



July 24, 2023

Samantha Deshommes  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue, NW  
Washington, DC 20529-2140

*Submitted via regulations.gov*

**RE: Comments on Application for Asylum and Withholding of Removal: Instructions and Related Web Pages**  
**OMB Control Number 1615–0067, Docket ID USCIS–2007–0034, 88 FR 33161**

Dear Ms. Deshommes:

We write to share comments from Kids in Need of Defense (KIND), the National Immigration Project (NIPNLG), and Public Counsel in response to the invitation for public comment (OMB Control Number 1615–0067; Docket ID USCIS–2007–0034) published in the Federal Register by U.S. Citizenship and Immigration Services (USCIS). Specifically, in our role as class counsel in *J.O.P. v. DHS*, No. 8:19-cv-01944 (D. Md.), we suggest revisions to the revised Form I-589 Instructions (Instructions) and related web pages. Our proposed changes are designed to improve the quality, utility, and clarity of the information relevant to the nationwide class of asylum seekers who previously received “Unaccompanied Alien Child” (UC) determinations. Our suggested changes are in some instances mandated by the *J.O.P.* nationwide injunction,<sup>1</sup> and in any event are designed to benefit asylum seekers, legal representatives, and USCIS alike.

KIND is a national nonprofit organization that provides free legal and social services to unaccompanied immigrant children. Since January 2009, KIND has received referrals for over 30,000 children from 80 countries. KIND’s legal services staff and over 800 pro bono partner organizations combine to serve children through seventeen locations across the United States, including in applications for asylum and related relief. In addition to our work in *J.O.P.*, we

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<sup>1</sup> The amended *J.O.P.* preliminary injunction, issued on December 21, 2020, can be found at: [https://www.uscis.gov/sites/default/files/document/memos/Order\\_Granteeing\\_Class\\_Certification\\_Granteeing\\_in\\_Part\\_Plaintiffs\\_Mtn\\_to\\_Amend\\_PL.12.21.2020\\_for\\_website.pdf](https://www.uscis.gov/sites/default/files/document/memos/Order_Granteeing_Class_Certification_Granteeing_in_Part_Plaintiffs_Mtn_to_Amend_PL.12.21.2020_for_website.pdf) (referred to below as Dkt. 144).

represented asylum-seekers in a challenge to employment authorization regulations in *Asylumworks v. Mayorkas*. KIND also works to address the root causes of child migration, and advocates for laws, policies, and practices to improve the protection of immigrant children in the United States.

NIPNLG is a national nonprofit membership organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG fights for fairness and transparency in immigration adjudication systems and believes that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States. We have engaged in litigation to ensure that asylum seekers are afforded their right to pursue protection in the United States, especially in the face of unlawful and discriminatory border policies. NIPNLG staff frequently provide training and technical assistance to legal representatives assisting asylum seekers, including those representing individuals previously determined to be UC.

Public Counsel has extensive experience handling children’s asylum claims and protecting their rights to seek this relief. Over the years, we—and our corps of volunteer attorneys, social workers and law students—have represented hundreds of young asylum seekers. We assist youth in Southern California before both USCIS and the Executive Office for Immigration Review. Public Counsel provides trainings and technical assistance at national conferences and webinars. In addition to our work in *J.O.P.*, we have litigated asylum-related issues on class and individual bases before the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit. Our comments in this letter derive from our own experiences with young people seeking asylum as well as from what we have seen in the field.

\* \* \*

As explained below and illustrated in the attached proposed redlines, we suggest that USCIS amend the Form I-589 Instructions and related web pages to clarify that: (1) the one-year filing deadline does not apply to those with UC determinations; (2) USCIS has jurisdiction over the asylum applications of those with previous UC determinations; (3) UCs and those with previous UC determinations are not barred from USCIS jurisdiction by the previous asylum denial bar; and (4) UCs and those with previous UC determinations are not barred from USCIS jurisdiction under the grounds listed at 8 CFR § 208.2(c)(1).

## **I. Clarify That the One-Year Deadline Does Not Apply to UC-Related Asylum Claims**

The governing statute provides that the one-year deadline “shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).” *See* 8 U.S.C. § 1158(a)(2)(E). Our understanding is that where USCIS has initial jurisdiction over a Form I-589, it will not apply the one-year deadline to that claim. We suggest that the Instructions be revised to reflect this important exception. *See* Edits to Instructions Pages 1, 2, and 7 (attached). Without these revisions, the Instructions will discourage young people who arrived in the United States more than a year prior—particularly those without a legal representative—from applying for asylum.

## **II. Clarify That USCIS Has Jurisdiction over Forms I-589 Filed by Individuals with Previous UC Determinations**

The *J.O.P.* injunction prevents USCIS from “rejecting jurisdiction over any asylum application filed by Plaintiffs and members of the class whose applications would have been accepted under the 2013 Kim Memorandum.” Dkt. 144 at 2. And under the [2013 Kim Memorandum](#), USCIS accepted jurisdiction over asylum applications filed by individuals in removal proceedings who at the time of filing: (1) met the UC definition found at 6 U.S.C. § 279(g)(2); *or* (2) did not meet the UC definition found at 6 U.S.C. § 279(g)(2) but had a previous UC determination that had not been altered by an “affirmative act” prior to their Form I-589 filing date. *See* 2013 Kim Memorandum at 2.

We suggest that the Instructions be revised to reflect this critical point. *See* Edits to Instructions Pages 2, 9, 10, and 12 (attached). As proposed, the Instructions misleadingly suggest that prospective applicants in removal proceedings must *currently* meet the statutory UC definition to merit USCIS initial jurisdiction over their asylum claims—contrary to the *J.O.P.* injunction and the 2013 Kim Memorandum. Without our suggested revisions, many young people entitled to have USCIS hear their asylum claim in the first instance will forgo this opportunity and instead pursue their asylum claim only via an adversarial immigration court process. Indeed, through our work as *J.O.P.* class counsel we know that even legal representatives are misled by this language.

Because the Instructions suggest that applicants visit the USCIS asylum website, we also propose revisions to two USCIS web pages to align them with the *J.O.P.* injunction. *See* Edits to “Minor Children Applying by Themselves” and “Asylum Procedures for Minor Children” web pages (attached). The current web pages, like the Instructions, are misleading and incomplete. Moreover, we believe USCIS would do well to merge the two web pages into one by moving the “Interviewing Procedures for Minor Applicants” to the bottom of the revised “Minor Children Applying by Themselves” web page and deleting the “Asylum Procedures for Minor Children” web page altogether.

## **III. Clarify That an Individual Who Currently Is, or Was Previously Determined to Be, a UC and Has a Removal Order Need Not Show “Changed Circumstances” or File a Motion with the Board of Immigration Appeals (BIA) to Secure USCIS Initial Jurisdiction**

USCIS initial jurisdiction over asylum claims filed by individuals who currently are or were previously determined to be UCs is not defeated by the existence of a removal order. *Cf.* Dkt. 144 at 2 (USCIS is “enjoined and restrained from deferring to EOIR determinations in assessing jurisdiction over asylum applications filed by Plaintiffs and members of the class”). We suggest that the Instructions be revised to reflect that UCs and those with previous UC determinations who were denied asylum by an immigration judge or the BIA need not show changed circumstances that affect their eligibility for asylum in order to pursue an asylum application with USCIS for the first time. *See* Edits to Instructions Page 2 (attached). We also suggest that the Instructions clarify that if a UC or individual with a previous UC determination has a case before the BIA, they need not file a motion to remand or reopen with the BIA in order to pursue

asylum before USCIS. *See* Edits to Instructions Page 10 (attached). Without these revisions, the Instructions will discourage young people with prior removal orders—particularly those without a legal representative—from pursuing asylum before USCIS in a timely fashion, if at all.

**IV. Clarify That the Grounds for “Asylum Only” Proceedings Do Not Apply to Individuals Who Currently Are or Were Previously Determined to Be UCs**

Our understanding is that USCIS does not apply the “asylum only” carve-outs found at 8 C.F.R. § 208.2(c)(1) to defeat its initial jurisdiction over a Form I-589 filed by an individual who currently is or was previously determined to be a UC. *See, e.g.*, USCIS Affirmative Asylum Procedures Manual III.L.3.c (2016) (noting in the context of Visa Waiver Program entrants that “USCIS has initial jurisdiction over all [UC]s seeking asylum, including all [UC]s who entered under the Visa Waiver Program, regardless of filing date”); *see also* 8 U.S.C. § 1232(a)(5)(D)(i) (creating a statutory right to removal proceedings under INA Section 240 for UCs whom the government seeks to remove). We suggest that the Instructions be revised to reflect this important exception. *See* Edits to Instructions Page 11 (attached). Without this revision, the Instructions will discourage young people who may fall into one or more of these “asylum only” categories—particularly those without a legal representative—from applying for asylum with USCIS.

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KIND, NIPNLG, and Public Counsel are hopeful that USCIS will incorporate our comments when finalizing its Form I-589 Instructions and related web pages to align them with the current *J.O.P.* injunction and other established law and procedures. If you have any questions, please feel free to contact us at [wwylegala@supportkind.org](mailto:wwylegala@supportkind.org), [rebecca@nipnl.org](mailto:rebecca@nipnl.org), and [kjackson@publiccounsel.org](mailto:kjackson@publiccounsel.org). Thank you for your consideration.

Sincerely,



Wendy Wylegala  
Director, Legal Strategy, Kids in Need of Defense



Rebecca Scholtz  
Senior Staff Attorney, NIPNLG



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## FORM I-589 INSTRUCTIONS

### Page 1

**NOTE:** You **must** submit an application for asylum within 1 year of arriving in the United States, unless there are changed circumstances that materially affect your eligibility for asylum or extraordinary circumstances directly related to your failure to file within 1 year. (See **Part C, Additional Information about Your Application, in Section V on Part 1** of the instructions for further explanation.) However, the 1-year deadline “shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).” See 8 U.S.C. § 1158(a)(2)(E). If USCIS has jurisdiction over your application because you are currently, or were previously determined to be, an Unaccompanied Alien Child as defined in 6 U.S.C. § 279(g)(2), USCIS will not apply the 1-year deadline to your case.

### Page 2

You **MUST** file this application within 1 year after you arrived in the United States, unless you can show that there are changed circumstances that affect your eligibility for asylum or extraordinary circumstances that prevented you from filing within 1 year. (See **Part I Section IV, Right to Counsel** of the instructions.) However, the 1-year deadline “shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).” See 8 U.S.C. § 1158(a)(2)(E). If USCIS has jurisdiction over your application because you are currently, or were previously determined to be, an Unaccompanied Alien Child as defined in 6 U.S.C. § 279(g)(2), USCIS will not apply the 1-year deadline to your case.

“An Unaccompanied Alien Child” (UAC) is a legal term referring to a non-U.S. citizen child who has no lawful immigration status in the United States; has not attained 18 years of age; and has no parent or legal guardian in the United States, or for whom no parent or legal guardian in the United States is available to provide care and physical custody. See 6 U.S.C. 279(g)(2). The Asylum Division has initial jurisdiction over an asylum application filed by an individual who is currently, or was previously determined to be, a UAC, including a UAC even if that individual is in removal proceedings before an immigration judge. For more information about the asylum process for individuals who currently are or were previously determined to be UACs, visit the USCIS asylum website at [www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-themselves](https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-themselves). <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves>.

Detailed UAC filing instructions are found in **Part 1 Section XII** of these instructions.

If you have previously been denied asylum by an immigration judge or the Board of Immigration Appeals, you must show that there are changed circumstances that affect your eligibility for asylum unless you are filing an asylum application with USCIS for the first time and you are currently, or were previously determined to be, a UAC.

## Page 7

If you are unable to explain why you did not apply for asylum within the first year after you arrived in the United States or your explanation is not accepted by the Government, you may not be eligible to apply for asylum, but you could still be eligible for withholding of removal under INA section 241(b)(3), or for protection from removal under the Convention Against Torture.

However, the 1-year deadline “shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).” See 8 U.S.C. § 1158(a)(2)(E). If USCIS has jurisdiction over your application because you are currently, or were previously determined to be, an Unaccompanied Alien Child as defined in 6 U.S.C. § 279(g)(2), USCIS will not apply the 1-year deadline to your case. In responding to Question 5 you may identify yourself as currently, or previously determined to be, a UAC and you may provide additional explanation if desired.

## Page 9

*If you are in proceedings in Immigration Court, unless you are currently, or were previously determined to be, filing as an unaccompanied alien child (UAC):*

## Page 10

### **Special Filing Instructions for an Unaccompanied Alien Child (UAC) or an Individual Previously Determined to Be a UAC**

If you are ~~a child~~ in removal proceedings and are currently, or were previously determined to be, filing as a UAC as defined in 6 U.S.C. § 279(g)(2), mail your completed application as indicated on the USCIS website: [www.uscis.gov/i-589](http://www.uscis.gov/i-589).

If you received an instruction sheet from Counsel for DHS when you attended a hearing in Immigration Court, or if you have a copy of documentation provided by the Department of Health and Human Services, Office of Refugee Resettlement (ORR) showing that you are , or ~~that you~~ were in ORR custody as a UAC, such as the UAC *Initial Placement Referral Form* or the *ORR Verification of Release Form*, please submit those documents with your application package as well.

If you are currently or were previously determined to be a UAC but you are not in removal proceedings, please submit your form I-589 application package as directed below above in the discussion entitled, “If you are not in proceedings in Immigration Court or before the Board of Immigration Appeals.”

***If you are in proceedings before the Board of Immigration Appeals:***

You may file your Form I-589 with the Board of Immigration Appeals in conjunction with a motion to remand or reopen under 8 CFR 1003.2 and 1003.8. You may file an initial Form I-589 with the Board of Immigration Appeals only if the Board of Immigration Appeals has jurisdiction over your case. Any such motion must reasonably explain the failure to request asylum and/or withholding of removal prior to the completion of the proceedings.

However, while you are in proceedings before the Board of Immigration Appeals, you may file a Form I-589 with USCIS if:

- You are currently, or were previously determined to be, an Unaccompanied Alien Child as defined in 6 U.S.C. § 279(g)(2); and
- USCIS has not previously adjudicated a Form I-589 for you on the merits.

**Page 11**

The following categories of individuals are not entitled to an asylum interview at a USCIS asylum office (unless they are currently, or were previously determined to be, an Unaccompanied Alien Child as defined in 6 U.S.C. § 279(g)(2)):

1. Certain alien crewmembers;
2. Certain stowaways;
3. Visa Waiver Program applicants for admission;
4. Visa Waiver Program overstays and status violators;
5. Certain aliens ordered removed under section 235(c) of the INA on security-related grounds; and
6. Aliens granted S nonimmigrant status under section 101(a)(15)(S) of the INA (such as witnesses and informants).

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If you are not in proceedings in Immigration Court or before the Board of Immigration Appeals, or if USCIS otherwise has jurisdiction over your asylum application, you will be notified by the USCIS Asylum Office of the time, date, and place (address) of a scheduled interview.



**WEBPAGE EDITS; <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves>**

Minor and Unaccompanied Children Applying for Asylum By Themselves

Minor and Unaccompanied Child Asylum Applicants

You may apply for asylum with USCIS as a minor if you:

- Are under 18 years old;
- Want to have your own case separate from your parents;
- Are not in immigration court proceedings.

You may apply for asylum with USCIS even if you are in immigration court proceedings if you are currently, or were previously determined to be, as an unaccompanied child, even if you are in immigration court proceedings, meaning that if you are now or it was previously determined that you were:

- U~~Are~~ under 18 years old;
- ~~Have Without~~ lawful immigration status in the United States; and
- ~~Have no~~Without a parent or legal guardian in the United States available to provide care and physical custody.

Asylum officers will consider your asylum claim if you filed your application with ~~an~~ USCIS asylum office and you meet the criteria above. If you are in immigration court proceedings, you must attend your immigration court hearings and should follow the Immigration Judge's instructions, even if you have filed for asylum with ~~an asylum office~~ USCIS.

**WEBPAGE EDITS; <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum-procedures-for-minor-children>**

Asylum Procedures for Minor and Unaccompanied Children

**Minor and Unaccompanied Minor-Child Asylum Applicants**

You may apply for asylum as a child-minor if you:

- Are under 18 years old
- Want to have your own case separate from your parents or spouse

~~You may apply for asylum as an unaccompanied child if you:~~

- ~~• Are under 18 years old.~~
- ~~• Have no parent or legal guardian in the United States who can provide care or custody.~~
- ~~• Were separated from your parents or legal guardians.~~
- ~~• Entered the United States with a parent or other adult guardian but left the parent's or guardian's care.~~
- ~~• Have a parent(s) that is deceased and there is no legal guardianship arrangement.~~

~~You may apply for asylum with USCIS, even if you are in immigration court proceedings, if you are currently, or were previously determined to be, an unaccompanied child, meaning that you are now or it was previously determined that you were:~~

- ~~• Under 18 years old;~~
- ~~• Without lawful immigration status in the United States; and~~
- ~~• Without a parent or legal guardian in the United States available to provide care and physical custody.~~

Asylum officers will decide your case if you filed your application with USCIS and you meet the criteria above. ~~if you are in immigration court proceedings while your asylum application is pending with USCIS, or filed your application with an asylum office.~~ You must attend your immigration court hearings and should follow the Immigration Judge's instructions.

**Interviewing Procedures for Minor Applicants**

Asylum officers conduct child-appropriate interviews taking into account the applicant's age, stage of language development, background, and level of sophistication.

For cases involving a child applicant, asylum officers ask questions about:

- If you have a guardian or parent
- If your guardian or parent allowed you to apply for asylum

~~If more information is needed~~The asylum officer may also seek additional information about your guardian or parent(s).~~the asylum officer may delay your case.~~

If needed and with your permission, the asylum officers may interview your parent or trusted adult about information you may not be able to provide. It is not required that a witness or trusted adult be present at your interview.