

Lesson Plan Overview

Course	Asylum Officer Basic Training Course
Lesson	<i>Guidelines for Children's Asylum Claims</i>
Rev. Date	March 21, 2009
Lesson Description	This lesson introduces, and is based on, the <i>Guidelines for Children's Asylum Claims</i> , issued by the former INS in 1998. Issues addressed include interviewing and procedural considerations when working with child asylum applicants, as well as considerations for the legal analysis of their claims.
Field Performance Objective	Given a request for asylum from a child to adjudicate, the asylum officer will correctly apply the law to determine eligibility for asylum in the United States.
Academy Training Performance Objective	Given written scenarios involving child asylum applicants, the trainee will determine the proper handling of the situation in accordance with all laws, policies, and USCIS guidance and training standards.
Interim (Training) Performance Objectives	<ol style="list-style-type: none">1. Summarize the developments in international law that focus on the rights of children and child asylum-seekers.2. Identify inter-cultural factors that may hinder an interview of a child asylum-seeker.3. List the steps that an asylum officer can take to ease the task of interviewing a child applicant.4. List child-sensitive questioning and listening techniques that aid in eliciting information from children.5. Describe questions to ask concerning a child's care and custody and parental knowledge of or consent to the asylum application, and be familiar with the proper use of such information in the adjudication.6. Define an unaccompanied minor and legal guardianship for RAPS purposes.7. Describe how persecution must be analyzed when looking at a claim of a child asylum-seeker.8. Identify issues of nexus that can complicate the analysis of a child's claim to asylum.9. Identify factors to consider when evaluating evidence presented by child asylum applicants.
Instructional Methods	Lecture, class discussion, visual aids, practical exercises.
Student Materials / References	Participant Workbooks; <i>UNHCR Handbook</i> ; <i>Matter of S-M-J-</i> , 21 I&N Dec. 722 (BIA 1997); <i>Matter of A-K-</i> , 24 I&N Dec. 275 (BIA 2007);

Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004); *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000); *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

Method of Evaluation

Written test

Background Reading

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4. Bhabha, Jacqueline and Wendy A. Young. "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," *Interpreter Releases* (Vol. 75, No. 21, 1 June 1998) p. 757-773. (attached)
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7. Cooper, Bo. General Counsel, INS. *Elián Gonzalez, Memorandum for Doris Meissner, Commissioner* (Washington, DC: 3 January 2000), 11 pp. plus attachment.
8. Langlois, Joseph. Asylum Division Chief, USCIS. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum for Asylum Office Directors, etc.* (Washington, DC: 14 August 2007), 9 pp. (attached)
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12. Neal, David L. Chief Immigration Judge, Executive Office for Immigration Review. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, Memorandum for All Immigration Judges, etc.* Washington, DC: 22 May 2007. 11 pp. (attached)
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- Testimony*, 28 PAC. L.J. 3 (1996), 92 pp.
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 20. UNHCR. *Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum* (1997).
 21. UNHCR. *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).
 22. UNHCR. [Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001-2003](#) (Geneva: July 2004), 14 pp.
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 25. Weiss, Jeff. INS Office of International Affairs. *Guidelines for Children's Asylum Claims*, Memorandum to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) (Washington, DC: 10 December 1998), 30 pp. (attached)
 26. William R. Yates. Assoc. Director for Operations, US Citizenship and Immigration Services. [The Child Status Protection Act – Children of Asylees and Refugees](#), Memorandum to Regional Directors, et al. (Washington, DC: 17 August 2004), 4 pp., plus attachments. (attached)

CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
012	Identify issues of claim.
016	Advise all parties of their roles and responsibilities.
017	Identify all persons present at interview.
019	Request/accept additional evidence.
020	Conduct non-adversarial interview.
021	Determine credibility of applicant and materiality to claim.
024	Determine if applicant is a refugee.
041	Follow all service policies and procedures for special applicants, including minors, VWP, individuals 75 years of age and older, etc.
SS 7	Develop ability to interpret cross-cultural behavior and respond appropriately.
SS 10	Develop ability to lead/direct/organize and control the interview process.
SS 13	Develop ability to analyze complex issues.
SS 15	Develop ability to work effectively with interpreters.
SS 19	Maintain current working knowledge of relevant laws, regulations, procedures, policies, and country conditions information.

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Presentation

I. INTRODUCTION

The purpose of this lesson is to familiarize the student with the *Guidelines for Children's Asylum Claims* regarding the adjudication of asylum claims filed by applicants under eighteen years of age. The lesson will cover the international guidance that bears on this issue, the procedural adjustments asylum officers must make when interviewing children, and the legal issues that must be considered when analyzing cases and making asylum determinations.

The majority of the content of this lesson derives from the Immigration and Naturalization Service (INS) memorandum *Guidelines for Children's Asylum Claims*. All asylum officers should be familiar with its content as the memorandum continues to provide valuable guidance when interviewing children. Keeping in mind that any memorandum is static by nature and that changes in regulations and caselaw in the years after a memorandum's issuance may supersede its legal guidance, officers should not rely solely on the sections of the Children's Guidelines on legal analysis when adjudicating a child's claim. The Asylum Division memorandum *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS* provides an additional resource on procedures asylum officers must follow in cases involving minor principal applicants.

During the last twenty years, the topic of child asylum seekers has drawn increasing attention from the international community. Human rights violations against children take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish a minimum age for participation in armed conflicts, children under age eighteen are forcibly recruited by state-sanctioned armies or private militias to participate in military combat in some countries.

The unique vulnerability and circumstances of children and the increasing interest in children requesting asylum demanded that the INS issue guidance relating to young asylum seekers. On Human Rights Day 1998, the INS issued its *Guidelines for Children's Asylum Claims* (or "Children's Guidelines") which address child-sensitive interview procedures and legal analysis of the issues that commonly arise in such cases.

The Children's Guidelines resulted from a collaborative effort of the INS and interested US governmental and non-governmental organizations (NGOs), individuals, and the UNHCR. The Women's

References

See Weiss, Jeff. INS Office of International Affairs. *Guidelines for Children's Asylum Claims*, Memorandum to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees) (Washington, DC: 10 December 1998), 30 pp.

See Langlois, Joseph E. USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 14 August 2007), 9 pp.

Commission for Refugee Women and Children was instrumental in the development of the guidance.

II. INTERNATIONAL GUIDANCE

As the issue of children as asylum-seekers has moved only relatively recently into the forefront of immigration law, relevant US caselaw is somewhat scarce. In the absence of caselaw, or when caselaw does not specifically address an issue, international instruments can provide helpful guidance and context on human rights norms.

The following international instruments and documents contain provisions specifically relating to children. They recognize and promote the principle that children's rights are universal human rights.

In addition to the sources cited below, the information in this section of the lesson derives from section I., Background and International Guidance, of the Children's Guidelines.

See lesson, *International Human Rights Law*.

A. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (U.N.) General Assembly on December 10, 1948. The Declaration sets forth a collective understanding of the rights that are fundamental to the dignity and development of every human being. Most relevant to the task before asylum officers are Article 14, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.

Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

For more on the United Nations and the United Nations High Commissioner for Refugees, see lessons, *Introduction to UNHCR* and *International Human Rights Law*.

B. Convention on the Rights of the Child

Many of the components of international policy regarding refugee children derive from the U.N. *Convention on the Rights of the Child* (CRC). Adopted by the U.N. in November 1989, the CRC codifies standards for the rights of all children, including those who are refugees. Article 3(1) of the CRC provides that "the 'best interests of the child' should be the primary consideration" in all actions involving children. The "best interests of the child" principle holds that the State is ultimately responsible for ensuring that the basic needs of children are met and that the fundamental rights of children are protected. The internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for child asylum seekers, but it does not play a role in determining substantive eligibility under the U.S. refugee definition. Additionally, under Article 12(1), children's viewpoints should be considered in an

Convention on the Rights of the Child (CRC). G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989.
<http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>

CRC, Article 3.

CRC, Article 12.

age and maturity-appropriate manner.

Because the United States has signed but not ratified the CRC, its provisions, including those noted above, provide guidance only and are not binding on adjudicators. However, having signed the CRC, the United States is obliged under international treaty law to refrain from acts that would defeat the object and purpose of the Convention.

On December 23, 2002, the U.S. ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Optional Protocol calls for State Parties to prohibit and create criminal penalties for the sale of children, child prostitution, and child pornography.

Additionally, the United States ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on January 23, 2003. Among other things, the Optional Protocol calls for State Parties to ensure that children under eighteen years of age do not take a direct part in hostilities, sets out safeguards for those under eighteen years of age who are voluntarily recruited into their nation's armed forces, and prohibits non-governmental armed groups from recruiting or using persons under eighteen years of age as soldiers. In 2008, the Child Soldiers Accountability Act became U.S. law, providing criminal and immigration penalties for individuals who recruit or use child soldiers.

Vienna Convention on the Law of Treaties, Art. 18(a), signed May 23, 1969, entered into force January 27, 1980.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, G.A. Res. 54/263, U.N. GAOR, May 25, 2000. <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, G.A. Res. 54/263, U.N. GAOR, May 25, 2000. <http://www.ohchr.org/english/law/crc-conflict.htm>; Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See section E on child-specific considerations concerning bars, below, for more detail on the CSAA.

C. UNHCR ExCom Conclusion No. 47

Over the years, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children. Safeguarding the wellbeing of refugee children has long been a high priority of UNHCR and the United States. In 1987, the Executive Committee issued its first conclusion devoted exclusively to children – Conclusion No. 47. This Conclusion urged action to address the human rights and needs of children who are refugees and highlighted the particular vulnerability of unaccompanied and disabled refugee children, and highlighted the need for action by UNHCR to protect and assist them. Conclusion

For more on the Executive Committee, see lesson, *Introduction to UNHCR*.

UN High Commissioner for Refugees, *Conclusion on Refugee Children*, 12 Oct. 1987. No. 47 (XXXVIII) - 1987.

No. 47 condemned specific violations of basic human rights, including sexual abuse, trafficking of children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, and arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims.

Conclusion No. 47 also emphasized that all action taken on behalf of refugee children must be guided by the principle of the “best interests of the child.”

See section II.B.
Convention on the Rights of the Child, above.

D. UNHCR ExCom Conclusion No. 59

In Conclusion No. 59 issued in 1989, the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children, particularly in regards to access to education. It also drew special attention to the needs of unaccompanied minors, emphasizing the need to develop legal methods to protect them from irregular adoption and forced recruitment into armed forces.

UN High Commissioner for Refugees, *Conclusion on Refugee Children*, 13 Oct. 1989. No. 59 (XL) - 1989.

E. UNHCR ExCom Conclusion No. 107

The Executive Committee issued Conclusion No. 107 on Children at Risk in 2007. It recognizes that children should be prioritized in receiving refugee protection and assistance. It also calls for UNHCR, Member States, and others to identify children at heightened risk due to risks in the wider protection environment and risks resulting from individual circumstances, and to work to prevent such heightened risks.

UN High Commissioner for Refugees, *Conclusion on Children at Risk*, 5 Oct. 2007. No. 107 (LVIII) – 2007.

F. UNHCR Policies and Guidelines

UNHCR has enacted policies and issued several sets of child-related guidelines in recent years.

1. Senior Adviser for Refugee Children

Reflecting an expanded effort to safeguard the wellbeing of refugee children, in 1992 UNHCR established the position of Senior Coordinator for Refugee Children, now known as the Senior Adviser for Refugee Children. This action was a significant step toward improving UNHCR’s protection of and assistance to minors.

2. Policy on Refugee Children

UNHCR. *Policy on*

The UNHCR *Policy on Refugee Children* issued in 1993 points out that children’s needs are different from adults’ due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm. Thus, governmental actions relating to children must be “tailored to the different needs and potentials of refugee children,” to avoid the tendency to think of refugees as a uniform group.

Refugee Children, EC/SCP/82 (August 6, 1993).

3. Refugee Children: Guidelines on Protection and Care

In 1994 UNHCR issued *Refugee Children: Guidelines on Protection and Care*, incorporating international norms relevant to the protection and care of refugee children. The Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR’s standards. For the survival and development of children, UNHCR endorses a “triangle of rights:” the “best interests” rule, a policy of non-discrimination towards all refugee children, and age-appropriate participation of children in issues affecting their lives.

UNHCR. *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

4. Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum

UNHCR published in 1997 the *Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum*. The purpose of the Guidelines is threefold:

UNHCR. *Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum* (1997).

- a. to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC;
- b. to highlight the importance of a comprehensive approach to child refugee issues; and
- c. to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are met.

The UNHCR Guidelines emphasize that all children are “entitled to access to asylum procedures, regardless of their age,” and that the asylum process should be prioritized and expedited for children’s cases. UNHCR recommends that adjudicators take into account “circumstances such as the child’s stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well

as his/her special vulnerability.” It also notes that children may face child-specific persecution, such as recruitment of child soldiers, forced labor, trafficking of children for prostitution, and female genital mutilation. Finally, UNHCR recommends that where there is “doubt as to the veracity of the account presented or the nature of the relationship between caregiver and child,... the child should be processed as an unaccompanied child.”

5. UNHCR Guidelines on Determining the Best Interests of the Child

UNHCR. *Guidelines on Determining the Best Interests of the Child* (May 2008).

The Best Interests Determination (BID) Guidelines set forth the formal process that UNHCR has established to determine the best interests of refugee children confronted with major decisions regarding their care or durable solutions, such as the possibility of voluntary repatriation, local integration, or resettlement. UNHCR commits to undertake a BID in three contexts: (1) identification of the most durable solution for unaccompanied and separated refugee children; (2) temporary care decisions for unaccompanied and separated refugee children in certain exceptional circumstances; and (3) decisions which may involve separating a child against his or her will from parents.

G. Canadian Guidelines

On September 30, 1996, the Canadian Immigration and Refugee Board (IRB) issued the groundbreaking guidance *Child Refugee Claimants: Procedural and Evidentiary Issues*, the first document of its kind issued by a country operating a refugee determination system. In its guidelines, the Government of Canada recognizes that refugee claims of children pose a special challenge since they represent a particularly vulnerable group. The Canadian guidelines, acknowledging that children may not be able to articulate their claims to refugee status in the same way as adults, establish special procedures for adjudicating children’s claims. The guidelines also adopt the best interests of the child as the relevant standard for assessing procedures to be followed in a child’s claim. The IRB developed these guidelines after consultation with international, national, local, and legal organizations working with refugee children.

Immigration and Refugee Board, Canada. *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Ottawa: 30 September 1996), 18 pp., hereinafter, *Canadian Guidelines*.

III. CHILD DEVELOPMENT

The needs of child asylum seekers are best understood if the applicant

Jacqueline Bhabha and Wendy A. Young. “Through a Child’s Eyes: Protecting the Most

is regarded as a child first and an asylum-seeker second. Child asylum-seekers approach the task before them as children, and not necessarily as individuals with legal matters before a State.

Vulnerable Asylum Seekers,” *Interpreter Releases* (Vol. 75, No. 21, 1 June 1998) p. 760.

Most of the information in this section is taken from the Lutheran Immigration and Refugee Service (LIRS) publication *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*.

LIRS. *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998), 84 pp., hereinafter LIRS.

A. Development

A child’s ability to participate in the asylum interview will vary based on a number of factors in the child’s development.

1. Factors in development

At each stage in development, numerous factors interact to shape the child’s personality and abilities. Factors influencing development are:

LIRS, pp. 6-7.

- a. chronological age;
- b. physical and emotional health;
- c. physical, psychological, and emotional development;
- d. societal status and cultural background;
- e. cognitive processes;
- f. educational experience;
- g. language ability; and
- h. experiential and historical background.

2. Factors that accelerate or stunt development

Some children may seem to be much older or much younger than their chronological age. A number of environmental and experiential factors can stunt or accelerate dramatically the development of a child. They include, but are not limited to:

- a. chaotic social conditions; LIRS, p. 7.
- b. experience with forms of violence;
- c. lack of protection and caring by significant adults;
- d. nutritional deficits;
- e. physical disabilities; and
- f. mental disabilities.

B. Preconceptions

Children will bring to the asylum interview a unique set of preconceived notions that could hinder the officer's attempts to elicit information. Such preconceptions may include the ideas that:

1. All governments are corrupt.

The child may be arriving from a country where he or she has already had extensive interaction with or knowledge of a corrupt government. Such a child may assume that the fraud, abuse of authority, and mistreatment of the citizens he or she witnessed in the country of origin is just as pervasive in the United States.

LIRS, p. 35.

2. Others still at home will be harmed.

Especially when a child comes from a country in which informants and their family members are harmed, the child may not understand that the U.S. government has no interest in harming, or doing anything to bring about the harm of, his or her relatives still in the country of origin.

LIRS, p. 36.

3. He or she should feel guilty for fleeing.

It is not uncommon for any asylum-seeker to experience "survivor's guilt" for having fled to a country of asylum, especially when family members were left behind.

LIRS, p. 36.

4. Others will be privy to the testimony.

Many young people do not understand that in the asylum setting, confidentiality protections generally prevent USCIS from sharing information with others, without the applicant's consent. This misconception is most likely to

hinder an interview when an applicant feels shame as a result of his or her mistreatment, most commonly in cases of sexual abuse.

Asylum officers must earn the trust of the child applicant in order to dispel these preconceptions and put the applicant at ease.

See section V.B., General Interview Considerations, below.

IV. PROCEDURAL CONSIDERATIONS

The majority of children who appear before an asylum officer do so as a dependent of a parent who has filed an asylum application. The Children's Guidelines apply primarily to children under the age of eighteen who apply for asylum independently by submitting a Form I-589 in their own name, rather than as derivative applicants on their parents' applications. However, for the purposes of derivative determinations, the Guidelines apply to all individuals under the age of twenty-one. While the Guidelines are particularly relevant for children who raise independent asylum claims, the procedural sections may be useful for all cases involving children and young adults. Although young people between the ages of eighteen and twenty-one will be interviewed much in the same manner as adults, asylum officers should bear in mind that an applicant whose claim is based on events that occurred while under the age of eighteen may exhibit a minor's recollection of the past experiences and events.

Except where otherwise cited, the information in this section derives from the Children's Guidelines.

A. Asylum Officers

All asylum officers are trained on child refugee issues in the event that they are called upon to interview a child who seeks asylum. It is in the child's best interests to be interviewed by an official who has specialized training in child refugee issues. To the extent that personnel resources permit, Asylum Offices should attempt to assign asylum officers with relevant background or experience to interview children's cases.

B. Interview Scheduling

Asylum offices should make every effort to schedule siblings' interviews with the same asylum officer and in the same time period, to the extent such cases are identified in advance of the interviews. In cases where siblings are interviewed by different asylum officers, the officers should consult with one another about the claims and, to the extent possible, should be reviewed by the same supervisory asylum officer.

C. USCIS Initial Jurisdiction for Unaccompanied Alien

Children's Asylum Cases

With the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child. This law takes effect on March 23, 2009. As a result, unaccompanied minors filing for asylum who previously would have had their case heard by an immigration judge in the first instance will now receive an affirmative interview with an asylum officer. Procedural guidance is being drafted and will be issued in the near future.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457 (Dec. 23, 2008). For a definition of "unaccompanied alien child," see section IV.D.2., below.

D. New Minor Principal and Unaccompanied Minor Field in RAPS

1. In August 2007, the Asylum Division incorporated a new mechanism in RAPS to capture data on minor principal applicants, both accompanied and unaccompanied. The mechanism allows the Asylum Division to track applicants who are unaccompanied minors and reminds asylum officers that modified procedures are in order when handling a minor principal applicant's claim. The ability to gather information on the adjudication of unaccompanied minors' applications assists the Asylum Division in developing or refining policy with regard to these cases.

Joseph E. Langlois, USCIS Asylum Division. *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum. (Aug. 14, 2007). See the memo for more details about the commands used in RAPS to capture this data.

2. Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child

- a. Minor Principal

A minor principal is a principal applicant who is under eighteen years of age at the time of filing an asylum application.

- b. Unaccompanied Minor

For purposes of the asylum program, an unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal guardian in the U.S. who is available to provide care and physical custody. This definition encompasses separated 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 that a child who entered the U.S. with a parent or other adult guardian but who

See Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (defining the term "unaccompanied alien child").

subsequently left the parent's or guardian's care would be considered an unaccompanied minor.

For purposes of the unaccompanied minor definition, guardianship refers to a formal (legal/judicial) arrangement. If the parent is deceased and there is no legal guardianship arrangement, the child would be considered unaccompanied.

c. Unaccompanied Alien Child

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 U.S., and who either has no parent or legal guardian in the U.S. or has no parent or legal guardian in the U.S. who is available to provide care and physical custody. Other than defining an unaccompanied alien child as a person who has no lawful immigration status in the U.S., the term "unaccompanied minor" as adopted in the August 2007 Asylum Division memo is the same as the term "unaccompanied alien child." The two terms may generally be used interchangeably.

Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

3. The determination as to whether the applicant is an unaccompanied minor should be made by the asylum officer based on the applicant's status at the time of the preliminary decision update (PDEC) or final decision update (FDEC) in RAPS.

E. Submission of Juvenile Cases to HQASM for Quality Assurance Review

All asylum claims filed by principal applicants under the age of eighteen at the time of filing must be submitted to the Headquarters Asylum Division (HQASM) for quality assurance review before they can be finalized. This requirement applies regardless of whether the applicant is considered an unaccompanied minor.

Joseph E. Langlois, 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).

F. Determining Capacity to Apply for Asylum

Statutorily (subject to the filing bars), any alien in the U.S., without regard to immigration status, has the right to apply for

INA § 208(a)(1); 8 C.F.R. § 103.2(a)(2).

asylum. Under certain circumstances, however, children may lack 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 ignoring the parents’ wishes.” In the case involving *Elian Gonzalez*, the six-year-old Cuban boy who applied for asylum against the wishes of his father in Cuba, INS determined that he did not have the capacity to seek asylum on his own behalf. Important to INS’s decision was the finding 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.

Bo Cooper, INS General Counsel *Elian Gonzalez*, Memorandum. Jan. 3, 2000),.

Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).

Polovchak v. Meese, 774 F.2d 731, 736-37 (7th Cir. 1985); *see also* 8 CFR § 103.2(a)(2) (providing that a parent or legal guardian may sign an application or petition of a person under the age of fourteen); 8 CFR § 236.3(f) (providing for notice to parent of juvenile’s application for relief).

In *Polovchak v. Meese*, a Seventh Circuit case involving a twelve-year-old boy’s grant of asylum counter to his parents’ wishes to return to Russia, the court evaluated the applicant’s capacity to assert his individual rights as part of the court’s procedural due process balancing test: “At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents’ wishes looks very different. The minor’s rights grow more compelling with age, particularly in the factual context of this case.” While the court was not evaluating capacity to apply for asylum, its findings on age and capacity to assert individual rights are nonetheless instructive in the asylum context.

When questions of the child’s capacity to apply for asylum arise, the Asylum Office should contact HQASM.

G. Conflicts between the Child’s and Parents’ Interests

Where a child applies for asylum without the parents’ knowledge and/or consent, many complex issues are raised. When there appears to be a conflict between a child’s and the parents’ interests concerning the asylum application, the Asylum Office should contact HQASM.

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant. However, in the case of young children who lack the capacity to make immigration decisions, the Asylum Officer will need to 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 in 8 CFR § 208.6.

8 C.F.R. § 208.6.

See Polovchak, 774 F.2d at 735 (noting “the fundamental importance of the parents’ interest in the residence, nurture and education of a minor child, then twelve or thirteen”).

V. INTERVIEW CONSIDERATIONS

Child asylum applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma. The following procedures have been designed with children’s behavior and cognitive ability in mind to help asylum officers interact more meaningfully with children during an asylum interview.

Except where otherwise cited, the information in this section derives from the Children’s Guidelines.

A. Presence of Trusted Adult at the Interview

It is usually appropriate for a trusted adult to attend an asylum interview with the minor applicant in order to establish the interview conditions most likely to elicit a full story. A child’s lack of experience in talking with government officials can make testifying difficult, particularly when discussing traumatic events. A trusted adult is a support person who may help to bridge the gap between the child’s culture and the environment of a U.S. asylum interview. The function of the adult is not to interfere with the interview process or to coach the child during the interview, but to serve as a familiar and trusted source of comfort. As appropriate, asylum officers may allow the adult to provide clarification, but asylum officers should ensure that those children able to speak for themselves are given an opportunity to present the claim in their own words.

See UNHCR. Refugee Children: Guidelines on Protection and Care (Geneva: 1994) p. 102; and lesson, *Interviewing Part I: Overview of Nonadversarial Interview*: “Some applicants may request that a relative or friend be present at the interview for ‘moral support.’ There is no prohibition against this and the asylum officer, in his or her discretion, may allow such individual to remain during the interview.”

The policy of allowing a trusted adult to participate in this process does not mean to suggest that the trusted adult serve as a substitute for an attorney or an accredited representative, neither is there a requirement that a trusted adult, attorney, or accredited relative be present at the interview. The child may be accompanied at the interview by both a trusted adult and an attorney or accredited representative.

When conducting an interview of a child in the presence of another adult, the asylum officer should assess whether the child is comfortable speaking freely in front of the adult. In order to

ascertain the child's level of comfort with the adult, asylum officers may initially bring the child into the interview room alone, and ask if the child would like for the accompanying adult to be present. This approach will generally work best with adolescents. Where warranted, asylum officers may additionally ask the child at the end of the interview if he or she has anything to add in private. If at any point during the course of the interview the asylum officer determines that the child is uncomfortable or afraid of the adult, the asylum officer should continue the interview without that person. Given concerns regarding human trafficking, particularly in children, attention to the nature of the relationship between the child and the adult is particularly important.

As appropriate and with the consent of the child, asylum officers are encouraged to interview the trusted adult, if any, in order to confirm his or her relationship to the child, any guardianship arrangement, and the adult's legal authority to speak on behalf of the child. The adult may also have information about parental knowledge of and consent to the asylum application. The trusted adult may also be able to provide information on the child's claim where the child's age at the time of harm or interview prevents him or her from fully detailing events. Where inconsistencies arise between the applicant's and the adult's testimony, an opportunity must be given to the child to reconcile inconsistencies apparent at the interview. Note that it is not a requirement that a witness or trusted adult be present at the interview.

See Joseph E. Langlois, USCIS Asylum Division. Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum.

B. Interview Questions Concerning Guardianship and Parental Knowledge and Consent

If a child appears at the asylum interview without a parent or guardian, asylum officers should 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.

See Joseph E. Langlois, USCIS Asylum Division. Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum.

Asylum officers should elicit information about issues of guardianship and parental knowledge of and consent to the application for asylum. The questions of guardianship may be particularly important for unaccompanied minors because whether or not there is a legal guardian informs the asylum officer's decision of whether to categorize the applicant as an unaccompanied minor. Additionally, the information elicited by asylum officers is useful to HQASM in informing policy making and in helping HQASM provide guidance on individual cases, as necessary.

Below are questions and issues that asylum officers should take into account when conducting an interview with a minor principal applicant. These questions provide a general framework for exploration of issues of guardianship and parental knowledge and consent. Interview notes should reflect the below-requested information. A minor principal applicant'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; rather, these questions are important to HQASM in reviewing cases, gathering information, and informing our policy on juvenile cases. If there is a concern in regards to parental notification and confidentiality, or a concern for the child's welfare and/or safety, please contact HQASM for further guidance.

1. With whom is the child living in the U.S.?
2. Did anyone accompany the child to the interview?
3. Is there a guardianship arrangement?
4. If there is an adult caregiver but not a legal guardian, what arrangements has the adult made to provide for the child?
5. Is there one or more living parent?
6. Do the parents know that the child is applying for asylum in the U.S.?

C. General Interview Considerations

1. Conducting a non-adversarial interview

Although all interviews with asylum applicants are to be conducted in a non-adversarial manner, it is crucial when interviewing children that the tone of the interview allow the child to testify comfortably and promote a full discussion of the child's past experiences.

8 C.F.R. § 208.9(b).

In many cases, girls and young women may be more comfortable discussing their experiences with female asylum officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation. To the extent that personnel resources permit, asylum offices should have female asylum officers interview such applicants.

See Phyllis Coven, INS Office of International Affairs. Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum. May 26, 1995), p. 5.

2. Working with an interpreter

Interpreters play a critical role in ensuring clear communication between the child and asylum officer and the actions of an interpreter can affect the interview as much as those of an asylum officer. As in all interviews, asylum officers should confirm that the child and the interpreter fully understand each other. Asylum officers should also confirm that the child understands the role of the interpreter. This is particularly important in cases where the interpreter does not have the child's best interests at heart, such as when the private interpreter is part of a trafficking ring. In cases where the child appears to be uncomfortable with the interpreter, or where the interpreter does not appear to be interpreting correctly, asylum officers should stop the interview and reschedule with a different interpreter.

See lesson, Interviewing Part VI: Working with an Interpreter.

The identity of the interpreter is especially significant when children have been victims of sexual violence. In such situations, children may be very reluctant to share such information if the interpreter is of the opposite gender, especially if he or she is a parent, relative, or family friend. Every effort should be made to make sure that the child applicant is comfortable testifying through the interpreter.

See Gender Guidelines, p. 5; and lesson, Interviewing Part VI: Working with an Interpreter.

3. Building rapport

The child may be reluctant to talk to strangers due to embarrassment or past emotional trauma. Asylum officers may have to build rapport with the child to elicit the child's claim and to enable the child to recount his or her fears and/or past experiences. Where the child finds the asylum officer friendly and supportive, the child is likely to give fewer false details.

LIRS, p. 45.

Asylum officers must be culturally sensitive to the fact that asylum applicants are testifying in a foreign environment and may have had experiences leading them to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception. This fear may cause some children to be initially timid or unable to fully tell their story.

UNHCR Handbook, para. 198.

Asylum officers may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed, such as general interests, family, pets, hobbies, and sports. Asylum officers may wish to ask family members or the attorney

LIRS, p. 38; Nancy W. Perry and Larry L. Teply. "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," *Creighton Law Review*

about the child's interests before the interview to ease conversation. This rapport-building phase also permits the asylum officer to assess the child's ability to answer questions.

(vol. 18, 1985) pp. 1369-1426, reprinted in Jean Koh Peters. *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (Charlottesville, Virginia: Lexis, 1997), pp. 584-585. (hereafter Perry and Teply).

Once the child appears comfortable, the asylum officer should make a brief opening statement before beginning the formal interview. Asylum officers can explain in very simple terms in the opening statement what will happen during the asylum interview and the roles that the asylum officer, applicant, interpreter, and/or attorney will play. Knowing what to expect will help ease the child applicant's anxiety.

See Annex I of this lesson for an example of an opening statement to be used in interviews of children.

LIRS, pp. 45-46.

The tone of the opening statement is intended to build trust and to assure the child that the asylum officer will be asking questions to help understand the asylum claim. The statement gives the child permission to tell the asylum officer when the child does not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that embarrassing or traumatic events from the past generally will not be shared, without their prior consent, with others, including family members, friends, or individuals from their home country.

See 8 C.F.R. § 208.6 on disclosure to third parties.

4. "Reading" the applicant

During the interview the asylum officer must take the initiative to determine whether the child understands the process and the interview questions. The asylum officer should watch for non-verbal cues, such as puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. While these behaviors may signal something other than lack of comprehension, they may also signal that a child is confused. In such circumstances, the asylum officer should pause, and if no appropriate response is forthcoming, rephrase the question.

LIRS, pp. 46-47.

Correspondingly, the asylum officer should expect the child to be attuned to the asylum officer's body language. Children rely on non-verbal cues much more than adults to

LIRS, p. 27. Perry and Teply, p. 1380.

determine whether they can trust the person. The asylum officer should be careful neither to appear judgmental nor to appear to be talking down to the child.

5. Explaining how to respond to questions

Children in some cultures are taught to listen to adults but not to speak in their presence. Other children may have spent time in school or other environments where providing answers to questions is expected and responding with “I don’t know” is discouraged.

If necessary, an asylum officer may explain to the child how to use the “I don’t know” response.

LIRS, p. 50.

Example:

AO: If I ask you the question, ‘How many windows are in this building?’ and you don’t know the answer to that question, you should say, ‘I don’t know.’ Let’s practice that. ‘How many windows are in this building?’

Child: I don’t know.

This approach helps to ensure that the child understands when to provide an “I don’t know” response.

6. Reassuring the applicant

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, the asylum officer should offer verbal reassurances. The asylum officer may empathize with the child by saying, “I know that it’s difficult to talk about this, but it is important for me to hear your story.” Additionally, a simple expression of interest (e.g., “I see” or “uh-huh”) may be enough for the child to continue.

Perry and Teply, p. 1381, citing John Rich, MD. *Interviewing Children and Adolescents* (London: MacMillan & Co., 1968), p. 37.

The asylum officer may also shift the focus of the questioning to a non-threatening subject until the child regains his or her confidence. Reassurance, empathetic support, carefully framed questions, encouragement, and topic-shifting are crucial techniques for facilitating interviews of children.

7. Taking breaks

Asylum officers should take the initiative in suggesting a brief recess when necessary. Sometimes a child’s way of

Symposium: Child Abuse,

coping with frustration or emotion is “to shut down during the interview, to fall into silence, or respond with a series of ‘I don’t know’ and ‘I don’t remember’ responses.” Many children may not take the initiative to request a recess if needed. A young child, for example, may stop answering questions or cry rather than interrupt the asylum officer with a request to go to the bathroom or rest. The responsibility may fall to the asylum officer to monitor the child’s needs.

Psychological Research On Children As Witnesses: Practical Implications Forensic Interviews And Courtroom Testimony, 28 PAC. L.J. 3 (1996), p. 70, (hereafter *Symposium*).

8. Concluding the interview

As the interview draws to a close, the asylum officer should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child’s sense of security at the conclusion of the interview. As with all cases, the asylum officer should ask the child if he or she has any final questions, and inform the child of the next steps in the application process.

UNHCR. “Interviewing Children,” in *Interviewing Applicants for Refugee Status* (1995), p. 48.

D. Child-Sensitive Questioning and Listening Techniques

Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. The asylum officer’s questions during the interview should be tailored to the child’s age, stage of language development, background, and level of sophistication. A child’s mental development and maturity are important considerations when determining whether the child has satisfied his or her burden to establish that he or she meets the definition of a refugee. In order to communicate effectively with a child asylum applicant, an asylum officer must ensure that both the officer and the child understand one another.

UNHCR Handbook, para. 214.

The asylum officer should take care to evaluate the child’s words from the child’s point of view. Most children cannot give adult-like accounts of their experiences and memories, and asylum officers should be conscientious of age-related or culturally-related reasons for a child’s choice of words.

Example: The phrase “staying awake late” may indicate after 10 p.m. or later to the asylum officer, while the phrase could mean early evening for a child.

Perry and Teply, p. 1383.

Children’s perceptions of death can cloud their testimony concerning such matters. Children may not know what happened or may feel betrayed by an adult who has died, and some may not understand the permanence of death. Even older children may not fully appreciate the finality of death until months or years after the

Perry and Teply, p. 1419, citing R. Kastenbaum. “The Child’s

event.

Example: Instead of saying that a relative died or was killed, a child may state that the individual “went away” or “disappeared,” implying that the individual may return.

Understanding of Death:
How Does it Develop?”
Explaining Death to Children (E. Grollam, ed. 1967), p. 98.

Proper questioning and listening techniques will result in a more thorough interview that allows the case assessment to be more complete and accurate. The following techniques should help the asylum officer elicit more thorough information.

1. General rules

Asylum officers should endeavor to:

- a. use short, clear, age-appropriate questions.

Symposium, p. 40.

Example: “What happened?” as opposed to “What event followed the arrest?”

- b. avoid using long or compound questions.

Example: “What time of year did it happen?” and “What time of day did it happen?” as opposed to “What time of year and what time of day did it happen?”

Ann Graffam Walker,
Handbook on Questioning Children: A Linguistic Perspective (Washington, DC: ABA Center on Children and the Law, 1994), pp. 95-98 reprinted in Lutheran Immigration and Refugee Service.
Working with Refugee and Immigrant Children: Issues of Culture, Law & Development (June 1998), p. 63. (hereafter Walker); and *Symposium*, p. 40.

- c. use one or two syllable words in questions and avoid using three or four syllable words

Example: “Who was the person?” as opposed to “Identify the individual.”

Symposium, p. 40 (note that this technique is generally more important when conducting the interview in English without an interpreter).

- d. avoid complex verb constructions.

Symposium, p. 40.

Example: “Might it have been the case....?”

e. ask the child to define or explain a term or phrase in the question posed in order to check the child’s understanding. Walker, reprinted in LIRS, p. 63; *Symposium*, p. 40.

f. ask the child to define or explain the terms or phrases that he or she uses in answers, then use those terms.

Example: If a child says that his father “disappeared,” ask him what he means by “disappeared,” and then use that term in questions involving that event.

g. use easy words over complex ones. Walker, reprinted in LIRS p. 63.

Example: “Show,” “tell me about...,” or “said” instead of “depict,” “describe,” or “indicate.”

h. tolerate pauses, even if long. Perry and Teply, p. 1380.

i. ask the child to describe the concrete and observable, not the hypothetical or abstract. *Symposium*, p. 40.

j. use visualizable, instead of categorical, terms. *Symposium*, p. 40.

Example: Use “gun,” not “weapons.”

k. avoid the use of legalistic terms in questions, such as “persecution.” *Symposium*, p. 40.

Example: Ask, “Were you hurt?” instead of “Were you persecuted?”

Example: Asylum can be explained as “a way to stay in the U.S. if there are people who hurt or want to hurt [you] back home and [you are] afraid of returning.”

Christopher Nugent and Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 INTERPRETER RELEASES 1569, 1575 (2001).

- l. avoid using idioms.

Idioms are phrases that mean something other than what the words actually say. Such phrases could be difficult for both the interpreter and the child applicant to understand.

Example: Ask, “Do you understand?” not “Is this over your head?”

- m. use the active voice, instead of passive, when asking a question. *Symposium, p. 40.*

Example: Ask, “Did the man hit your father?” instead of “Was your father hit by the man?”

- n. avoid front-loading questions. *Symposium, p. 40.*

Front-loading a question places a number of qualifying phrases before asking the crucial part of the question.

Example: “When you were in the house, on Sunday the third, and the man with the gun entered, did the man say...?”

- o. keep each question simple and separate. *LIRS, p. 47.*

Example: The question, “Was your mother killed when you were 12?” should be avoided. The question asks to confirm that the mother was killed and about the child’s age at the same time.

- p. avoid leading questions.

Research reveals that children may be more highly suggestible than adults and are more likely to answer according to what they think the interviewer wants to hear. Leading questions may influence them to respond inaccurately.

LIRS, p. 26, and Perry and Teply, pp. 1393-1396.

- q. use open-ended questions to encourage narrative responses.

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

LIRS, p. 47.

- r. explain any repetition of questions.

Make clear to the child that he or she should not change or embellish earlier answers. Explain that you are asking repeated questions to make sure you understand the story correctly.

Walker, reprinted in LIRS, p. 64.
Symposium, p. 23.

"Repeated questions are often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired."

Walker, reprinted in LIRS, p. 64.

- s. never coerce a child into answering a question during the interview.

Symposium, p. 41.

Coercion has no place in any asylum interview. For example, an asylum officer should never tell a child that she cannot leave the interview until she answers the asylum officer's questions.

- t. accept that many children will not be immediately forthcoming about events that have caused great pain.

2. Details

Children may not know the specific details or circumstances that led to their departure from their home countries. Children may also have limited knowledge of conditions in the home country, as well as their own vulnerability in that country.

For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults. More probing and creative questions are required.

Canadian Guidelines, p. 8.

Example: The child may not know whether any family members belonged to a political party. The asylum officer should probe further and ask the child whether his or her

parents attended any meetings and when the meetings were held. The asylum officer should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

3. Measurements of time and distance

Children may try to answer questions regarding measurements of distance or time without the experience to do so with any degree of accuracy. Asylum officers must make an effort to ascertain the child's quantitative reasoning ability.

Example: The asylum officer should determine the child's ability to count before asking how many times something happened.

Symposium, p. 41.

Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Not only is imprecise time and date recollection a common problem for children owing to their cognitive abilities, it can also be a product of their culture. The western mind typically measures time linearly, in terms of successive – and precise – named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events.

See lesson, Interviewing Part IV: Inter-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview.

Example: In response to the question, "When were you hurt?" it may not be uncommon for a child to state, "During harvest season two seasons ago" or "shortly after the hurricane." These answers may appear vague and may not conform to linear notions of precise time and named dates, but they may be the best and most honest replies the child can offer.

Even in those cultures where time is measured by a calendar, it may not comport to the Gregorian calendar used in the western world.

Example: Many Guatemalan Indians still use the Mayan calendar of 20-day months.

Example: In certain Asian cultures, a baby is considered to be “1” on his or her date of birth thereby causing, to the western mind at least, a 1-year discrepancy between the child’s age and date of birth.

Example: In many Latin cultures, 2 weeks is often “15 days” because the first and last days are counted.

Example: Certain Asian cultures count the first day or year, adding 1 day or year to the time of the event.

4. “I don’t know” responses

In certain cultures, “I don’t know” is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question.

Example: A child may respond “I don’t know” when asked who killed his or her parents, but upon further inquiry may state that everyone in his or her home village believes that it was government forces. Asylum officers should generally probe further regarding these opinions. The child’s awareness of community opinion may provide information about the issue in question even though the child may initially state “I don’t know.”

E. Credibility Considerations During the Interview

Sensitivity to cultural and personal experiences is required of all asylum officers irrespective of the applicant’s age. This becomes critical when examining testimony presented for credibility. The task of making an appropriate asylum decision when interviewing children, including making a credibility determination, requires that asylum officers be aware of the following issues involving the testimony of children.

See lessons, Interviewing Part IV: Inter-Cultural Communication...; and Credibility.

1. Demeanor

The term “demeanor” refers to how a person handles himself or herself physically – for example, maintaining eye contact, shifts in posture, and hesitations in speech. A child may appear uncooperative for reasons having nothing to do with the reliability of his or her testimony.

Example: Different cultures view expressions of emotion differently. Though an asylum officer raised in the United States might question the credibility of a child who, without crying or expressing emotion, is able to retell how his or her

parents were killed in front of him, it could be that the child was raised in a culture that deems improper any expression of emotion in front of an authority figure.

2. Trauma

Asylum officers should be careful when interpreting certain emotional reactions or psychiatric symptoms as indicators of credibility. Children who have been subjected to extreme abuse may be psychologically traumatized. Lengthy confinement in refugee camps, repeated relocation, or separation from family can also greatly impact the psychological well-being of children. Children who are separated from their families due to war or other refugee-producing circumstances are placed at even greater psychological risk than those children who remain in the care of parents or relatives.

Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability of an applicant to present testimony. Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation (emotionally separating oneself from an event). A child may appear numb or show emotional passivity when recounting past events of mistreatment. A child may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by retelling what happened. Inappropriate laughter or long pauses before answering can also be a sign of trauma or embarrassment. These symptoms can be mistaken as indicators of fabrication or insincerity, so it is important for asylum officers to be aware of how trauma can affect an applicant's behavior.

See lesson, Interviewing Part V: Interviewing Survivors: Physical Abuse, Torture, and Trauma-Related Conditions.

3. Age and developmental considerations

In reviewing a child's testimony, the asylum officer should consider the following:

- a. the child's age and development at the time of the events.
 - b. the child's age and development at the time of the retelling.
 - c. the child's ability to recall facts and communicate them.
4. Other considerations

The asylum officer may encounter gaps or inconsistencies in the child's testimony. The child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances.

See lesson, Credibility; see also Canadian Guidelines, p. 12; Bhabha and Young.

Officers should keep the following in mind:

- a. the impact of the lapse of time between the events and the retelling.

Any individual may have trouble remembering events that took place many years earlier. However, children who may have been very young at the time of an incident will have greater difficulty in recalling such events.

- b. the needs of children with special mental or emotional issues.
- c. the limited knowledge that children may have of the circumstances surrounding events.

Example: A child may not know the political views of his or her family, despite the fact that his parents were among the most visible individuals in the opposition party. When asked follow-up questions, the asylum officer learns that the applicant was seven years old when his parents were assassinated and the relatives who raised him were reluctant to share any information about his parents' activities.

- d. the role of others in preparing children for interview.

Some children may have been coached by a human trafficker or an ill-informed adult to tell a particular story, which the child repeats at the interview in order

not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and the asylum officer should undertake a careful and probing examination of the underlying merits of the child's case. Quite often a child does not intend to deceive when making a fabrication or exaggeration; rather the statement may serve another purpose for the child such as to avoid anticipated punishment, to be obedient to the perceived authority figure (perhaps the attorney or the asylum officer), or to please others.

LIRS, p. 51.

Given the above-noted considerations of issues that may arise in children's asylum cases, all efforts should be made during the interview to present the minor applicant with adverse information and to give the applicant an opportunity to provide an explanation. Where adverse information is discovered after the interview, the asylum office should consider scheduling a re-interview in order to give the minor applicant an opportunity to address the issue.

F. Evidence

In evaluating the evidence submitted to support the application of a child seeking asylum, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The *UNHCR Handbook* advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution. In the concurring opinion to *Matter of S-M-J-*, "the benefit of the doubt" principle in asylum adjudications is described thus:

UNHCR Handbook, para. 219.

...while the burden of proof is borne by the asylum applicant, our law does not include a presumption that an applicant is unbelievable. If as adjudicators we intentionally or subjectively approach an asylum applicant and presume an individual to be a liar rather than a truth teller, we violate not only our duty to be impartial, but we abrogate the statute and regulations which govern our adjudications.

Matter of S-M-J-, 21 I&N Dec. 722, at 739 (BIA 1997) (Rosenberg, L., concurring).

A child, like an adult, may rely solely on testimony to meet his or her burden of proof when that "testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." Certain elements of a child's claim, however, such as easily verifiable facts that are central to

INA § 208(b)(1)(B)(ii).

INA § 208(b)(1)(B)(ii); *see Matter of S-M-J-*, 21 I&N

the child's claim, may require corroborating evidence. A child, through his or her advocate or support person, is expected to either produce such documentation or offer a reasonable explanation as to why those documents cannot be obtained. What is reasonable will depend on the child's individual circumstances, including whether or not the child is represented. Additionally, a child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members.

Dec. at 725.

Given the difficulties associated with evaluating a child's claim, asylum officers should carefully review relevant country conditions information. While the onus is on the child, through his or her advocate or support person, to produce relevant supporting material, asylum officers should also supplement the record as necessary to ensure a full analysis of the claim.

See lesson, Country Conditions Research and the Resource Information Center (RIC); Matter of S-M-J-, 21 I&N Dec. at 726.

Apart from the child's verbal testimony, the asylum officer may consider other evidence where available, including:

1. Testimony or affidavits from family members or members of the child's community.
2. Evidence from medical personnel, teachers, social workers, community workers, child psychologists, and others who have dealt with the child.

Example: A report from a child psychologist who has interviewed the child may indicate that the child suffers from post-traumatic stress, a conclusion that could support the asylum officer's determination regarding past or future persecution.

3. Documentary evidence of persons similarly situated to the child (or his or her group), physical evidence, and general country conditions information.

VI. LEGAL ANALYSIS OF CLAIMS

A. Introduction

This section will focus on the particular legal issues an asylum officer may encounter when adjudicating the claim of a child who has filed his or her own asylum application. This section does not create new law or alter existing law, nor does it attempt to address all the legal issues that may arise in adjudicating a child's asylum claim. Instead, it identifies particular issues relevant to children that an asylum officer may encounter and places those issues

Except where otherwise cited, the information in this section derives from section III., Legal Analysis of Claims, in the Children's Guidelines.

within the context of United States law and UNHCR guidance.

Unlike the child who is a derivative applicant under the parent's application, the child who has filed a separate asylum application must recount his or her own story, frequently without the support of familiar adults. The child may not even fully understand why or how the events leading to his or her arrival in the United States came about.

In order to be granted asylum in the U.S., the child applicant must establish that he or she meets the definition of a refugee contained in the Immigration and Nationality Act, irrespective of age. The *UNHCR Handbook* equally states, "[t]he same definition of a refugee applies to all individuals, regardless of their age."

INA §§ 101(a)(42)(A); 208(a)(2); *UNHCR Handbook*, para. 213.

Consequently, the best interests principle, while useful for procedural and interview considerations, does not replace or change the refugee definition in determining substantive eligibility.

While the burden of proof remains on the child to establish his or her claim for asylum, the asylum officer must consider the effects of the applicant's age, maturity, ability to recall events, potentially limited knowledge of events giving rise to the claim, and potentially limited knowledge of the asylum process when assessing the minor applicant's eligibility. The asylum officer should also attempt to gather as much objective evidence as possible to evaluate the child's claim, to compensate for cases where the applicant's subjective fear or accounting of past events is limited. Given the non-adversarial nature of the affirmative asylum adjudication and the special considerations associated with adjudicating a child's claim, a close working relationship with the child's representative and support person may be necessary to ensure that the child's claim is fully explored.

See section V.F., Evidence, for more on the child's burden of proof; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Geneva: February 1997), p. 10.

B. Persecution (Determining Whether the Harm Rises to the Level of "Persecution")

As in all asylum cases, the asylum officer must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant domestic and international law.

See lesson, *Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution.*

1. Harm that rises to the level of persecution

Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to

UNHCR Handbook, para. 52; see also Bhabha and Young, pp. 761-62.

vary.” The harm a child fears or has suffered may still qualify as persecution despite appearing to be relatively less than that necessary for an adult to establish persecution. This is because children, dependent on others for their care, are prone to be more severely and potentially permanently affected by trauma than adults, particularly when their caretaker is harmed.

Several circuit courts have recognized that events that occur when the applicant is a child, particularly when the events cause serious harm to the child’s family, can constitute persecution.

In *Jorge-Tzoc v. Gonzales*, the Court of Appeals for the Second Circuit noted, “Jorge-Tzoc was a child at the time of the 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.”

Jorge-Tzoc’s family and other families were targeted by the Guatemalan army’s campaign against Mayan Indians. When he was seven years old, Jorge-Tzoc’s sister, her husband, and her mother-in-law were fatally shot by Guatemalan soldiers. While Jorge-Tzoc did not witness any murders, he saw many corpses, including the bullet-ridden body of his cousin lying on the ground. The army’s campaign resulted in his father selling their land and the family’s relocation to a one-room home in Quiche where they struggled to survive. When the family returned to the village after a year away, they found that the house was full of bullet holes and the family’s animals were unrecoverable.

The Seventh Circuit held in *Kholyavskiy v. Mukasey* 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” and his school. The 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 a Jew on a quarterly basis, and being called slurs and being physically abused in his neighborhood.

See Marina Ajdukovic and Dean Ajdukovic, *Psychological Well-Being of Refugee Children*, 7 CHILD ABUSE AND NEGLECT 843 (1993); Betty Pfefferbaum, *Posttraumatic Stress Disorder in Children: A Review of the Past 10 Years*, J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 36:11, at 1504-05.

Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006).

Kholyavskiy v. Mukasey, 540 F.3d 555, 571 (7th Cir. 2008).

Hernandez-Ortiz v.

Additionally, the Ninth Circuit held in *Hernandez-Ortiz v. Gonzales*, “[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.”

Gonzales, 496 F.3d 1042 (9th Cir. 2007).

Hernandez-Ortiz involved two Mayan Indian brothers from Guatemala who fled to Mexico in 1982 at the ages of seven and nine due to the Guatemalan army’s arrival in 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 on suspicion of being a guerilla sympathizer.

In a concurring opinion to *Kahssai v. INS*, Judge Reinhardt of the Ninth Circuit noted 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 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.”

Kahssai v. INS, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring opinion).

While age should be taken into account in making the persecution determination, not all harm to a child, including physical mistreatment and detention, constitutes persecution. In *Mei Dan Liu v. Ashcroft*, the Seventh Circuit upheld a finding by the BIA that harm Liu experienced at the age of sixteen did not constitute persecution. Liu, a Chinese national, had been forcibly taken to the Village Committee Office and interrogated by police and pressured to confess involvement in Falun Gong. On two occasions, police and guards pulled her hair, causing her to cry, and pushed her to the ground. She was detained for two days. The police reported Liu’s arrest to her school and she was expelled. One month later, the police searched Liu’s home and questioned her and her mother, pushing her mother to the floor.

Mei Dan Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); *Santosa v. Mukasey*, 528 F.3d 88, 92 (1st Cir. 2008) (upholding the BIA’s conclusion that Santosa did not establish past persecution in part because he suffered only “isolated bullying” as a child); cf. *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (suggesting that the hardships suffered by fourteen year old applicant, including economic deprivation resulting from fines against her parents, lack of educational

In holding that the evidence did not compel a finding that Liu suffered harm rising to the level of persecution, 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 or whether she holds a

well-founded fear of future persecution...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. But this is not such a case. Though a minor, Mei Dan was near the age of majority – she was sixteen – at the time the events took place. Whatever slight calibration this may warrant in our analysis is insufficient to transform her experiences with the Chinese authorities from harassment to persecution.”

opportunities, and trauma from witnessing her father’s forcible removal from the home, could be sufficient to constitute past persecution).

2. Types of harm that may befall children

The types of harm that may befall children are varied. In addition to the many forms of persecution adults may suffer, children may be particularly vulnerable to sexual assault, forced marriage, forced prostitution, forced labor, severe parental abuse, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as female genital mutilation (FGM), may constitute persecution. When considering whether a cultural practice will amount to persecution, not only must the adjudicator consider whether the harm is sufficiently serious to rise to the level of persecution, but also whether the applicant subjectively experienced or would experience the procedure as serious harm. For example, if an individual applicant welcomed, or would welcome, FGM as an accepted cultural right, then it is not persecution to that applicant. Existing case law does not definitively address how to determine whether FGM imposed in the past on a young child, who did not have the capacity to welcome or reject the practice, constitutes past persecution. However, since FGM is clearly serious harm objectively, the asylum officer should consider FGM under such circumstances as persecution unless the evidence establishes that the child did not experience it as serious harm. An adult applicant’s testimony about her own subjective experience as a young child should be given significant weight. If, for example, an adult applicant testifies that she underwent FGM as a child but does not consider it to have been serious harm, then it generally would not be considered persecution. Alternatively, an adult applicant’s testimony that she considers the FGM she underwent as a child to be serious harm generally would suffice to establish her subjective experience of persecution.

Bhabha and Young, pp. 760-61.

Fundamental rights of children listed in the CRC that may rise to the level of persecution if violated include the rights to

Convention on the Rights of the Child.

be registered with authorities upon birth and 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). The impact of these harms on the child must be explored in order to determine whether the violations, considered individually or cumulatively, amount to persecution.

3. Identification of the Persecutor – private versus public actors

The claims of child asylum seekers may often involve forms of harm that have not traditionally been associated with government actors. Harms such as child abuse, forced labor, or criminal exploitation of children are often inflicted by non-state actors. Where a nexus to a protected ground can be established, the applicant must demonstrate both that the private persecutor has the requisite motivation to persecute and that the government is unable or unwilling to protect the child from the alleged persecutor.

The fact that a child did not seek protection in his or her country of origin does not necessarily undermine his or her case. The asylum officer must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that the asylum officer will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to the child's ability to affirmatively seek protection and government efforts to address criminal activities relating to children.

See Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); *see also* lesson, *Eligibility I: Definition of Past Persecution...*, Section VI.A., *Identifying a Persecutor*.

C. Well-founded Fear of Future Persecution

1. General Considerations

Child-specific issues also arise in determining whether a child has a well-founded fear of persecution. A well-founded fear of persecution involves both subjective and objective elements, meaning that an applicant must have a genuine fear of persecution and that fear must be objectively reasonable. For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. The *UNHCR Handbook* suggests that children under the age of sixteen may lack the maturity to form a well-founded fear of persecution, thus

See lesson, *Eligibility Part II: Well-Founded Fear*.

Matter of Acosta, 19 I&N Dec. 211, 224 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987); *see also* lesson, *Eligibility II: Well-Founded Fear of Persecution*.

UNHCR Handbook, para. 215.

requiring the adjudicator to give more weight to objective factors. “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.” All asylum officers must evaluate the ability of a child to provide information “in the light of his [or her] personal, family and cultural background.”

UNHCR Handbook, para. 216.

The Sixth Circuit, in *Abay v. Ashcroft*, acknowledged the Children’s Guidelines’ reference to the *UNHCR Handbook* on the subject of a child’s subjective fear. In *Abay*, the Sixth Circuit court overturned an Immigration Judge’s finding that the nine-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.

Abay v. Ashcroft, 368 F.3d 634, 640 (6th Cir. 2004).

On the other hand, a child may express a subjective fear without an objective basis. In *Cruz-Diaz v. INS*, the Fourth Circuit noted that the seventeen-year-old petitioner who had entered the U.S. two years prior had a subjective fear of persecution but had not established an objectively reasonable fear with a nexus to one of the protected grounds.

Cruz-Diaz v. INS, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).

2. Personal circumstances

UNHCR Handbook, para. 218.

Asylum officers should examine the circumstances of the parents and other family members, including their situation in the child’s country of origin.

a. family as similarly situated

Asylum officers may be able look to the child’s family as individuals similarly situated to the applicant. A well-founded fear of persecution may be supported by mistreatment of a child’s family in the home country. The First Circuit Court of Appeals concluded that evidence of mistreatment of one’s family is probative of a threat to the applicant. 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. Where there appears to be a conflict of interest between the child and the parents, the asylum officer “will have to come to a decision as to the well-foundedness of the minor’s fear

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).

Bhabha and Young, at 764.

UNHCR Handbook, para. 219.

on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.”

b. the family’s intentions

If the child was sent abroad by his or her parents or family members, the circumstances of that departure are relevant to the child’s asylum application. “If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution...,” that may suggest that the child has such a fear as well. On the other hand, a family’s actions toward a child – abandonment, neglect, or selling a child into slavery – may support a child’s fear of persecution at the hands of relatives.

UNHCR Handbook, para 218.

c. the child’s arrival

The circumstances of a child’s arrival in the United States may provide clues as to whether the child has a well-founded fear of persecution. If the child arrives in the company of other asylum seekers who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child’s fear is well-founded.

See 8 C.F.R. § 208.13(b)(2); *UNHCR Handbook*, para. 217.

3. Internal Relocation

It is generally not reasonable to expect a child to internally relocate by himself or herself; however, asylum officers should examine whether circumstances show that internal relocation would be reasonable.

Cf. Lepe-Guitron v. INS, 16 F.3d 1021, 1025 (9th Cir. 1994) (finding that petitioner’s 7-year period of lawful unrelinquished domicile, for purposes of a discretionary waiver of deportation, began on the date his parents attained permanent resident status, as he was a child at the time).

D. Nexus to a Protected Characteristic

Regardless of the nature or degree of harm the child fears or has suffered, that harm must be tied to one of the protected grounds contained in the definition of a refugee. Children, like adults, may raise one or more protected grounds as the basis for an asylum claim. The asylum officer must explore all possible grounds for asylum and should take into account the age and relative maturity of the child in assessing the child’s ability to articulate his or her claims.

The Children's Guidelines look briefly at the protected grounds in general and then turn to an analysis of membership in a particular social group, because claims based on this ground are frequently novel and analytically complicated.

1. Burden of proof

The burden falls to the child to establish that he or she belongs, or is perceived to belong, to the protected group on account of which he or she has suffered or fears suffering persecution. Because children may lack, or have limited access to, the necessary documents to establish their identity with respect to one of the protected grounds, the asylum officer may have to rely solely on testimony of the child to establish these elements.

Although the Board has issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents. This distinction may be particularly important in analyzing a child's claim, particularly if the child has no legal representation.

See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.13(a); *see also* section VI.F. Evidence, below and lesson *Eligibility IV: Burden of Proof and Evidence*.

2. Inability to articulate a nexus to a protected characteristic

Analyzing whether the applicant has established a nexus to a protected characteristic in an asylum claim made by a child may be particularly difficult because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist.

Because more than one factor may motivate a persecutor to inflict harm, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic. 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.

Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988).

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).

3. No requirement for punitive intent

The inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. The Board of Immigration Appeals has held that a punitive or malignant intent is not required for harm to constitute persecution on the basis of a protected ground. A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic.

Matter of Kasinga, 21 I&N 357 (1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

4. Inability to articulate a political opinion

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 have difficulty articulating a political opinion. Because the level of children's political activity varies widely among countries, however, asylum officers should not assume that age alone prevents a child from holding political opinions for which he or she may have been or will be persecuted.

In *Civil v. INS*, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views." Although the court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by the petitioner cast serious doubts on the presumption that youth "are unlikely targets of political violence in Haiti."

Civil v. INS, 140 F.3d 52 (1st Cir. 1998).

Similarly, in *Salaam v. INS*, the Ninth Circuit overturned a BIA ruling of adverse credibility 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.

Salaam v. INS, 229 F.3d 1234 (9th Cir. 2000) (per curiam).

It may also be possible for a child's claim to be based on imputed political opinion. The adjudicator should carefully review the family history of the child and should explore as

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); see *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066,

much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

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).

5. Membership in a particular social group

In order to establish eligibility for asylum based on membership in a particular social group, an applicant must establish that the group constitutes a particular social group within the meaning of the refugee definition; that the applicant is a member or is perceived to be a member of that group; and that the persecutor was or will be motivated to target the applicant on account of that membership or perceived membership in the particular social group. There is a two-prong test for evaluating whether a group constitutes a particular social group. First, the group must comprise individuals who share a common, immutable characteristic – such as sex, color, kinship ties, or past experience – that members cannot change or a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it. Second, the group must be recognizable and distinct in the society.

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

Note: Because caselaw on particular social group continues to evolve, it will not be discussed in this lesson. See lesson, *Nexus*, section VI, *Membership in a Particular Social Group, including the subsection on age as a characteristic*.

Issues of social group that are likely to arise in a child's asylum claim include social groups defined by family membership, social groups defined in whole or in part by age, and social groups defined in whole or in part by gender. The question of whether the group with which the child applicant identifies himself or herself can be considered a particular social group for the purpose of asylum eligibility will be analyzed in the same manner as with adults.

E. Child-Specific Considerations Concerning Bars to Applying for or Eligibility for Asylum

1. One-Year Filing Deadline

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 amended the INA to state that the one-

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, §

year filing deadline does not apply to unaccompanied alien children. As of March 23, 2009, the effective date of the TVPRA, when an asylum officer determines that a minor principal applicant is unaccompanied, the asylum officer should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply. The one-year filing deadline continues to be applicable for *accompanied* minor principal applicants (those with a parent or legal guardian) and for adult principal applicants. Additionally, as the unaccompanied alien child definition includes the element that the child not have lawful immigration status, the one-year filing deadline must still be analyzed for in-status unaccompanied minors.

235(d)(7)(A). For more details, *see* lesson, *One-Year Filing Deadline*.

See section IV.D.2., *Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child*, above.

Accompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one-year filing deadline based on legal disability. While unaccompanied minors are specifically listed in the regulations as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance for the purposes of the one-year filing deadline, the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations. The same logic underlying the legal disability ground listed in the regulations also is relevant to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

8 C.F.R. § 208.4(a)(5).

As long as an accompanied minor applicant applies for asylum while still a minor (while the legal disability is in effect), the applicant should be found to have filed within a reasonable period of time.

Matter of Y-C-, 23 I&N Dec. 286, 288 (BIA 2002).

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen year old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody. The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because “he did not, through his own action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline.” Note that this case was decided before the TVPRA’s amendment to the INA to exclude unaccompanied minors

from the one-year filing deadline took effect.

2. Safe Third Country

As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child. The Safe Third Country Agreement between the U.S. and Canada, currently the only safe third country agreement between the U.S. and another country, already has an exception for unaccompanied minors. Even if future safe third country agreements are created, INA § 208(a)(2)(E), as created by the TVPRA, does not permit a safe third country agreement to apply to unaccompanied alien children.

See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). *See also* INA § 208(a)(2)(A); lesson, *Safe Third Country Threshold Screening*.

3. Firm Resettlement

In interpreting whether a child is firmly resettled under 8 CFR § 208.15, asylum officers should consider that a child's status in a third country will generally be the same as his or her parent's. The BIA has long held that a parent's status is imputed to his or her children. The Ninth Circuit looks to "whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute[s] the parents' status to the minor."

8 CFR § 208.15; *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); *Matter of Hung*, 12 I&N Dec. 178 (BIA 1967) (holding that because parents were not firmly resettled in Hong Kong, the minor child also was not firmly resettled there); *Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (holding that the parents' status is attributed to the minor when determining whether the minor has firmly resettled in another country).

4. Serious Nonpolitical Crime

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers. Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. These parallel grounds set forth that "[a]ny alien who has

Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). *See also* Lori Scialabba and Donald Neufeld, USCIS. *Initial Information Concerning the Child Soldiers Accountability*

engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code” is inadmissible and is removable.

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability “shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime,” and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii). The regulations are in the process of being promulgated. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. Note that the statute does not exempt children from the applicability of this ground.

Act, Public Law No. 110-340, Memorandum to Field Leadership (Washington, DC: 31 December 2008). CSAA, sec. 2(b)-(c).

CSAA, sec. 2(d)(1). See also lesson, Mandatory Bars to Asylum and Discretion.

VII. DERIVATIVE ASYLUM STATUS FOR CHILDREN

A. Derivative Status versus Independent Status

Under DHS regulations, the child of an asylee is usually afforded the same status as his or her parent as a child accompanying or following to join the principal applicant.

While derivative status is statutorily available to children and spouses, there is no statutory or regulatory right of parents to be eligible for derivative status in the asylum context. The asylum applicant must establish eligibility in his or her own right.

8 C.F.R. § 208.21(a). See also Lepe-Guitron v. INS, 16 F.3d 1021, 1025 (9th Cir. 1994); Vang v. INS, 146 F.3d 1114 (9th Cir. 1998).

Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

B. Children Who Turn 21 Years of Age Before the Asylum Interview

Under the INA, as amended by the Child Status Protection Act of 2002 (CSPA), on or after August 6, 2002, an unmarried child of a principal applicant granted asylum may receive a derivative grant of asylum so long as the child was under twenty-one years of age at the time of *filing* the asylum application. Therefore, children who turn twenty-one years of age *after* the date of filing, but before the adjudication are still considered eligible for derivative asylum status.

Note that there is no requirement that the child have been included as a dependent on the principal applicant’s asylum application at the time of filing, only that the child be included prior to the adjudication.

INA § 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. See also Joseph E. Langlois, Director, Asylum Division, Office of International Affairs. H.R. 1209 – Child Status Protection Act, Memorandum to Asylum Office Directors, et al. (Washington, DC: 7 August 2002), 2 pp., plus attachment.

If, however, an individual turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless the asylum application was pending on August 6, 2002.

William Yates, USCIS Associate Director for Operations. *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al. (Washington, DC: 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff. *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC: 23 July 2003).

C. Children Who Turn 21 Years of Age Before Adjustment

The CSPA also amends INA section 209(b)(3) to allow dependents who are the subjects of pending adjustment petitions who turn twenty-one on or after August 6, 2002, to continue to be classified as children for adjustment purposes (in order not to need to file an independent petition).

INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208.

As noted above, if an individual turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless an application was pending with then-INS on August 6, 2002. While the Domestic Operations Directorate of USCIS recently issued revised guidance on the CSPA for family and employment-based petitions, which eliminated the requirement for a pending application on the CSPA effective date, this guidance memo does not apply to applications for children of asylees and refugees. As a result, a dependent who turned twenty-one years of age and whose principal's adjustment petition was adjudicated prior to the enactment of the CSPA lost his or her ability to adjust as a dependent of the principal applicant. While he or she did not lose the asylum status already granted, the former derivative does not gain the ability to adjust to legal permanent resident status as a principal applicant. In such situations, a *nunc pro tunc* (retroactive approval) procedure is permitted, although the need for such an adjudication will become increasingly rare as more time passes.

See William Yates, USCIS Operations. *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum; Michael Petrucelli, BCIS. *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum. See Donald Neufeld, Acting Associate Director, USCIS Domestic Operations. *Revised Guidance for the Child Status Protection Act (CSPA) AFM Update: Chapter 21.2(e)*, Memorandum (Apr. 2008). See USCIS Asylum Division, Affirmative Asylum Procedures Manual; "INS Discusses

Adjustment of Status Issues For Children of Asylees,” 69 *Interpreter Releases* 847 (1992).

VIII. OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN

A. Special Immigrant Juvenile Status

Special Immigrant Juvenile (SIJ) status provides legal permanent residency under certain conditions to unmarried alien children present in the U.S. who are under 21 years of age. First, a juvenile must be declared dependent on a state juvenile court or legally committed to, or placed under the custody of, an agency or department of a state, and the juvenile court must find the child’s reunification with one or both of his or her parents not viable “due to abuse, neglect, or abandonment” and must determine that “it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence.” Second, the Department of Homeland Security must consent to the grant of SIJ status. In cases where the child is in the custody of Health and Human Services (HHS), the Secretary of HHS must specifically consent to juvenile court jurisdiction to determine the custody status or placement of an alien. Because SIJ status is designed to protect children abandoned, neglected, or abused by their parents or guardians, the child may never sponsor his or her natural or adoptive parents for any family immigration status.

INA § 101(a)(27)(J).

B. Victims of Trafficking or Criminal Activity

The T visa is available to aliens present in the U.S. who have been the victims of a severe form of trafficking in persons, who are physically present in the U.S. on account of such trafficking, and who “would suffer extreme hardship involving unusual and severe harm upon removal.” Aliens must comply with governmental requests for assistance in investigation or prosecuting the acts of trafficking, though persons under the age of 18 are exempt from this obligation. After three years of continuous presence from the date of admission as a nonimmigrant, the T visa holder may adjust status.

INA § 101(a)(15)(T)(i).

The U visa is available to aliens who have “suffered substantial physical or mental abuse as a result of having been a victim” of qualifying criminal activity, which violated U.S. law or occurred in the U.S. The person must possess information related to the criminal activity and aid or be likely to aid in the investigation or prosecution of the criminal activity. Where the person is under

INA § 101(a)(15)(U)(i). See USCIS Adjudicator’s Field Manual, chapter 39, for further details.

16 years of age, a parent, guardian, or next friend may possess information and aid in the investigation or prosecution, in the place of the child under 16. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

IX. SUMMARY

D. International Guidance

Considering that the issue of children asylum-seekers is relatively new in U.S. immigration law, asylum officers may have to look to international law for guidance when binding U.S. caselaw does not speak to the relevant issue. International instruments such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and several UNHCR Executive Committee Conclusions and UNHCR published policies provide insight regarding how to handle asylum claims presented by children. Most importantly, these documents highlight the need for particular attention to issues involving refugee minors.

E. Child Development

Asylum officers interviewing children must recognize that a child's stage of development can affect the asylum interview – both in tone and content. Children who are in a younger stage of development may not be able to recall facts or analyze issues as well as more mature children or adults. Furthermore, children's perceptions of the world will not conform to those of most adults and could create an obstacle to a smooth interview.

F. Procedural Considerations

In order to address the unique situation of child asylum-seekers, asylum officers must make adjustments to their interviews and interview style to facilitate the process. Procedural adjustments made at the asylum office include allowing the child to be interviewed by an officer with relevant experience and scheduling the interviews of family members – especially siblings – as close in time as possible.

Other procedural considerations necessary in children's cases include determining whether or not the minor applicant is unaccompanied and answering the unaccompanied minor field in RAPS, sending all juvenile cases to HQASM for quality assurance review, determining a minor's capacity to apply for asylum, and evaluating any conflicts between a minor's and

parents' interests in the asylum application.

G. Interviewing Considerations

In order to create a child-friendly atmosphere, asylum officers must attempt to build a rapport with the child, “read” the child applicant for any sign of anxiety, and guide the child through the interview process. Questions should be posed with the child’s mental development and maturity in mind. Whenever possible, officers must accommodate child applicants who would like a trusted adult to be present during the interview. Asylum officers should ask questions concerning the child’s guardianship and parental consent to and knowledge of the asylum application. While these questions usually do not affect substantive eligibility, they are nonetheless important for evaluating the child’s care and custody situation.

Because children are less likely than adults to be able to articulate their claim and obtain supporting documents, asylum officers may be required to consider more sources of information to evaluate the objective merit of the claim. This includes taking testimony from other individuals, looking to documentary evidence of individuals similarly situated to the applicant, and taking into account the amount of information that a child of that age can be expected to know and recall.

Children, as adults, are not required to provide corroborating evidence and may rely solely on testimony when the testimony is credible. However, children cannot be expected to present testimony with the same degree of consistency or coherency as adults, and asylum officers must consider children’s development levels and emotional states when evaluating their testimony. The lack of supporting documents and inability of a child to articulate clearly a claim to asylum demand that asylum officers thoroughly research conditions in the countries of origin and first asylum when evaluating a child’s case.

H. Legal Analysis

The definition of a refugee contained in the INA applies to all individuals regardless of their age. Although children do not enjoy a lessened standard for asylum eligibility, there are considerations that must be made when analyzing children’s claims. First, the harm that a child suffered or fears may rise to the level of persecution even when the same harm claimed by an adult would not be considered persecution. Second, though the child may be able to express a subjective fear of persecution, he

or she might not be able to articulate the objective reasons for that fear. Third, an examination into the circumstances in which a child finds himself or herself – how he or she came to the U.S., the location of his or her relatives, or the harm that has befallen his or her parents, for example – may reveal facts that support the child’s asylum claim.

A child’s inability to understand all of the circumstances surrounding his or her flight creates difficulty in analyzing the nexus of the harm or fear of harm to a protected ground. Officers must pay close attention to the objective facts surrounding the child’s claim to determine if there is a nexus regardless of the child’s ability to articulate one. Many claims raised by children will be on account of membership in a particular social group. The body of caselaw that discusses the issue of particular social group applies to children just as it does to adults.

Other legal issues that may involve child-specific considerations include the application of some of the bars to asylum. As of March 23, 2009, the one-year filing deadline does not apply to unaccompanied alien children. Minors accompanied by a parent or legal guardian must still comply with the one-year filing deadline, though they may qualify for an extraordinary circumstance exception based on legal disability. Similarly, as of March 23, 2009, any safe third country agreement cannot apply to unaccompanied alien children. In regards to firm resettlement, a parent’s status is generally imputed to the parent. Finally, in regards to the serious nonpolitical crime bar, the Child Soldiers Accountability Act of 2008 set forth that any alien who engaged in the recruitment or use of child soldiers is considered barred for having committed a serious nonpolitical crime.

ANNEX I

SAMPLE OPENING STATEMENT FOR CHILDREN¹

I am glad that you are here today, and that your friend Mr. (Ms.) [name of support person, if any] is here with you. Do you know what we are going to do today? We are going to talk about why you left [name of country of origin], and why you may not want to go back there. As we talk, you and I both have jobs to do. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember – even the little things.

I will be asking you some questions today. Some questions will be easy for you to answer. But you may not understand other questions. It is OK if you do not understand a question. Just tell me that you do not understand and I will ask the question differently. But please do not guess at an answer or make an answer up.

If you do not know the answer to the question, that is OK too. Just tell me that you don't know the answer. No one can remember everything. There are no "right" or "wrong" answers to any of my questions.

As we talk today, I will write down what we say because what you tell me is important. Do not get nervous about my taking notes. Later, if I forget what we said, I can look it up.

I understand that you may be nervous or scared to tell me about what happened to you. I will not tell anyone in [name of country of origin] about what you tell me today. Also, none of your friends or family here in the United States will know anything about what you tell me, unless you write a special letter that allows me to share information with them.

Before we start, do you have any questions that you would like to ask me? Or is there anything that you want to tell me? If you think of something while we are talking, let me know. If you have to go to the bathroom or want to stop for a while, also let me know.

¹ The sample Opening Statement is intended for young children, and may be modified for older children, depending on their developmental stage and level of sophistication.