INT'L L.J. 545 (2008).

Bars to asylum can be grouped into two categories. First, there are bars to asylum applicants that deal with when an asylum applicant should not be permitted to access the asylum process because the person is eligible for some type of protection in a third country, has already applied for asylum, or missed a filing deadline. The second class of bars are actions the asylum applicant has committed prior to being granted asylum that deem the applicant "unworthy" of being granted asylum protection. Actions include criminal conduct, terrorism, or the persecution of others.

Bars to accessing the asylum adjudication process:

Firm resettlement
An applicant who was firmly resettled in another country prior to arriving in the United States is not eligible for asylum.[80] For an applicant to be deemed "firmly resettled" means the applicant received an offer of some part of permanent status from another country.

An applicant is not firmly resettled if the applicant establishes that:

- The applicant's entry into that country was a necessary result of this flight from persecution, and she remained there only long enough to arrange continued travel, and did not establish significant ties to that country; OR

- The conditions of such permanent status are so "substantially and consciously restricted" that she cannot be said to have actually resettled (i.e., housing/employment available, right to hold property, right to travel, right to education or public assistance, right to naturalize, etc.).[81] In other words, an applicant who merely "passes through" a country on her way to the United States, or even temporarily resides in another country in preparation for continued travel to the United States (e.g., to earn money for a plane ticket), will not be considered to be firmly resettled.

Child Practice Pointer:

In interpreting whether a child is firmly resettled, asylum officers will consider that a child's status in a third country is generally the same as her parents' status. The BIA has long held that a parent's firm resettlement status is imputed to his or her children – thus, if the parents were firmly resettled, their status will be imputed to the child.[82]

Firm resettlement is not a bar to withholding of removal. If an unaccompanied child has a firm resettlement issue, she may still pursue withholding of removal relief.

Safe third country
Generally, if an asylum seeker can be removed to a safe third country pursuant to a bilateral agreement, the child is ineligible to apply for asylum.[83] Currently, Canada is the only country with which the United States has a safe third country agreement. This means if an applicant applying in the United States for asylum passed through Canada prior to arriving in the United States, the applicant must apply in Canada for asylum.

Child Practice Pointer:

[80] INA § 208(b)(2)(A)(vi); 8 CFR § 208.13(c)(2)(B).
[81] 8 CFR § 208.15.
[82] See *Matter of Ng*, 12 I&N Dec 411 (BIA 1967) (holding that a minor was firmly resettled in Hong Kong because he was part of a family that resettled in Hong Kong).
[83] INA § 208(a)(2)(A).

The Trafficking Victims Protection Reauthorization Act of 2008 provides an explicit exception for unaccompanied children. They are not barred from seeking asylum even if there is a safe third country agreement.[84]

One-year filing deadline
The one-year filing deadline does not apply to unaccompanied minor principal applicants.[85] The one-year filing deadline does apply to minor principal applicants who are living with a parent or legal guardian and for adult principal applicants.

Keep in mind that, to meet the definition of an unaccompanied alien child, the child cannot have lawful immigration status. If a child is not living with a parent or legal guardian but is in lawful status, the child is not considered an unaccompanied child and therefore is not categorically exempt from the one year filing deadline.[86]

Previous asylum application
If a child has filed a previous asylum application and has been denied asylum, this person may not re-apply for asylum unless there is a change in circumstances affecting eligibility.[87]

Prior actions barring a grant of asylum

- **Persecution of others**
  An alien who has persecuted others on account of a protected ground is not eligible for asylum.[88] The U.S. Supreme Court in March 2009 reversed the denial of asylum and withholding of removal for a person who was compelled under threat of death or torture to participate in acts of persecution, holding that the BIA and Fifth Circuit erred in presuming that the coercion was immaterial.[89] The Court remanded the case to the BIA to address where, under the INA, motivation or intent in assisting in the persecution of others is material for persecutor-bar purposes. The outcome of this case will be relevant for those children who were forced under duress or threat of death to commit acts of persecution and who are now seeking asylum in the United States.

- **Serious crimes**
  Particularly serious crime/aggravated felony

NOTE: If a child is under age 16, or was tried as a juvenile (may be age 16-18), a conviction of a particularly serious crime is not a bar to asylum.[90] However, such a conviction may be a basis for a denial or referral as a matter of discretion.

- **Serious nonpolitical crime**
  A child for whom there are reasons to believe that she committed a serious nonpolitical crime outside the United States is not eligible for asylum.[91]

[84] INA § 208(a)(2)(E); TVPRA, P.L. 110-457, §235(d)(7)(A).
[85] See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A)..
[86] AOBTC Guidelines for Children's Asylum Claims, (March 21, 2009), 45.
[87] INA §§ 208(a)(2)(C) and (D).
[88] INA § 208(b)(2)(A)(i).
[89] *Negusie v. Holder, Attorney General*, No. 07–499, U.S. (March 3, 2009).
[90] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
[91] INA § 208(b)(2)(A)(iii).

NOTE: You should pay particular attention to this bar if your client has a history – to any extent – as a child soldier in her home country (whether under duress or not).[92]

- **Terrorism and threat to national security**
  Threat to National Security: An alien for whom reasonable grounds exist for regarding her as a danger to the security of the United States is not eligible for asylum.[93]

  Terrorism: A child who has had some sort of involvement in terrorist activity, or for whom there are reasonable grounds to believe that she is engaged in, or likely to engage in terrorist activity, is not eligible for asylum unless the U.S. Attorney General determines that there are no reasonable grounds for regarding her as a danger to national security.[94] See additional information on the material support bar found under the "additional resources" section.

What does the applicant need to show to merit a favorable exercise of discretion?

Asylum is discretionary. It is not a mandatory form of relief. As a result, even after a child has established that she is a refugee and eligible for asylum, the asylum officer or immigration judge must still exercise discretion in determining whether asylum should be granted.[95]

This means that other outside factors, beyond the applicant's ability to qualify under the refugee definition, are taken into consideration. The BIA has stated that in exercising discretion, the danger of persecution should outweigh all but the most egregious adverse factors.[96]

What are the benefits for a child being granted asylum?

A child who is granted asylum receives the legal status of "**asylee.**" There are a number of important benefits. An asylee is:

- Allowed to remain in the United States.
- May not be removed to the country of persecution.
- Allowed to work.
- Eligible for certain federal benefits.
- Allowed to travel abroad with the prior consent of the U.S. Attorney General (with a refugee travel document).

In addition:

- The spouse or child of an asylee, who accompanies the asylee or follows to join her, may also be granted derivative asylum.

[92] Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110- 340 (Oct. 3, 2008), which creates a ground of inadmissibility for engaging in the use or recruitment of child soldiers.
[93] INA § 208(b)(2)(A)(iv).
[94] INA § 208(b)(2)(A)(v).
[95] INA §208(b)(1).
[96] *Matter of Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

- After one year in asylee status, an asylee may apply for lawful permanent residency and may eventually apply for citizenship.

    - This status is important because a person with LPR status does not need additional work authorization, has greater legal protections, and is eligible for certain government jobs and educational loans. Five years after being granted LPR status, the individual is eligible to apply for U.S. citizenship.

    - Once an asylee has been physically present in the United States for one year after the grant of asylum, the asylee may apply to adjust her status as long as she continues to meet the refugee definition, is not inadmissible,[97] and has not firmly resettled in another country.[98]

What is withholding of removal?

A child who is denied asylum, or who is not eligible to apply for asylum may still be eligible for withholding of removal.[99] To qualify for withholding, the child must establish that her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion."[100]

What is the burden of proof in a withholding of removal claim?

The analysis of the nexus requirement, the protected ground requirement, and the internal relocation requirement is the same for asylum and withholding of removal. However, the standard of proof required for withholding is higher than that for asylum. While asylum only requires the applicant to establish a "well-founded fear," an applicant for withholding must establish a "clear probability of persecution."[101] This is a purely objective standard, which means that your client must demonstrate that it is more likely than not (i.e., 51 percent or higher likelihood) that her life or freedom would be threatened.[102]

Unlike asylum, there is **no discretion** involved in a withholding of removal decision. An applicant who meets the eligibility requirements for withholding of removal, and is not subject to one of the mandatory bars, must be granted relief from removal.[103]

What are the bars to being granted withholding of removal?

There are four bars to withholding of removal:

1. Persecution of others

[97] 8 CFR § 209.2(a) provides a comprehensive list of the inadmissibility grounds that are automatically waived for asylees, which include public charge and the possession of a valid visa, entry document, or travel document. 8 CFR § 209.2(b) provides the grounds for when an asylee is eligible to apply for an inadmissibility waiver, which include humanitarian purposes, to assure family unity, or because it is otherwise in the public interest to waive the inadmissibility ground.
[98] 8 CFR § 209.2(a).
[99] INA § 241(b)(3).
[100] 8 CFR § 208.16(b).
[101] *INS v. Stevic*, 467 U.S. 407, 430 (1984).
[102] *INS v. Cardoza-Fonseca*, 480 U.S. at 421.
[103] 8 CFR § 208.16(d).

An alien who has persecuted others on account of a protected ground is not eligible for withholding of removal.[104]

In March 2009, the U.S. Supreme Court reversed the denial of asylum and withholding of removal for a person who was compelled under threat of death or torture to participate in acts of persecution, holding that the BIA and Fifth Circuit erred in presuming that the coercion was immaterial.[105] The Court remanded the case to the BIA to address where, under the INA, motivation or intent in assisting in the persecution of others is material for persecutor-bar purposes. The outcome of this case will be relevant for those children who were forced under duress or threat of death to commit acts of persecution and who are now seeking asylum in the United States.

2. Particularly serious crime/aggravated felony

An alien who has been convicted of a "particularly serious crime" is not eligible for withholding of removal.[106] In addition, an alien who has been convicted of an aggravated felony is considered to have been convicted of a particularly serious crime.[107]

If a child is under age 16, or was tried as a juvenile (may be age 16-18), a conviction of a particularly serious crime is not a bar to withholding of removal.[108]

3. Serious non-political crime

A child for whom there are reasons to believe that she committed a serious nonpolitical crime outside the United States is not eligible for withholding of removal.[109]

NOTE: You should pay particular attention to this bar if your client has a history – to any extent – as a child soldier in her home country (whether under duress or not).[110]

4. Threat to national security

A child for whom reasonable grounds exist for regarding her as a danger to the security of the United States is not eligible for withholding of removal.[111]

What does withholding of removal mean for my child client?

When a child is granted withholding of removal, a final order of removal is entered against her (and the execution of the order is simply "withheld.")[112] Those granted withholding have the ability to legally live and work in the United States. However, the additional benefits of withholding of removal are much more limited than those of asylum protection.

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[104] INA § 208(b)(2)(A)(i)..
[105] *Negusie v. Holder, Attorney General*, No. 07–499, U.S. (March 3, 2009).
[106] INA § 208(b)(2)(A)(ii).
[107] INA § 208(b)(2)(B)(i). The definition of "aggravated felony" may be found at INA § 101(a)(43).
[108] *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
[109] INA § 208(b)(2)(A)(iii).
[110] Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110- 340 (Oct. 3, 2008), which creates a ground of inadmissibility for engaging in the use or recruitment of child soldiers.
[111] INA § 208(b)(2)(A)(iv).
[112] *Matter of I-S- & C-S-*, 24 I&N 432 (BIA 2008).

- **Withholding <u>does not</u> grant the applicant permanent legal status, or a means of obtaining legal status in the United States.** Withholding of removal is a temporary status that can be revoked or terminated under certain circumstances (although in reality, those granted withholding of removal often remain in the United States for many years, if not indefinitely). Those granted withholding of removal can still be removed from the United States to a third country.[113] In addition, withholding grantees can be removed to their home country if circumstances change, and their lives or freedom will no longer be threatened there.

- A child who has been granted withholding of removal <u>does not</u> have the right to petition for her spouse or children on that basis.

- **No travel document** will be issued to those granted withholding of removal, nor will they be given permission to re-enter should they depart the United States. Thus, a person granted withholding of removal may not leave the United States.

<u>Child Practice Pointer:</u>

You should seriously discuss the consequences of withholding of removal with your client. It has become more common in recent years for the government (Office of Chief Counsel) or the immigration judge to offer a grant of "withholding" instead of asylum as essentially a type of plea bargain. Before the child's hearing, you should fully discuss with the child the possibility of being granted withholding and to explain what it would mean for the child. For example, it is important that the child understand that she cannot leave the United States once withholding is granted. Understanding the child's goals and objectives will help better inform you as to the type of relief you should or should not pursue on the child's behalf.

What is protection under the Convention Against Torture (CAT)?

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the return of an individual to a country where there are substantial grounds to believe that she would be tortured.[114] One of the advantages of CAT relief is that it can be requested even after a final order of removal has been issued. Further, the applicant does not need to prove that her torture would be on account of a protected ground (**no nexus requirement**).

There are two possible forms of relief under CAT: withholding of removal or deferral of removal.

1.Withholding of removal under CAT

Withholding of removal under CAT prevents the removal of the child to her home country if it is more likely than not that she will be tortured. This form of relief should not be confused with the withholding of removal form of relief discussed above, also known as "traditional withholding" under INA 241(b)(3)).

The mandatory bars to withholding under CAT are the same as the bars to traditional withholding of removal.

2. Deferral of removal under CAT

[113] 8 CFR § 208.16(f).
[114] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984).

There are no bars to relief under deferral of removal under CAT. Thus, if the child is subject to one of the bars to withholding of removal, discussed above, the child can still be granted deferral of removal instead.[115] This form of protection is more temporary and DHS is more likely to terminate it should circumstances change. Also, applicants granted deferral of removal under CAT may be detained.

What does an applicant need to prove to be granted CAT relief?

Any applicant who establishes that it is more likely than not that she will be tortured if returned to her country must be granted protection under CAT. Unlike asylum protection, protection under CAT is mandatory, not discretionary.

The standard of proof under CAT is much higher than asylum. The applicant must prove that it is "**more likely than not"** that she would be tortured if forced to return to the home country.[116] Evidence to be considered includes evidence of past torture inflicted upon the applicant, evidence that the applicant could not relocate internally, evidence of gross, flagrant or mass violations of human rights within the country, and other relevant country conditions information.[117]

NOTE: Under regular withholding of removal, the applicant must prove that there is a nexus between her persecution and one of the five enumerated grounds. With withholding of removal under CAT or deferral of removal under CAT, **there is no nexus requirement.**

However, if the Secretary of State provides the U.S. Attorney General with assurances that she has obtained assurance from a specific country's government that the individual would not be tortured there, and the Attorney General determines that such assurances are sufficiently reliable to allow the individual's removal to that country, the individual's application for protection under CAT will be denied.[118]

What actions constitute torture?[119]

The BIA interprets the definition of torture as "an extreme form of cruel and inhuman treatment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment of punishment.[120] The definition of torture must include the following elements described below:

- **Severe physical or mental pain or suffering**. The act must cause severe physical or mental pain or suffering. Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment.[121]

- **Mental pain or suffering.** Mental pain or suffering must be prolonged and must result from one of the following:
    1) intentional infliction or threatened infliction of severe physical pain or suffering

[115] 8 CFR § 208.16(c)(4).
[116] 8 CFR § 208.16(c)(2); see also *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002).
[117] 8 CFR § 208.16(c)(3).
[118] 8 CFR § 208.18(c).
[119] 8 CFR § 208.18(a)(1).
[120] *Matter of J-E-*, 23, I&N Dec. 291 (BIA 2002).
[121] 8 CFR § 208.18(a)(2).

2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality
3) threat of imminent death, or
4) threat that another person will imminently be subjected to the above.

- **Intentionally inflicted**. The act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.[122]

- **For an illicit or proscribed purpose**. The act must be committed for an illicit purpose. This includes any discriminatory purposes, as well as such purposes as obtaining information or a confession from the victim or a third person, punishing the victim for an act that she or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person.[123]

- **By, or at the instigation of, or with the consent or acquiescence of a public official who has custody or physical control of the victim**. To constitute torture, an act must be directed against a person in the offender's custody or physical control.[124] In order for a public official to have "acquiesced" to torture, it is necessary that the public official be aware of the act prior to it being committed, and breach his or her legal responsibility to intervene to prevent it.[125]

- **Not arising from lawful sanctions**. Pain and suffering arising only from, inherent in, or incidental to lawful sanctions, which include judicially imposed sanctions and other enforcement actions authorized by law, does not constitute torture.[126]

What does relief under the Convention Against Torture mean for my child client?

The effects of withholding of removal are the same whether a child obtains it by proving that it is more likely than not that she will be tortured under CAT, or by proving a clear probability that her life or freedom would be threatened under "withholding of removal" (see above).

Further, in the case of deferral of removal under CAT, an order of removal is issued but deferred, and the child may not be removed to the country where she is more likely than not to be tortured until such time as the deferral is terminated.[127] However, the child may be removed to another country where she is not likely to be tortured. [128]

- Deferral of removal does not grant the child legal status, nor does it guarantee that a detained individual will be released from custody[129]

- An individual granted CAT protection is not able to petition for family members

[122] 8 CFR § 208.18(a)(5).
[123] 8 CFR § 208.18(a).
[124] 8 CFR § 208.18(a)(6).
[125] 8 CFR § 208.18(a)(7).
[126] 8 CFR § 208.18(a)(3).
[127] 8 CFR §§ 208.17(a) and (b).
[128] 8 CFR § 208.17(b)(2).
[129] 8 CFR § 208.17(b)(1).

- A non-detained child granted deferral of removal may apply for work authorization and work lawfully in the United States

- She may also be required to report regularly to the Department of Homeland Security

Can CAT protection be terminated?

Yes. At any time, an order deferring removal may be reviewed and terminated by the immigration judge if it is determined that it is not likely that the child would be tortured upon return to her country.[130] DHS may initiate a termination hearing by filing a motion with the immigration court, which "shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would not be tortured in the country to which removal has been deferred and that was not presented at the previous hearing."[131] A *de novo* determination is made, based on the original application and proceedings, as well as additional evidence presented, and the child once again bears the burden of establishing that it is more likely than not that she will be tortured if returned.[132] A child may initiate termination of the deferral order by making a written request to the immigration court.[133] The deferral order may also be terminated by the U.S. Attorney General if she receives sufficiently reliable diplomatic assurances from the Secretary of State that the country's government will not torture the individual.[134]

What are the nuts and bolts of applying for asylum?

An application for asylum requires a significant investment of time and resources. The preparation of a meritorious application can take weeks, if not months, to complete. The result, however, can provide a child with an opportunity to legally remain in the United States and enjoy a safe, stable, and more optimistic future.

A child may be with or without legal status when applying for asylum. Further, it does not matter how the child originally entered the United States (whether the child had lawful permission or not) or whether the child has continuously maintained legal status while in the United States—in all cases, the child has the right to apply for asylum protection.

A child can apply for asylum by filing an application with USCIS in a non-adversarial process.[135] A trained asylum officer in an asylum office interviews the child, and the process from beginning to end is relatively quick for the applicant. If successful, the child will be granted asylum and avoid being placed in removal proceedings.

Who is an unaccompanied alien child for USCIS?

For purposes of the USCIS asylum program, an unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal guardian (refers to a formal legal/judicial arrangement) in the United States who is available to provide care and physical custody. This definition encompasses separated

[130] 8 CFR § 208.17(b)(1).
[131] 8 CFR § 208.17(d)(1).
[132] 8 CFR § 208.17(d)(3).
[133] 8 CFR § 208.17(e).
[134] 8 CFR § 208.17(f).
[135] Section 235(d)(7) of the TVPRA amends section 208(b)(3) of the INA to state that: "[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . . regardless of whether filed in accordance with this section or section 235(b)."

minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members.

NOTE: A child who entered the United States with a parent or other adult guardian but who subsequently left the parent's or guardian's care is considered an unaccompanied minor.

What happens when an unaccompanied child subsequently reunites with a parent in the United States?

USCIS currently takes the position that if a child has reunited with a parent at the time of filing her asylum application, she will no longer be considered an unaccompanied child. Further, even if a child remains separated from a parent at the time of filing, USCIS will check again at the time of the asylum interview to ensure that the child has not yet reunited with a parent.

NOTE: Please consult your KIND pro bono coordinator for the most up to date information as to how both USCIS and EOIR are interpreting this issue.

What is the process?

An asylum officer (AO) at the USCIS Asylum Office hears the case, considers the evidence, and makes a decision on the application in a non-adversarial, interview setting. Asylum officers are bound by statutes, regulations, and BIA and federal court decisions. They also are required to follow the guidance set forth in the Asylum Officer Basic Training Manual and legacy INS Guidelines for Children's Asylum Claims.

If a child's affirmative asylum application is not approved by the asylum officer, and the child does not have legal status in the United States at the time of denial, the child's case will be referred to immigration court and removal proceedings will be initiated. The Asylum Office will issue a Notice to Appear (NTA), which is the charging document that places the child into removal proceedings. The charging document will also inform the child the date and time that the child must appear in immigration court to answer the allegations in the NTA and seek any relief for which the child is eligible. Once in removal proceedings, the child can renew her asylum application as a defense from removal and an immigration judge will then rule on the asylum application.

Which cases will be heard before the USCIS Asylum Office?[136]

In the following scenarios, a child's initial asylum case will be heard before the USCIS Asylum Office if the child:

- Has never been in removal proceedings and will affirmatively apply for asylum under pre-existing procedures.
- Was placed in removal proceedings on or after March 23, 2009 and who seeks to file for asylum.
- Is in pending removal proceedings, with a case on appeal to the BIA, or with a petition for review in federal court as of December 23, 2008, who has previously submitted an asylum application (Form I-589) as a UAC.

[136] Langlois, Joseph E. USCIS Asylum Division. Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, Memorandum to Asylum Office Directors, et al. HQRAIO 120/12a. (March 25, 2009).

NOTE: It is USCIS's position that an unaccompanied child whose case was referred to immigration court after having been affirmatively adjudicated by USCIS may not re-file with USCIS because USCIS has already had initial jurisdiction of the case.[137] Please consult your KIND pro bono coordinator for any recent updates. Procedures and regulations regarding the above are still under development.

If my child client is in removal proceedings, what is the process for applying for asylum under the TVPRA?

For unaccompanied children in removal proceedings under the TVPRA the following process applies:

- The child's removal proceedings should be suspended pending the decision of the asylum officer (in many jurisdictions, immigration judges will grant a continuance instead of administrative closure).

- While in court, ICE will give the child written instructions on how to file for asylum with USCIS. This UAC instruction sheet should then be included in the asylum package when the child submits his or her application by mail to USCIS.

- The child will file the Form I-589 with the Nebraska Service Center (NSC) – although in certain extenuating circumstances (including if the child is in ORR custody), the local Asylum Office may consent to the child filing directly with that local office.

If the child's removal proceedings have not been terminated or administratively closed, the child may requ st multiple continuances over time: first to file the asylum application with USCIS; and second, to present a receipt for proof of filing, and to allow enough time for USCIS to adjudicate the application.

- If USCIS grants the asylum application, the parties may request that removal proceedings be terminated.

Does my child client have the "capacity" to apply for asylum?

Many complex issues are raised when a child applies for asylum without her parents' knowledge and/or consent. For unaccompanied children, this may often be the case, since the child has either been abandoned or lacks a parent who is capable of taking care of her.

NOTE: Should any of these issues arise, please consult your KIND pro bono coordinator for further guidance.

Generally, any noncitizen in the United States, without regard to immigration status, has the right to apply for asylum.[138] According to the USCIS Asylum Office however, "[u]nder certain circumstances . . . the issue may arise as to whether a child lacks the capacity to assert this right to apply for asylum. While there is no age-based restriction to applying for asylum, USCIS need not process . . . applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for

[137] Id at pg. 3.
[138] INA § 208(a)(1); 8 C.F.R. §103.2(a)(2).

ignoring the parents' wishes."[139] This issue seems to emerge specifically when the child is applying for asylum against the expressed wishes of her parents.[140]

Further, federal regulations governing asylum adjudications generally do not permit the disclosure of information to third parties regarding a child's asylum application due to confidentiality concerns.[141]

However, in the case of a young child who lacks the capacity to make immigration decisions, the asylum officer must determine who has the legal authority to speak for the child. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, notification of the parent or legal guardian will not violate the asylum confidentiality provisions.

How do I prepare a successful asylum application?

The key to preparing a successful asylum application is to provide as much corroborating evidence as possible. However, you must also ensure that each piece of evidence serves a specific purpose or underlines a certain point in the case. Superfluous documentation only serves to annoy the asylum officer or immigration judge. Further, the trial attorney may move to strike the documents based on irrelevancy. You must be strategic in determining what is helpful and what is not. Thus, it is advisable to specifically point out to the asylum officer, judge, and trial attorney exactly why each piece of evidence is included. This can be done, for example, through an annotated table of contents.

How do I interview the child and establish trust?

Often you will not gain a comprehensive appreciation of the child's full asylum claim until you have spent a significant amount of time with the child. This may require numerous meetings, especially because children are often reluctant to divulge important details to unfamiliar adults. It may take time to establish a trusting relationship before the child feels comfortable telling you the substantive and often painful parts of her background.

Child Practice Pointer:

Before initiating the fact-finding phase of the client meeting, you should spend time talking to the child about non case-related topics to break the ice and establish rapport.

Furthermore, children often will not know or understand what information is most pertinent and significant to their case. It is your job to elicit the most important information, which can sometimes be a frustrating and time-consuming task. Thus, succeeding in getting a child to open up and discuss traumatic details is perhaps the most important step in preparing the asylum application. In addition, it encourages the child to become more comfortable speaking about her life and answering pointed questions. This is a necessary skill that the child must develop to prepare for her asylum interview and/or immigration court proceeding.

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[139] Section excerpted from the AOBTC Guidelines for Children's Asylum Claims, March 21, 2009, pg. 18.

[140] See Bo Cooper, INS General Counsel Elian Gonzalez, Memorandum. (Jan. 3, 2000); see also See *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000)(where a six-year-old Cuban boy applied for asylum against the wishes of his father in Cuba and INS determined that he did not have the capacity to seek asylum on his own behalf, where it was found that Elian was not at risk of persecution or torture, that Elian's father had Elian's best interests in mind, and that the father did not have conflicts of interest that would prevent him from pursuing the child's best interests. The Eleventh Circuit upheld the INS policy, noting that line drawing on the basis of age is an adequate approach to determining who may individually file for asylum.)

[141] 8 CFR § 208.6.

Child Practice Pointer:

When concluding an interview session during which the child has recounted traumatic and difficult experiences, you should end the discussion by returning to neutral topics with which the interview began, such as school, sports, etc. This approach will help to restore the child's sense of security and normalcy at the conclusion of the interview.

NOTE: For more detailed guidance on how to work with children, please refer to the chapter in KIND's manual on how to represent a child in immigration court.

How do I work with the child to gather evidence?

There are certain pieces of evidence that may be difficult or time-consuming to obtain. Thus, it is important to start early when attempting to collect necessary evidence. Below are suggestions of documentation that may be helpful in assembling a child's asylum case:

- **Identity of the applicant:** birth certificate, baptismal certificate, national ID card, military service records, and/or passport.

- **Applicant's family members:** birth certificates, marriage certificates, divorce certificates, national ID cards, passports, and/or family photographs.

- **Persecution of the applicant:** medical records, psychological records; photographs establishing political involvement, religious participation, or involvement in a social group; affidavits, statements, or letters from witnesses; arrest or conviction records; ID or membership cards in a political, religious, or social group; newspaper articles that mention the applicant; and/or photographs of wounds or scars.

- **Applicant's journey to the United States:** photographs, receipts for transportation and hotels, and/or letters from witnesses.

- **Discretionary factors:** educational records in the United States; work records in the United States if employment authorization has been provided; certificates from local law enforcement authorities that the applicant has no criminal history; letters stating good moral character; ESL certificates; and/or documentation reflecting involvement in a religious or social organization in the United States.

Investigating the government's records
If your child client has come in contact with U.S. government officials you should investigate what records the government possesses. Usually, if your client has not been placed in removal proceedings there will be no DHS documents available to request.

- **Form I-213.** If an immigration officer has interviewed your client there will be a I-213 in your client's A file. You should obtain and review the "Record of Deportable Alien" (Form I-213, Record of Sworn Statement) prior to the submission of the child's affidavit or the completion of the I-589 to avoid creating any inconsistencies with what is contained in the government's file. If your client is in removal proceedings the government trial attorney will look to Form I-213 for valuable information about the child, especially if the child has criminal issues.

- If there are discrepancies between your client's testimony and the information contained in the I-213, you will want to argue that the I-213 is inherently unreliable. In the U.S. Commission on International Religious Freedom study entitled "Report on Asylum Seekers in Expedited Removal," dated February 2005, the Commission concluded that the Record of Sworn Statements were "often incomplete and less than reliable."[142]

- **Review the court record**. If the child is in removal proceedings, you should review the court's record file (referred to as the Record of Proceeding (ROP)). The ROP consists of written documents and the court recordings of all court hearings on the case. This file is different from what is in the government trial attorney's file. You should be aware of all documents and information that both the trial attorney and the immigration judge will rely on during the hearing. The procedure differs for each jurisdiction as to how to review the court's file. In many jurisdictions, you must file a Request to Review Record of Proceeding or Hearing Tape, or you may request to review both. A copy of this form can be obtained from the immigration court clerk. Upon filing this request, the immigration clerk will contact you to set up a date to review the court's file and/or listen to the tape recording of all events occurring prior to your entry into the case.

- **Request and review the child's ORR file.** Consult your KIND pro bono coordinator for the proper procedure).

What are the major components of an asylum application?

What if my client does not have any corroborating evidence of the asylum claim?
In many cases, it will be difficult to present eyewitnesses in support of the child's claim. Such witnesses may still be in the child's home country, afraid to come forward, or no longer living. Further, the child's application may lack direct evidence in support of her case – especially if she fled from home very quickly. This is not uncommon for asylum seekers, and the key is to learn how to work around it. If you cannot obtain specific pieces of evidence such as a birth certificate, etc., you should explain why such evidence is unavailable. This may be done in the child's affidavit, (e.g., "the rebels arrived and we fled in such a hurry that we did not have time to collect our important documents. We have never returned to our home although we have heard from neighbors that our entire village was burned down by the rebels").

The child's testimony alone may be sufficient to establish eligibility for asylum, as long as it is credible, detailed and persuasive.[143]

The legal brief
While not required, a legal brief can be used to educate the asylum officer or immigration judge, tie together a comprehensive argument based on all of the evidence, and address any unique legal issues.

The decision as to whether or not to submit a legal brief is based on a number of factors. Some practitioners caution that it may be unadvisable to submit a brief early on in the application process because there can be months of delay between the time the asylum application is submitted and the actual interview or hearing. During the time after the application is submitted and before the hearing takes place, a traumatized child may reveal additional information and the legal theory of the case may shift as

[142] "Report on Asylum Seekers in Expedited Removal", U.S. Commission on International Religious Freedom, Vol. 1, Findings and Recommendations, (Feb. 2005) at 57. Available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf.
[143] INA § 208(b)(1)(B)(ii).

a result. Therefore, submitting a legal brief early in the case can cause unnecessary credibility problems and legal hurdles.

Usually legal briefs are most effective when they are submitted to address a novel legal issue in the case or to address an area where the law is unsettled. If the legal issues in your client's claim are straightforward, spend your time working on preparing your client's affidavit.

The client affidavit
A personal declaration, or affidavit, explains a child's story in the child's own voice. However, it is important to note that the use of declarations in children's asylum claims has the potential to provide credibility problems and may result in discrepancies between what is on paper and what the child testifies during the interview or later in court. For example if the case is first heard by an asylum officer, who takes many notes, and then is heard by an immigration judge and the notes or the testimony conflict with the written affidavit, your client may be deemed not credible. You should use caution in making sure that the child is comfortable with all information submitted in any affidavit and that the child will be able to recount the same information months later during the interview or hearing. If the child has particular memory problems as a result of trauma, you may want to reconsider whether submitting a written affidavit is appropriate.

The best rule of thumb is to keep any affidavit narrow enough so that it provides value in support of the child's claim but general enough so that the child is not "locked in" to specific details and dates which she will then be forced to remember in an interview or on the witness stand.

In addition, when drafting your client's affidavit, it is important to keep the language and tone in the applicant's own voice. You should pay close attention to the vocabulary used and the way in which points are phrased or worded. While your role is to help the child verbalize her story in a clear and concise manner, it can quickly become apparent to the adjudicator that you wrote the affidavit. For example, it is highly unlikely that a child would use the word "persecution" in describing what happened to her.[144]

Child Practice Pointer:

To get started with drafting the affidavit, you may want to ask your child client to write a letter or summarize on paper the significant events of her life and background. This will provide a good starting point and enable you to follow up with additional questions. Also, the child may feel less intimidated initially by writing these details down as opposed to talking about them with an unfamiliar adult.

Expert witnesses and affidavits
Expert witnesses are most useful when highlighting the conditions of the child's home country and the difficulties the child would face if forced to return. For cases involving traumatization of a child, the expert may want to include information regarding the lack of availability of counseling or medical services in the child's home country.

Psychological or mental health evaluation
When a child has suffered past trauma, it is helpful for the child to be evaluated by a mental health expert to give weight and credibility to the claim. For example, the existence of post-traumatic stress disorder may be at issue. An official diagnosis not only strengthens the client's story, but may also help explain why the child may have memory problems, has difficulty talking about various topics, or appears confused or devoid of emotion. Such explanations can be beneficial in rebutting a trial attorney's claim that the child's testimony or actions demonstrate a lack of credibility.

[144] *See* Germain, AILA's Asylum Primer (5th Ed.), pp. 385-389 (American Immigration Lawyer's Association 2007).

Background on the country conditions
Asylum officers and judges do not appreciate applications that include voluminous country reports without any indication of the most relevant portions. In fact, the Immigration Court Practice Manual requires that the relevant portions of background documents be highlighted or marked in some way.[145] You should draw attention to the most pertinent points of documents through tabbing, highlighting, or ideally, including the exact page that you would like the officer or judge to review and include an explanation of why it is relevant in an annotated table of contents.

- **U.S. State Department Human Rights Report**. Great weight (depending on the federal circuit) is given to the information provided in this report. All asylum applications should include this report for the child's home country with relevant portions highlighted. If you feel that the report is inaccurate or biased (a common criticism), you may want to find an expert who is willing to testify on that point.

- **Other reports and documents** highlighting the child's claim from other well-known sources (e.g., the CIA, Amnesty International, Library of Congress, Congressional Research Service, Human Rights First, Human Rights Watch, United Nations agencies, etc).

Other pertinent evidence
Each asylum case is different and will often have claims requiring unique pieces of evidence. You must decide what is relevant and necessary, e.g., letters from family and friends in the child's home country that discuss the dangerous conditions occurring there since the child fled, documentary proof of police reports or medical reports if the child's claim refers to them, etc. Any document not written in English must be submitted with a certified translation (see below).

Copies and originals
USCIS requires that additional copies of the application and supporting documents be submitted along with the original. Refer to the USCIS Form I-589 instructions for specific requirements. In immigration court, the original Form I-589 must be filed with the immigration judge and a copy must be served on the trial attorney. In addition, a third copy must be submitted so that the court may serve the U.S. Department of State.

If requested, you should be prepared to present the originals of supporting documentation such as birth certificates, death certificates, police reports, and medical reports. DHS may send these documents for laboratory testing to determine their authenticity. However, never mail originals to USCIS or to the court with the asylum application. Send only copies until the originals are requested.

Using specific dates
It is less likely that children, especially young children, will remember specific dates. While sometimes it is necessary to provide a specific date, there are many occasions when a date could be generalized such as, "when I was five years old" or "in the spring of 2000," or "the year my parents got divorced." This prevents children from having to recount specific dates which can become a potential credibility trap should the trial attorney or judge ask about it and the child is unable to provide the correct response.

Translations
An English translation and a certificate of translation certifying that the translation is true and correct must accompany any documents written in a language other than English. This includes birth certificates

[145] ICP Rule 3.3(e)(iv).

and other forms.[146] As provided by the EOIR Immigration Court Practice Manual, the following language must be included in a certificate of translation:

CERTIFICATE OF TRANSLATION
I, _____, am competent to translate from
(name of translator)
_____ into English, and certify that the translation of
(language)
_____
(names of documents)
is true and accurate to the best of my abilities.
_____ _____
(signature of translator) (typed/printed name of translator)
_____
_____
_____
___

(address of translator)
_____
(telephone number of translator)

Change of address
If your child client changes addresses, the child must notify USCIS within **10 days**. If the child is in removal proceedings, she must also notify the immigration court within **five days**. See USCIS form AR-11 and the appropriate EOIR form found in the EOIR Immigration Court Practice Manual. There can be serious immigration consequences for failure to notify DHS of a change of address.

Where do I file my client's initial asylum application?

Affirmative asylum applications are submitted via mail to the USCIS Service Center with jurisdiction over the place of residence. The instructions on the I-589 will clarify the address to which the application should be sent. Once received, the Service Center will forward the application to the nearest asylum office in the child's region and the child will receive an interview appointment notice. The child will also receive a separate notice from USCIS to schedule an appointment to have her fingerprints (biometrics) taken. Note that asylum applicants are not required to show picture identification for their biometrics appointment.

Child Practice Pointer:

Although not required, KIND recommends that any application be sent via overnight mail. At the very least, the asylum application should be sent via certified mail, allowing for some sort of tracking mechanism. The potential for lost or misplaced documents can be relatively high at USCIS and/or the immigration court. USCIS will confirm in writing its receipt of the application via Form I-797.

Where do I file my client's asylum application if the child is before an immigration judge?

Applications for non-UAC children who are in removal proceedings before the immigration judge should file a defensive asylum application with the immigration court.

[146] ICP Manual § 3.3(a).

However, UAC children who are in removal proceedings before the immigration judge should file their asylum application under the provisions of the TVPRA because the child is unaccompanied and therefore the asylum application should be sent to the USCIS Nebraska Service Center. Please see the specific filing instructions in TVPRA guidance issued by the USCIS Asylum Office.[147]

If the child's case was referred to the immigration court from the Asylum Office, the child is allowed to re-file an entirely new application before the court or can simply make corrections or additions to the already existing application.

In these referred cases, you should submit the application to the immigration court that has jurisdiction over the case. When the asylum application is initially filed with the court, USCIS automatically sets up an appointment for children over 14 years to have their fingerprints taken.

Asylum applications are filed in open court at a master calendar hearing.

Unless the judge has set specific rules for her court, all evidence and supporting documents must be submitted to the court at least 15 days before the individual merits hearing. If this deadline is missed, the immigration judge may refuse to consider the evidence. For detained cases, filing deadlines are set by the individual immigration court, so be sure to verify this with the immigration judge.

What is the work authorization "clock"?

Filing an asylum application will start a 180-day "clock" for the Asylum Office or immigration court to complete adjudication. This timeframe is important because if it takes longer than 180 days, the child is eligible to apply for work authorization (Form I-765). An applicant cannot receive a work authorization document (EAD) before 180 days have elapsed from the filing of her initial asylum application. Since it takes about 30 days for DHS to adjudicate the application, the child may file the work authorization application after 150 days have elapsed, but she will not be eligible to receive an EAD until after 180 days.

NOTE: The 180-day "clock" will stop for any delay caused by the asylum applicant. This includes requesting a continuance from the court, or rescheduling an Asylum Office interview. Once the clock is stopped, each subsequent day that passes will no longer count towards the 180-day wait time. The applicant must have the clock "restarted" in order to continue accumulating 180 days – which is often a very difficult task. In such situations, you must request that the clock be restarted – it's not done automatically.

While receiving an EAD for the purpose of seeking employment may be less relevant for children, an EAD often acts as a form of photo ID that may help the child obtain other benefits. It is recommended to apply for an EAD even if the child is technically not old enough to work or does not want to work.

The status of the child's work clock may be determined by calling the EOIR main information line at 1-800-898-7180. If you believe the child's clock is wrong, you should contact the local court administrator.

Can my client travel outside the United States while her application is pending?

It is not recommended because there is no guarantee that if your client leaves the United States she will be allowed back into the country to pursue her asylum claim even if she received permission to leave the

[147] Joseph E. Langlois, Chief, USCIS Asylum Division, Memorandum, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, March 25, 2009. Available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Minor%20Children%20Applying%20for%20Asylum%20By%20Themselves/jurisdiction-provision-tvpra-alien-children2.pdf.

United States prior to departure. Upon re-entry, the asylum applicant must be inspected by an immigration inspector from U.S. Customs and Border Protection (CBP) who will determine whether the asylum applicant will be allowed to reenter. If the child has any inadmissibility issues (most common are adult criminal convictions), she may be denied admission.

However, if your client has to leave the United States for extenuating circumstances, she must first obtain advance parole. Advance parole, which is filed using Form I-131, Application for Travel Document, allows certain aliens to return to the United States without a visa after traveling abroad. An asylum applicant who leaves the United States without first obtaining advance parole will be presumed to have abandoned her asylum application and it will be denied or terminated.

Most importantly, if the child returns to her country of claimed persecution, even after receiving advance parole, she will be presumed to have abandoned her request for asylum, unless she is able to show compelling reasons for her return.

What should I expect at the asylum interview?

The asylum interview takes place in a relatively informal setting in an USCIS office. The asylum officer will conduct the interview while seated behind a desk with you and the child sitting across from the officer. The interview is intended to take place in a non-adversarial manner.

The interview will generally last at least one hour and will be recorded by the asylum officer. First, the child will be asked to take an oath promising to tell the truth during the interview. The asylum officer will verify the child's identity and ask basic biographical questions. The asylum officer will then ask the child about the substantive parts of her claim and determine if any asylum bars apply. The officer is also looking for any inconsistencies between the child's testimony and the information on her I-589.

Asylum officers are instructed to present the child applicant with any adverse information and to provide her with an opportunity to explain or provide clarification. When adverse information is discovered after the interview, the asylum officers are instructed to consider scheduling a follow-up interview to provide the child with an opportunity to correct or clarify the record.

A final decision will not be made at the asylum interview. You and the child will be asked to return to the Asylum Office to receive the decision in person. If you or the child resides at a significant distance from the office, the decision will be sent via regular mail within a few weeks.

It is important for both you and the child to understand that applying for asylum affirmatively carries with it certain risks. Specifically, a child without legal status will likely be put into removal proceedings if the asylum officer does not grant the application.

Can I file supporting materials once the application is filed with USCIS?

Yes. An applicant is permitted to amend or supplement an application at the time of the asylum interview or beforehand by submitting written notice or an erratum. For example, you may come across pertinent information after the time of the original submission that you would like to provide to the asylum officer. Alternatively, it may come to your attention that a mistake has inadvertently been made on the I-589, the affidavit, or elsewhere in the client's application. You have a duty to bring this mistake to the attention of the adjudicator so it may be corrected on the record.

What documents should I bring with my client to the interview?

The following documents, if available, should be brought to the interview:

- Form G-28, Notice of Entry of Appearance.
- A form of identification for the child, including any passport, travel or identification documents, and the Form I-94 Arrival-Departure Record (if your client received one).
- Originals of any birth certificates, marriage certificates, or other documents previously submitted with Form I-589.
- Copy of the asylum application in case the asylum office is missing any of the information.
- Any additional available items documenting the child's claim that have not already been submitted with the application.
- Certified translations of all documents not in English.
- If the non-UAC child is married or has children under 21 at the time of filing the application and are included as derivatives, they must also appear for the interview and bring any identity, travel, or other supporting documents they have in their possession. Again, only those who will be included as dependents in the asylum decision must attend the interview (this is only required for spouses or children living in the United States).

What are special considerations for children being interviewed?

The child's testimony

All asylum officers are provided with basic training in adjudicating children's asylum claims. Specifically, as discussed above, the "Guidelines for Children's Asylum Claims" (the "Guidelines")[148] provide asylum officers with child-sensitive interview procedures and guidance regarding the most common issues that may arise in these cases. This includes tailoring the interview to the child's age, stage of language development, background, and level of sophistication. For example, as stated in the Guidelines:

> The child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma. Asylum Officers may have to build a rapport with the child to elicit claims and to enable the child to recount his or her fears and/or past experiences. Several steps described below may be helpful in building rapport with a child and encouraging communication. Keep in mind that, from the point of view of most applicants – including children – Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences, which give him or her good reasons to distrust persons in authority.

Evidence

[148] INS Office of International Affairs Memo: Guidelines for Children's Asylum Claims – December 10, 1998, found at: http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf

A child cannot be expected to testify with the precision and accuracy of an adult. The UNHCR Handbook states that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's fear of persecution.[149] While, like adults, a child may rely solely on her own testimony to meet the burden of proof, certain easily verifiable facts central to the child's claim may require corroborating evidence.[150] As a result, a child through her attorney may be expected to produce such documentation or offer a reasonable explanation as to why such documentation is unavailable.

Can witnesses testify at the asylum interview?

Yes. A child may present witnesses to testify on her behalf. There are no restrictions on witnesses with regard to their number, age, their own asylum or immigration status, or the relationship to the child. It is recommended that a witness be presented if the witness can help corroborate the child's case or provide an expert opinion regarding the child's previous trauma.

Will USCIS provide an interpreter at the asylum interview for my client?

No. USCIS does not provide interpreters during the asylum interview, except in the case of hearing-impaired applicants, or if the child is in ORR custody at the time of the interview.[151] You must bring an interpreter if the child does not speak English well enough to proceed with the interview. Even if your client can communicate in English, oftentimes the client will feel more comfortable discussing her claim in her native language, particularly as the child will already be nervous about the interview itself. In addition, your client will most likely be able to testify with greater specificity about her claim in her native language than in English. If you bring an interpreter to the interview, ideally you should have worked with this individual on multiple occasions and used this interpreter for a mock interview.

The interpreter must be fluent in English and must be at least 18 years old. The following persons cannot serve as an interpreter: the attorney or representative of record, a witness testifying on the client's behalf at the interview, or a representative or employee of the government of the client's home country.

What is my role in the asylum interview?

Your role is limited in an asylum interview. You may be present to ensure that the asylum officer conducts the interview in a fair and impartial manner and to clarify any issues or questions that arise should the officer ask for clarification. If allowed, you may question the client about important issues or facts that the officer failed to address. You will also have time at the end of the interview to make a statement or add any additional information. This is an opportunity for you to summarize the client's claim and end the interview on a strong note. This is also a chance to draw attention to any important documents included in the application. In many cases, the officer has spent only a few minutes before the interview reviewing the child's file.

In addition, you have a right at any time during the interview to request a supervisory asylum officer to be present during the interview.

[149] *See* UNHCR Handbook, para. 219.
[150] See S-M-J-, 21 I&N Dec. 722, at 739 (BIA 1997).
[151] Langlois, Joseph E. USCUS Asylum Division. Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, Memorandum to Asylum Office Directors, et al. HQRAIO 120/12a. (March 25, 2009), page 6.

Lastly, Asylum Office guidelines also allow for the presence of a "trusted adult**"** to attend an asylum interview with the child to establish conditions in which the child feels safe, secure, and comfortable answering questions regarding her case. As appropriate, the trusted adult may provide clarification but generally does not interfere with the interview or in any way fulfill the role of an attorney. Both you and a trusted adult may accompany the child to an asylum interview.

Potential issues and areas of concern of which you should be alert for during the interview:

- You should bring any age, developmental, or trauma considerations to the asylum officer's attention before the interview begins – simply to ensure that the officer is aware of special considerations and conducts the interview accordingly

- It is appropriate that a child be able to take multiple breaks during the interview. If the child is uncomfortable or needs a brief recess, you should make such a request to the officer.

- You should listen intently to the way each question is worded and/or phrased. Particular language used by the officer may be unclear or confusing to a child. For example, the question "were you persecuted" could easily be rephrased to a similar question such as "were you hurt?" You should bring any such concerns to the officer's attention so that she may clarify the question.

Child Practice Pointer:

If the child requires particular accommodations, e.g., a child who is deeply traumatized, or two siblings who wish to have their cases heard jointly, you should contact the Asylum Office supervisor, before the interview so that the office can make any advance preparations necessary. You will want the asylum officer who will be hearing the case to be experienced in working with children.

What if my client can't make the scheduled interview date?

If it is necessary to reschedule the interview, a request letter must be mailed in advance to the asylum office, or else you must appear in person and complete a "Request to Reschedule Asylum Interview." The Asylum Office will reschedule an interview if it is the child's first request for rescheduling and the request is received prior to the interview date.

NOTE: A request to reschedule an interview will stop the child's work authorization "clock" (see above).

What about parents and legal guardians?

As will be the case in most situations when working with unaccompanied children, a child who remains unaccompanied at the time of her asylum interview will not have a parent or legal guardian present. When this is the case, the asylum officers will likely inquire into the location of the child's parents, and whether the parents are aware of the child's whereabouts and that the child has applied for asylum.[152]

The asylum officer basic training course states that in some cases, it may be appropriate to delay adjudication of a case after the interview so that the child can provide further information or documentation about the guardianship arrangement and/or parental knowledge of, and consent to, the asylum application, where such information could be reasonably available, and if there are unresolved

[152] See Langlois, Joseph E., USCIS Asylum Division. Issuance of Revised Quality Assurance Referral Sheet and Instructions on Submission of Certain Claims for Quality Assurance Review, Memorandum. Feb. 9, 2007).

questions that the documentation could help answer. However, a child's inability to demonstrate a guardianship arrangement or parental knowledge and consent does not foreclose the adjudication of the application or a grant of asylum.[153]

As mentioned previously in this chapter, if the Asylum Office finds that the child has in fact reunified with a parent or legal guardian, current USCIS guidelines instruct the asylum officer to declassify the child as an unaccompanied child. In other words, even if the child was truly unaccompanied at the time of filing her application, if at the time of the interview the child is living with a parent or guardian, they will not be able to benefit from unaccompanied children's status.

NOTE: This issue and USCIS's interpretation is still currently under review. Please ask your KIND pro bono coordinator for the most up to date information.

What if my client fails to show up for the interview?

If for some reason the child does not appear at the interview, USCIS must receive a written explanation within 15 days after the date of the scheduled interview. The Asylum Office director has discretion to reschedule the interview if provided with a reasonable explanation for the failure to appear. Otherwise, if the child is not in status at that time, the case may be referred to immigration court. Failure to appear at the interview may also affect eligibility to apply for work authorization.

What happens when a decision is rendered?

The asylum officer may (1) approve, (2) deny, or (3) "refer" an asylum application to the immigration court. According to the USCIS website, an affirmative asylum applicant is usually interviewed within 43 days of the application's submission and a final decision is received approximately 14 days after the interview (although processing times may vary in differing locations).

If the asylum officer **approves** the application, the child will receive a grant of asylum and be allowed to legally live and work in the United States. Alternatively, it is also possible that the asylum officer may issue a "recommended approval" meaning that the officer has determined the child to be eligible for asylum but that a final decision is being held pending identity and security checks. Once your client clears the security checks USCIS will then issue a final grant of asylum.

Child Practice Pointer:

All asylum applications submitted by minors are referred to the asylum office headquarters (HQASM) before a final decision is made. All asylum claims filed by principal applicants under the age of 18 at the time of filing must be submitted by the asylum officer to HQASM for a quality assurance review before they can be finalized. This requirement applies regardless of whether the applicant is considered an unaccompanied minor. This review may cause delays in receiving a decision.

What about children who are in legal status at the time of their asylum decision?

If the asylum officer decides that the child does not meet the necessary criteria for asylum, a Notice of Intent to Deny (NOID) will be issued to them. The NOID letter gives the reasons the officer is recommending denying the claim and provides the applicant an opportunity to provide additional documentation or evidence in support of her case. After such time, should the application be given a final denial, the applicant will be permitted to remain in the United States through the duration of her legal status.

[153] Id.

The applicant may not reapply (at any time) for asylum in the United States without demonstrating changed circumstances that affect that applicant's eligibility for asylum.

What about children out of legal status at the time of their asylum decision?

If the asylum officer decides not to approve an asylum application and the child is out of legal status, the case will be referred to the immigration court and removal proceedings will be initiated. Technically, under these circumstances, the application is not "denied" but simply "referred" to the court.

NOTE: Under some circumstances, it may be possible to file a "motion to reconsider" with the Asylum Office or asylum headquarters before the case is referred to immigration court. This can only happen if the Notice to Appear has not been issued. Once the court receives the Notice to Appear, USCIS loses jurisdiction over the case.

When before the immigration judge in removal proceedings, the child may renew her request for asylum. Applications for asylum before an immigration judge are considered *de novo*, which means all of the evidence will be considered for the first time, without the influence of the asylum officer's opinion or findings.

Can I appeal USCIS's decision?

No. There is no administrative or judicial appeal of a decision of an asylum officer. Instead, the case is referred to immigration court, as described above, and a request for asylum may be renewed before the immigration judge. Any adverse decision of an immigration judge may be appealed administratively to the Board of Immigration Appeals, and then to the circuit court of appeals.

What about defensive asylum and adjudication in removal proceedings?

If an asylum officer does not approve the asylum application, and the child does not have legal immigration status at the time of the decision, DHS will issue a Notice to Appear (Form I-862).

Once the child is placed in removal proceedings, she may request asylum as a defense from removal. This is referred to as defensive asylum because the child, while conceding that she does not have valid immigration status and is removable under the Immigration and Nationality Act, is arguing that she is a refugee and should be granted asylum.

By regulation, any application for asylum is deemed to also be an application for withholding of removal. Unlike asylum officers, an immigration judge has jurisdiction to grant withholding of removal or Convention Against Torture (CAT) protection in addition to asylum relief. In adjudicating the asylum application, immigration judges are bound by statute, published BIA opinions, court of appeals decisions from the child's specific federal circuit, and U.S. Supreme Court decisions. While decisions from other circuits may be cited, they will serve only as persuasive authority and are not binding.

At the removal hearing, an ICE trial attorney represents the government. It is the role of the trial attorney to test the credibility, plausibility, and validity of the child's asylum claim in an adversarial process.

Child Practice Pointer:

Defensive asylum claims can be extremely intimidating for children – as a result of both the physical surroundings of a courtroom, as well as having to answer many questions from unfamiliar adults, including the judge and the trial attorney.

Can the child amend the asylum application before the immigration judge?

After being placed in immigration court proceedings, the child may amend her asylum application. For example, the child may submit amended pages of the application, as long as all changes are clearly reflected. Such amendments must be filed with the court by the usual filing deadlines set in forth in the EOIR Practice Manual (15 days in advance of the hearing) or by deadlines set by the immigration judge. A cover page with an appropriate caption, such as "AMENDMENT TO PREVIOUSLY FILED ASYLUM APPLICATION" should accompany any amendment.[154]

NOTE: Affirmative asylum applications referred to an immigration court by the Asylum Office are contained in the Record of Proceedings. Therefore, there is no need for the child to re-file the application with the immigration court**.**

What is my client's immigration status once asylum is granted?

When individuals are granted asylum in the United States, they are referred to as "asylees." With a few exceptions, asylees are entitled to reside in the United States indefinitely as evidenced by the issuance of an I-94 (Record of Admission) by USCIS. To obtain Form I-94, the child must make an appointment with USCIS. The child will need to bring a copy of the judge's order, two photos, and a copy of her birth certificate. To make an appointment, visit USCIS's InfoPass webpage at: http://infopass.uscis.gov/.

Is an asylee authorized to work once granted asylum?

Yes. Asylees have the right to work in the United States. In fact, an asylee does not need to apply and receive an employment authorization document (EAD) before obtaining employment. Instead, an asylee is legally able to work as of the date of the grant of asylum and needs only show proof of the asylum grant by producing the I-94 card**.** However, it is a good idea to file an EAD application for your client because many employers are unfamiliar with Form I-94 as proof of lawful status and an EAD is more readily accepted. Further, an EAD may be helpful for a child as it serves as a picture ID, demonstrating that she is present in the United States with lawful immigration status.

The EAD is typically granted for a two-year period, at which point it must be renewed. The first EAD for an asylee is free, but thereafter the asylee must pay a fee to USCIS or request a fee waiver. For specific details on how to file Form I-765, see the USCIS website at www.uscis.gov.

Child Practice Pointer:

Even though a child asylee may receive immigration documents authorizing her to work in the United States, the right to work will be a legal issue controlled by federal and state labor and employment laws. When advising an asylee under 18 years old about the right to work, you should check with state and federal laws as well as with school districts to determine if the child can work and if so, for how many hours per day.

Can my client apply for a social security card and other forms of identification?

Yes. To obtain a social security card, a child must be lawfully present in the United States. An asylee will need to present proof of status (form I-94 or an EAD) and in addition, the child must present proof of

[154] See EOIR Practice Manual Appendix F (Sample Cover Page).

age. Some Social Security Administration offices may accept an EAD as proof of age while others may require an original birth certificate, with translation where necessary.[155]

To obtain an identification card or driver's license, some states require that a noncitizen show proof of lawful status in the United States and provide a social security number. Again, Form I-94 or an EAD will satisfy those requirements. For more detailed information on what documentation is required, visit the state's Department of Motor Vehicles or Department of Public Safety's website.

What happens if my client moves after being granted asylum?

Any person who is a noncitizen in the United States, including asylees, must report any change of address within 10 days to USCIS via Form AR-11. The form can be downloaded from USCIS's website and can be filed electronically. Failure to report a change of address is a ground for removability.

Does my client need to register for the selective service?

Yes, if the client is over 18 years old. Any male living in the United States between the ages of 18 and 25 must register with the Selective Service System. Males can register on the Internet or at a local post office.[156]

What kinds of social services programs are available to an asylee?

Asylees in the United States can access social programs designed to provide basic resources and training. Programs include cash and medical assistance, employment preparation, job placement, and English language training. It is important to direct asylees to these benefits as soon as possible because in certain instances there is a limited time during which an asylee can enroll in the social programs. In general, the asylee must apply within the first 30 days after the grant of asylum.

The Office of Refugee Resettlement (ORR) administers the majority of these social programs. ORR contracts with social service agencies such as Catholic Charities and Lutheran Immigrant and Refugee Services (LIRS) to operate and manage these programs locally.[157]

Who can assist an asylee in accessing these benefits?

Asylees can call the "Asylum Information and Referral Line," based in New York, NY, by calling 1-800-354-0365, to learn about local programs. The referral line is open Monday through Friday, from 9:00 a.m. to 6:00 p.m. EST.

The International Rescue Committee (IRC) [158] and the National Immigration Law Center (NILC) [159] are great resources to help asylee identify local programs that are available, as well as serve as a resource for information on public benefits.

What is the Unaccompanied Refugee Minor's Program?

[155] For further information on applying for a social security card visit: http://www.ssa.gov/online/ss-5.html. Applications can also be obtained by calling: 1-800-772-1213, or visiting a local Social Security Administration office.
[156] For online registration and further information, go to: http://www.sss.gov/.
[157] To learn more about the services available to asylees, go to ORR's website at http://www.acf.hhs.gov/programs/orr/about/divisions.htm.
[158] Visit the IRC at: http://www.theirc.org/where/northamerica.html
[159] For example, see "Overview of Immigration Eligibility for Federal Programs" October 2008, revised October 2011, found at: http://www.nilc.org/overview-immeligfedprograms.html

The Unaccompanied Refugee Minor's (URM) Program is a federal foster care system operated by ORR for refugee and asylee children. Asylee children who do not have at least one parent in the United States are eligible for the URM Program. Children who are granted asylum while in the custody of ORR's Division of Children's Services (DCS), are automatically transitioned into the URM Program after the grant of asylum unless one of their parents is present in the United States (regardless of lawful immigration status).

Can my client travel outside of the United States after being granted asylum?

Yes, but it is not recommended until your client is granted lawful permanent status (LPR). In order for an asylee to travel outside the United States, the asylee must first obtain a Refugee Travel Document (RTD) from USCIS. An asylee cannot travel using her passport and so the RTD serves as an internationally recognized travel document that in theory provides the asylee re-entry into the United States. However, the asylee still has to be granted permission to re-enter the United States by an immigration officer. There is always a risk that the officer on the border may deny entry to an asylee returning to the United States with a RTD. Therefore, KIND strongly recommends that you advise your client to wait to travel until she has been granted LPR status.

If your client must travel, an asylee can request an RTD by filing **Form I-131** (Application for Travel Document). Form I-131 must be filed with USCIS along with the appropriate fee or a fee waiver request. The RTD must be requested before the asylee travels abroad and it must be done plenty of time in advance to allow USCIS to process the request.

Can an asylee apply to bring family members located outside the United States to the United States?

An asylee's spouse and children under age 21 can obtain derivative status through the asylee, the principal applicant. Though not common in the case of an unaccompanied child, there will be situations in which the child may have children of her own. To apply for derivative asylee status on behalf of family members, the asylee must file Form I-730 with USCIS for each family member. The deadline to file is two years from the asylee's grant of asylum. The form is fairly simple and requires little documentation, mainly birth certificates and pictures.

When can an asylee apply for lawful permanent resident status?

One year after obtaining asylee status, an asylee can apply to adjust her status to that of a Lawful Permanent Resident (LPR) pursuant to INA § 209. Note that asylees and refugees adjust status pursuant to a different provision in the INA than most other individuals applying to adjust status. Most adjust status pursuant to INA § 245. There are different requirements in § 209 from § 245. For example, an asylee is not barred from adjusting under § 209 for "being a public charge" by accepting cash assistance. Under § 245 being a public charge can deem an applicant ineligible for adjustment. Make sure to read the relevant portions of the INA.

To apply for LPR status, an asylee must file Form I-485 with USCIS along with required fees, medical exams, and other forms.

The adjustment of status process can be costly, and some asylees do not file for adjustment for many years – if ever. Unlike refugees**,** an asylee is technically allowed to live in the United States legally in asylee status indefinitely without adjusting his or her status. There is a risk to your client if he chooses not to adjust status.

When an asylee adjusts to LPR status, she no longer needs to obtain a travel document from USCIS. An LPR has the right to travel outside the United States for periods of up to six months at a time. Traveling for more than six months can lead to the revocation of LPR status for abandonment reasons.

Travel to the asylee's country of origin is highly discouraged because ICE may question the asylee at the port of entry about changed circumstances in the country of origin and later use the information against the asylee in removal proceedings. Travel to the country of origin is best done once an LPR becomes a naturalized U.S. citizen.

It is important to remind clients that they can lose their asylee or lawful permanent resident status in the United States if they engage in criminal activity.

Can my client apply for U.S. citizenship?

Yes. A lawful permanent resident is eligible to apply for U.S. citizenship five years after obtaining lawful permanent resident status. For asylees, upon the grant of LPR status, USCIS generally backdates the original date by one year, so that the applicant only has to wait four more years before applying for citizenship.

Practice Pointer:

All of the requirements for eligibility for U.S. citizenship pertain to asylees. An asylee should consult competent legal counsel for assistance in filing a citizenship application.

Can my client's asylum status ever be terminated?

Yes. Under certain conditions USCIS can terminate a person's asylum status. This is why you should in most cases encourage your client to adjust to permanent legal resident status as soon as your client is eligible for adjustment.

There are conditions under which asylee status may be terminated,[160] including:

- A fundamental change in circumstances such that the asylee no longer meets the eligibility requirements for asylum
- The asylee becomes subject to one of the mandatory bars to asylum
- The asylee has voluntarily availed herself of the protection of her country by returning there with permanent resident status, or the possibility of similar status
- The asylee has acquired a new nationality and enjoys the protection of her new country.

In practical terms, two of the most common ways in which an asylee's status could be terminated if a person commits a crime or returns to her home country from which she claimed asylum.

[160] See 8 CFR 1208.24(a)-(f).