



The TVPRA and UAC Determinations



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Photograph by Hiram A. Ruiz, courtesy of the US Committee for Refugees.



Case Example: Adriana

- Adriana is a 13 year old girl from El Salvador.
- She entered the U.S. in April 2009 by walking across the border with other Salvadorans she met on her trip to the U.S. At her entry, she was apprehended by U.S. immigration officers. The following day, she was placed in removal proceedings and was placed in Office of Refugee Resettlement (ORR) custody until May 2009, when ORR released her into the custody of her maternal aunt in a city in your jurisdiction.
- The applicant expressed her interest in filing for asylum.
- **Question:** Would your asylum office be involved in this case?



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Answer: Yes, assuming Adriana filed for asylum, your asylum office would be involved in this case because under the TVPRA, as we will be discussing today, USCIS has initial jurisdiction over asylum applications filed by unaccompanied alien children, even if those children are in removal proceedings.




Objectives

1. Define an unaccompanied alien child (UAC).
2. Describe the Trafficking Victim Protection Reauthorization Act's (TVPRA's) initial jurisdiction provision.
3. Describe the TVPRA's other provisions that relate to the Asylum Division.
4. Understand whether an individual meets the UAC definition for jurisdictional purposes.
5. Identify procedural issues related to UAC cases.




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TVPRA Issues

WHO?




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UAC

- An Unaccompanied Alien Child (UAC) is a legal term referring to a child who:
 - has no lawful immigration status in the US;
 - has not attained 18 years of age;
 - and has no parent or legal guardian in the US, or for whom no parent or legal guardian in the US is available to provide care and physical custody.



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INSTRUCTOR NOTES: Ask the following question: Where does the UAC definition come from?

Answer: The Homeland Security Act of 2002 - 6 U.S.C. §279(g)(2). The Homeland Security Act transferred responsibility for the care and custody of UACs from INS to the Office of Refugee Resettlement (ORR) within Health and Human Services.


Question #2: If the Homeland Security Act has been in effect since 2002, how many of you had heard of the UAC definition since 2002?

Answer: Likely not many of you, since the UAC definition had no effect on USCIS until the passage of the TVPRA. The Asylum Division, however, did define an unaccompanied minor in the August 2007 memo to mirror the UAC definition.



Why Do Children Come to the U.S.?


- There are a range of reasons why children come to the U.S.
- Children may come to the U.S. due to a fear of harm in the home country. Often, children fear harm from non-state actors for such reasons as a family relationship, female genital mutilation, forced marriage, and domestic violence. A common reason for children from Central American countries coming to the U.S. is a fear of gang recruitment.
- Children may come to the U.S. due to economic hardship in the home country or the possibility of reuniting with their parents who are already living in the U.S.



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INSTRUCTOR NOTES: Before showing the bullets, ask the following question:
What are reasons a child may come to the US?



Why are Children Unaccompanied in the U.S.?


- There are a range of reasons why children are unaccompanied in the U.S.
- A child may be living in the U.S. unaccompanied by a parent or legal guardian, while the child's parents remain in the home country. The parents may have been involved in sending the child to the U.S., and may even have accompanied the child on the journey and returned to the home country.
- A child may have come to the U.S. unaccompanied in order to reunite with a parent or adult relative. Even if the child is successful in reuniting with that adult, he or she may not be a parent or legal guardian.



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INSTRUCTOR NOTES: Before showing the bullets, ask the following question:
What are reasons a child may be “unaccompanied” in the US?



Numbers of UACs

- Approximately 8,000 unaccompanied children are taken into federal custody each year after crossing the border into the United States.
- The most common native countries of UACs in ORR custody are Honduras, Guatemala, El Salvador, Mexico, and Ecuador.



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• **INSTRUCTOR NOTES:** Before showing the **first bullet**, ask the following question: How many UACs do you think are placed in removal proceedings in Immigration Court each year?


• Answer: see first bullet. UACs who are taken into federal custody are generally placed into removal proceedings. In FY12 this number greatly increased, and DHS is trying to figure out why.

• There is no comprehensive set of US government statistics on how many children enter the US alone every year.

• ORR's Division of Unaccompanied Children's Services is responsible for the care and custody of UACs. More information about UACs in ORR custody can be found at http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm.


• **INSTRUCTOR NOTES:** Before the **second bullet**, ask the following question: What are the common countries of origin for UACs?

• Answer: see second bullet.



UACs Seeking Asylum

- In FY12, the Asylum Program received 410 applications from UACs in removal proceedings, and in FY11, it received 577. In FY10 there were a total of 778 applications from UACs in removal proceedings.




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Despite increase in UAC apprehension, we haven't seen an uptick in UAC asylum applications yet.

FY10 was the first full FY following TVPRA effective date.



PRL

- PRL refers to those UACs who are currently in removal proceedings (under INA Section 240) in Immigration Court.
- PRL is the special group code entered by the Nebraska Service Center in RAPS at the time of I-589 receipt.



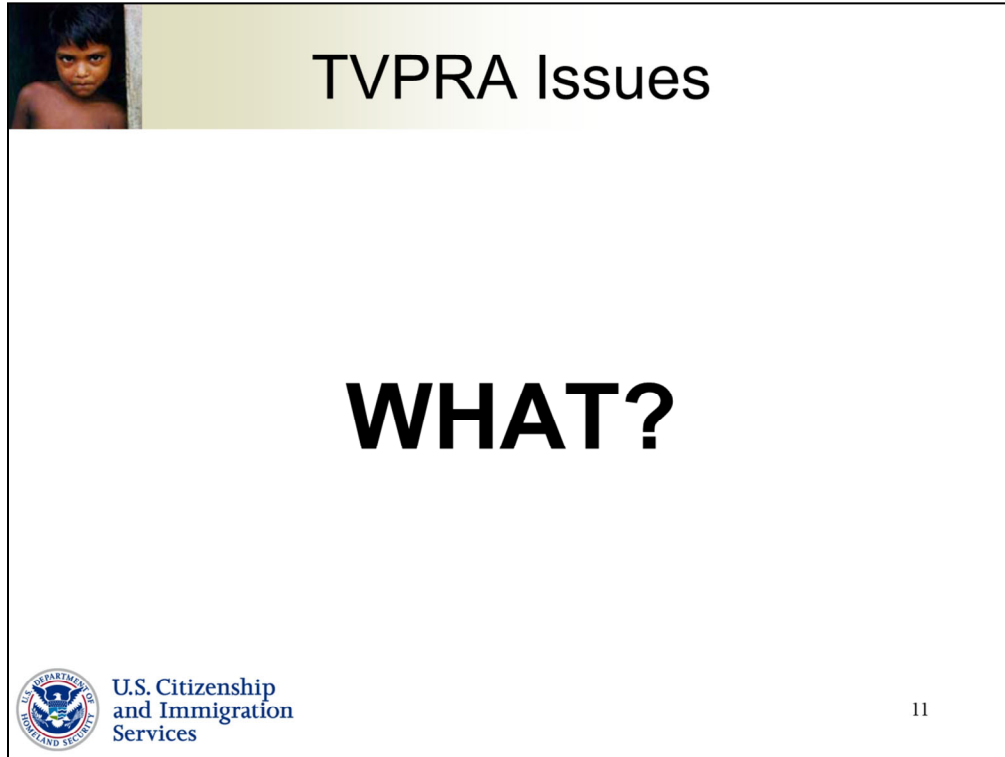
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•Pronounced: “**pearl**”


•PRL is a special group code in RAPS; however, these UACs are often referred to as “PRLs” within the Asylum Division. The PRL designation is an internal designation for tracking purposes.

•Keep in mind that UACs comprise a larger group than PRLs. A UAC would not be a PRL if the UAC was never apprehended and placed in removal proceedings. In such cases, the UAC seeking asylum would file through the purely affirmative process. As any alien in the U.S. may file for asylum, some of those who file are UACs.



TVPRA Issues

WHAT?



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You have now heard us mention the TVPRA and that we have initial jurisdiction through the TVPRA. We will now break down what that means.




TVPRA

- On December 23, 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008.
- This law took effect on March 23, 2009.




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TVPRA: Initial Jurisdiction

- Congress gave USCIS initial jurisdiction over any asylum application filed by a UAC.
- UACs in removal proceedings (PRLs) now file their initial application for asylum with USCIS.
- Initial jurisdiction also applies to those UACs who, as of 12/23/08, had a pending claim in Immigration Court, on appeal to the BIA, or in federal court, and who did not have an asylum claim previously adjudicated by USCIS.



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•Bullet 1: The initial jurisdiction provision is at section 235(d)(7)(B) of the TVPRA. December 23, 2008 is the date of enactment of the TVPRA. The TVPRA stated that its provisions also applied to UACs with pending claims as of the date of enactment.

•Bullet 1: Because USCIS has initial jurisdiction over all UACs seeking asylum, this includes all UACs who have entered under the Visa Waiver Program, regardless of the filing date.


•Bullet 3: UACs with pending/remand claims, as discussed in the third bullet, are small in number.

•Bullet 3: Keep in mind that if USCIS also adjudicated the UAC's asylum claim before passage of the TVPRA, we have already exercised initial jurisdiction.



Other TVPRA Asylum Provisions

- UACs whom DHS seeks to remove must be placed in 240 removal proceedings.
 - This means UACs do not go through the credible fear or reasonable fear process.
- UACs are not subject to the one-year filing deadline.
- Federal agencies must notify ORR upon discovery of a UAC.
- A child advocate may be appointed by ORR.
 - Available for child trafficking victims and other vulnerable UACs.




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•Bullet 2: the TVPRA states, “Each department or agency of the Federal Government shall notify the Department of Health and Human Services within 48 hours upon—(A) the apprehension or discovery of an unaccompanied alien child; or (B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.” Since there are no procedures in place as of January 31, 2011 (the date this TVPRA training material was “finalized”) for the notification process, the Asylum Office should contact HQASM should the office discover a UAC who has not yet come to the attention of the federal government.

•Bullet 3: the TVPRA authorizes HHS to appoint a child advocate to advocate in the best interests of the child for child trafficking victims and other vulnerable UACs. See the companion Capacity PowerPoint for more details.




TVPRA Issues

WHY?




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Why Have Initial Jurisdiction?


- UACs are vulnerable because they are away from their parents' protection, their traditional community, and their country of origin.
- Children may be at risk of being trafficked due to their dependence on adults and their susceptibility to outside influence.



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INSTRUCTOR NOTES: Before showing the bullets, ask: Why do you think Congress created the initial jurisdiction provision?



Why Have Initial Jurisdiction?

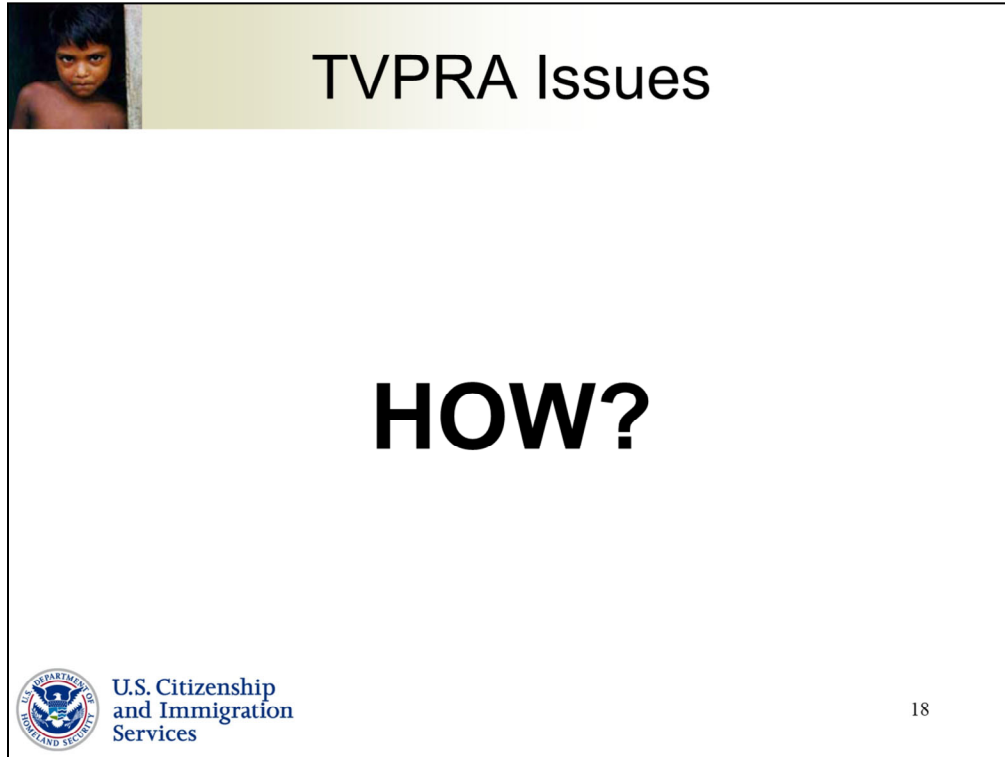
- The affirmative process is a non-adversarial interview, rather than a series of adversarial court hearings.
- AOs conducting the affirmative interview are trained in matters relating to children's asylum claims.



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- USCIS implements the principle of the “best interest of the child” in part by providing a non-adversarial asylum process for child asylum seekers.
- The best interest principle is a useful measure for determining appropriate interview procedures for child asylum seekers. Jeff Weiss Memo: *Guidelines for Children's Asylum Claims*, INS (December 10, 1998).
- The best interest principle is a factor for EOIR in ensuring that a “child appropriate” interview environment is established, allowing a child to discuss freely the elements and details of his or her claim. *Interim Operating Policies and Procedures Memorandum 04-07*, Office of the Chief Immigration Judge, EOIR (September 16, 2004).



TVPRA Issues


HOW?



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INSTRUCTOR NOTES: This section will answer the following questions: How does the process of initial jurisdiction work? What happens when a UAC files for asylum with USCIS? What happens leading up to that?



What Happens When a UAC is Apprehended?

- UACs in federal custody must be transferred to ORR custody within 72 hours of identification.
- ORR places UACs in a range of different settings until they are released into the care and physical custody of an adult sponsor.




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• *See* TVPRA section 235(b)(3): “TRANSFERS OF UNACCOMPANIED ALIEN CHILDREN.--Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.”

• There are various types of arrangements that ORR makes to hold UACs while they are in ORR custody. These include foster care, shelters, staff-secure facilities, secure facilities, and therapeutic staff-secure facilities. Staff-secure and secure facilities are facilities with additional security precautions, due to the factors that lead to an individual being placed there.



UAC Obtains Instruction Sheet and Files I-589

- UAC appears at Immigration Court master calendar hearing.
- ICE OCC issues UAC instruction sheet.
- IJ continues proceedings.
- UAC files asylum application with the Nebraska Service Center.



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•ICE issues the UAC instruction sheet if it appears to them that the applicant is a UAC at the time of expressing intent to file for asylum. If there is a dispute as to UAC status, an IJ may make a finding of UAC status. Additionally, while this issue has not been addressed in the absence of regulations, it is likely that a finding of UAC status could be appealed to the BIA on interlocutory appeal. . (An “interlocutory appeal” involves an appeal of a matter within a case before the case is concluded or final.)

•If the Immigration Court administratively closes removal proceedings in a UAC’s case, the procedures do not vary, as the NTA is still active.

•If the IJ terminates removal proceedings in a UAC’s case prior to the asylum interview, which is less common, then treat the case as a purely affirmative application. This means that it would not be necessary to examine UAC status for jurisdictional purposes, but it would still be necessary to examine UAC status in order to determine if the applicant is subject to the one year filing deadline. For a terminated PRL case, the asylum office should issue a new NTA if it finds the applicant not eligible for asylum.


•The Nebraska Service Center (NSC) should accept the I-589 filed by a PRL for all PRLs under 18, and should accept the I-589 for PRLs 18 or over when the UAC instruction sheet is included in the filing.

•The Asylum Division occasionally encounters cases where the PRL asylum applicant was never scheduled for an asylum interview, because NSC has treated it as a defensive filing for biometric purposes, rather than as a UAC filing. If an Asylum Office is contacted by an applicant who is puzzled as to why he/she has not been scheduled for an interview despite filing with NSC, please contact HQASM Operations for guidance.



Case Example


- At her Immigration Court master calendar hearing in December 2009, Adriana stated she wanted to file for asylum.
- What is the procedure for Adriana to file for asylum with USCIS?



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Answer: If Adriana appears to be a UAC, ICE will issue a UAC instruction sheet, instructing Adriana to file her asylum application with the NSC. At her next master calendar hearing in Immigration Court, Adriana should present proof of filing the I-589 and the Immigration Judge should continue her immigration proceedings pending the adjudication of her I-589 application by USCIS.



Scheduling Considerations

- Need both A-file and T-file to schedule interview.
- No shows
 - Standard AAPM no show procedures apply for represented UACs.
 - For unrepresented UACs, reschedule once.
- Withdrawals
 - Standard AAPM withdrawal procedures apply for UACs, except:
 - If an applicant seeks to withdraw because he/she was not a UAC at the time of filing, a jurisdictional determination should be made instead of accepting a withdrawal.



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•Interview scheduling is typically not conducted by an AO. For PRLs, the Asylum Office will manually schedule the interview, rather than RAPS automatically scheduling the interview.


•No Shows: For represented UACs, follow AAPM procedures. These include waiting 15 days for an applicant to provide an excuse. If no reasonable excuse is provided after 15 days, issue UAC no show decision letter and transfer file to ICE OCC (which subsequent slides will cover).

•For unrepresented UACs, reschedule once, and if additional no show with no reasonable excuse, issue UAC no show decision letter and transfer file to ICE OCC (guidance from 09/24/09).

•Withdrawals – the standard withdrawal procedure is that any applicant can withdraw at any time. The AAPM appendix contains the withdrawal form. If the withdrawing applicant is under 14, HQASM and OCC recommend seeking as many signatures as possible (e.g., the accompanying adult's signature, the representative's signature), as discussed in the Capacity PowerPoint.


•If the applicant states he/she wants to withdraw because he/she is not a UAC, a jurisdictional determination should be made instead of accepting a withdrawal. If USCIS does not have jurisdiction over the case, then USCIS does not have the authority to accept the withdrawal. Instead, a memo to file explaining lack of jurisdiction should be drafted based on the information in the record or provided by the applicant or applicant's attorney

(an interview is not necessary), and the case should be handled like a standard lack of jurisdiction/non-UAC case.



Other Procedural Considerations

- Check for concurrent filings
 - e.g., I-360 Special Immigration Juvenile Status, T-visa, U-visa, VAWA
 - see concurrent filings matrix for procedures for file transfer requests and requests to reschedule or hold a case in abeyance
- Waiver of presence of representative




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•**INSTRUCTOR NOTES:** For more information on concurrent filings, see handout.

•Check for concurrent filings by checking CLAIMS, the A-file, and by asking at the interview.


•Waiver of presence of representative: If a child is under 14, attempt to contact the applicant's representative prior to interview to determine if he/she is coming to the interview. If not appearing, ask for a statement in writing from representative to proceed with the interview.



Case Example

- In April 2010, Adriana was accompanied to her asylum interview by her aunt Paola and an interpreter. The applicant's attorney was unable to appear at the interview due to a scheduling conflict.

- What should the Asylum Officer do?




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Answer: If child is under 14, attempt to contact applicant's representative during interview, if not done prior to interview. If this is not feasible or the Asylum Division can't reach the representative, and the child and adult want to proceed with the interview, then have both the child and adult sign the waiver of presence of representative form. Since the aunt is not the legal guardian, she is not signing for the child, but is signing in addition to the child as a record for subsequent review by the Asylum Division, if necessary. If possible when the Asylum Division contacts the representative, ask for a statement in writing from the representative to proceed with interview.

Reminder: The guidance concerning contacting the representative for children under 14 was discussed in the Capacity PowerPoint [slide 32 - Child's Ability to Waive Presence of Representative]. The guidance was developed by HQASM and OCC after dealing with such a situation. While this recommended procedure of reaching out to the representative adds an extra step for the Asylum Office, this will arise in a limited number of cases (i.e., those involving minor PAs under 14 who are represented).



Asylum Officer Confirms Jurisdiction

- Remember UAC definition: was the applicant without a parent or legal guardian available to provide care and physical custody?
 - The AO is the one to determine UAC status.
 - The AO examines whether the applicant was a UAC at the time I-589 was first filed.
 - The AO should ask guardianship and parental knowledge and consent questions in order to elicit information re UAC status.



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• **INSTRUCTOR NOTES:** The next slide provides further detail on examining UAC status *at the time of first filing*.

• Given that there are many reasonable interpretations of what constitutes an asylum application “filed by” a UAC under the TVPRA’s initial jurisdiction provision, the Asylum Division has taken the position, pending promulgation of regulations, that the applicant should be a UAC at the time of filing the I-589. In circumstances where the applicant expressed intent to file the I-589 while still a UAC and such intent was documented, the Asylum Division may consider the applicant to have been a UAC at the time of filing.


• Under the current interim process, until regulations may provide differently, the AO, rather than the Service Center, ICE, the IJ, or the BIA, is the one who determines whether the applicant was a UAC at the time of first filing the I-589.

• The guardianship and parental knowledge questions are included in the HQASM August 14, 2007 juvenile procedures memo.



Asylum Officer Confirms Jurisdiction

- In order to determine whether the applicant was a UAC at the time of first filing the I-589:
 - The AO should check the date of first filing the I-589.
 - Check RAPS and ICE OCC notes.
 - The AO should check for evidence of UAC status at the time of filing.
 - Elicit testimony; check ORR custody release form (though not conclusive).




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•Keep in mind that pre-TVPR, a UAC could have filed the I-589 with EOIR, so the Asylum Division may encounter a case that was first filed with EOIR, then was pending appeal before the BIA or a petition for review in federal court, and was remanded back to Immigration Court in order for the UAC to file for asylum with USCIS under the initial jurisdiction provision. The general process is for the applicant to file a new I-589 with the NSC.


•Check RAPS for the first filing date: CSTA, EOIR, DSTA, and DHIS.

•The DSTA and DHIS screens in RAPS indicate whether a defensive asylum applicant filed the first 3 pages of their I-589 with the NSC for purposes of scheduling a biometrics appointment. If the DSTA and DHIS screens are completed in RAPS, this indicates that the applicant filed the first 3 pages with the NSC, after receiving a defensive filing instruction sheet from ICE. An applicant does not necessarily need to file the I-589 before EOIR before filing the first 3 pages with the NSC, so the DSTA date is not a conclusive I-589 filing date, but it provides evidence that the applicant had at the least intended to file the I-589 before EOIR. In combination with other evidence, it can indicate the date of first filing before EOIR.



Asylum Officer Confirms Jurisdiction


- Generally, when a child lives with his/her parent or legal guardian, he/she is accompanied, unless that person fails to exercise parental responsibilities such that he/she is not *available* to provide care and physical custody.
- Alternatively, a child may live away from the parent or legal guardian, but close enough that he/she can provide care and physical custody (e.g., child shares meals with and is cared for by the parent). Generally, such a child would be accompanied, as the parent is *available* to provide care and physical custody.



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- When addressing the question of availability, the AO should examine whether a parent with whom the child lives is able to exercise parental responsibilities with regard to either his or her general involvement in the child's life or with regard to immigration matters affecting the child.
- Keep in mind that the UAC status determination is not a determination of eligibility, but only a determination of jurisdiction.



Case Example

- Adriana’s mother resides in the same town as Adriana. Aunt Paola feeds and cares for Adriana on a daily basis.

- Is Adriana unaccompanied for initial jurisdiction purposes?



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INSTRUCTOR NOTES: Ask the following question: What more do we need to know to answer this question:

- What was Adriana’s living situation (and accompanied status) at the time of filing?
- Is Aunt Paola a legal guardian?
- Does the mother provide care and physical custody by doing things such as providing food, clothing, etc. for Adriana? (It does not appear to be the case.)


Note: the fact that ORR released Adriana to Aunt Paola does not make the aunt the legal guardian.

Note: whether or not the mother is undocumented does not directly impact the unaccompanied status determination. It only impacts the determination if the mother, due to her undocumented status or another reason, does not provide care and physical custody of the applicant.



Determination of Non-UAC Status

- If AO determines during the interview the applicant is not a UAC:
 - Conduct a full interview on the merits;
 - Draft a memo to file explaining lack of jurisdiction;
 - Use Notice of Lack of Jurisdiction (non-UAC) to transfer case to ICE.



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It is necessary to conduct a full interview on the merits, as it is possible following the interview that the AO, SAO, or HQASM may find that USCIS has jurisdiction.

A case involving a minor PA or PRL must be submitted to HQASM for review. Generally, HQASM should complete its review before a case is transferred to ICE.




Asylum Officer Conducts Asylum Interview of UAC

- Conduct the Interview.
 - Follow Children’s Guidelines.
 - Use child-sensitive interviewing techniques.
 - Take the child’s age into account in probing and assessing credibility and persecution.
 - Explore common PSGs in children’s claims.
 - Consider evidence obtained in previous proceedings with any other newly provided evidence, but remember that factual findings and legal conclusions from previous proceedings are not binding on USCIS.
- Conclude the asylum interview.
 - Do not give applicant a pick-up notice.




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The reason that factual findings and legal conclusions from previous proceedings are not binding on USCIS is because the TVPRA specifically provides for “initial” jurisdiction.



Asylum Officer Prepares a Decision of UAC


- Write the assessment.
 - Include initial filing date, brief summary that applicant was a UAC at the time of filing, and state that applicant is not subject to the one-year filing deadline.
- Enter the final decision in RAPS.
- Prepare HQ packet for QA review.



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- In order to FDEC for cases filed with USCIS by an under 18 applicant, answer the “UNACCOMPANIED MINOR: Y/N” question in RAPS.
- HQ QA review: all cases filed by a minor PA (under 18) or by a PRL should come to HQ for QA review. Even if the decision is lack of jurisdiction for a PRL, the case should come to HQ for QA review.
- HQ QA review priority: HQASM prioritizes for QA review those cases pending 180 days or more from time of filing. Concurrently, HQASM aims to prioritize PRL cases based on EOIR hearing date, in order to send a QA response to the field at least 1-2 weeks prior to the EOIR hearing date.



Types of UAC Decisions

- Grant
 - Issue standard grant letter, but copy local ICE OCC.
- Transfer
 - Replace referral notice with UAC Decision Notice for Non-Eligibility.
- Lack of jurisdiction
 - Use Notice of Lack of Jurisdiction (non-UAC). Instead of assessment, draft memo to file explaining lack of jurisdiction.



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•Remember: if the IJ continues proceedings or administratively closes removal proceedings in a UAC's case, the NTA is still active and USCIS does not need to issue an NTA where there is a decision to refer or lack of jurisdiction. If, however, the IJ terminates removal proceedings in a UAC's case prior to the asylum interview, then treat the case as a purely affirmative application.

•For grants of PRLs still in removal proceedings (i.e., proceedings are not terminated), copy ICE on the grant letter. It is not necessary to send the assessment to grant or other documents to ICE.

•Previously, HQASM provided the appropriate UAC decision letter in the QA response. As of August 2010, the UAC decision letters are posted to the RAIOVL for the asylum offices to access. *See* <http://z02rscow12:8080/docushare/dsweb/View/Collection-18051>.



Summary

1. A unaccompanied alien child (UAC) is, at the time of filing, under 18, unaccompanied, and without valid status.
2. The TVPRA gives USCIS initial jurisdiction over all asylum applications filed by UACs.
3. The TVPRA's other relevant provisions relate to the one-year filing deadline, placement in removal proceedings, and ORR responsibilities.
4. Whether an individual meets the UAC definition for jurisdictional purposes may turn on whether a parent was available to provide care and physical custody.
5. A range of procedural issues arise related to UAC cases, including scheduling, file transfer requests, UAC decision notices, waiver of presence of representative, and withdrawals.



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