PRACTICE ALERT[1]

What *J.O.P.* Class Members Need to Know About the April 22, 2022 Deadline for Asserting Rights Under the *Mendez Rojas* Settlement Agreement

Feb. 14, 2022

Introduction

The final settlement agreement in *Mendez Rojas v. Wolf* provides relief for certain asylum seekers who were not given adequate notice of the one-year deadline for filing an asylum application. To benefit from the settlement agreement's protections, individuals must assert their class membership and claims for relief under the settlement on or before April 22, 2022. *Mendez Rojas* class counsel have created detailed practice materials describing the agreement's terms, including who qualifies for class membership and relief, and explaining how a class member can assert claims under the agreement by the April 22 deadline.

This practice alert describes how some members of another certified class – of certain asylum seekers with prior "unaccompanied alien child" determinations, certified in *J.O.P. v. DHS*, 338 F.R.D. 33 (D. Md. Dec. 21, 2020) – may also be *Mendez Rojas* class members. It also addresses why it might benefit some *J.O.P.* class members to assert rights under the *Mendez Rojas* agreement by the April 22 deadline, and offers thoughts on how to do so. Note that because the *Mendez Rojas* agreement provides relief for the failure to meet the one-year deadline, this practice alert is not relevant for *J.O.P.* class members who filed their asylum applications within one year of arriving in the United States.[2]

Unaccompanied Children, the One-Year Deadline, and *J.O.P.*

Federal immigration law affords a number of protections to "unaccompanied alien children" (UCs), as defined at 6 U.S.C. § 279(g)(2). These protections include the right to file their initial asylum application with U.S. Citizenship and Immigration Services (USCIS) even when in

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[2] This practice alert is also not intended for individuals who met the definition of "unaccompanied alien child" at the time they filed their asylum application, since, as explained below, even under the government's most restrictive interpretation of the statute such individuals are exempt from the one-year deadline pursuant to INA § 208(a)(2)(E). Such individuals are by definition not *J.O.P.* class members.

removal proceedings, INA § 208(b)(3)(C), and an exemption from the general requirement that individuals must file an application for asylum within one year of their arrival in the United States, INA § 208(a)(2)(E). By statute, "unaccompanied alien child" is defined as an individual under 18 years old without lawful immigration status who has no parent or legal guardian in the United States available to provide care and physical custody.

During its tenure, the Trump administration took steps to limit the group of children whom it would recognize as entitled to UC protections, taking the position that protections would be available only during the time when an individual meets the UC definition. Through various policy documents,[3] the Trump administration rejected the notion, enshrined in previous agency policy, that following a federal agency's UC determination, the individual was entitled to UC protections throughout their ensuing removal proceedings – even if they later turned 18 or reunified with a parent. Notably, in May of 2019, USCIS issued a policy memorandum directing asylum officers to conduct independent factual inquiries to redetermine whether an applicant met the statutory UC definition on their filing date, rather than proceed pursuant to the previous UC determination made by the U.S. government. If USCIS determined that the applicant no longer met the UC definition on the filing date, USCIS was directed to conclude that the applicant was not entitled to the exemption from the one-year deadline for filing asylum applications (and, for applicants in removal proceedings, USCIS was to reject jurisdiction).

In *J.O.P. v. DHS*, the U.S. District Court for the District of Maryland preliminarily enjoined the Department of Homeland Security (DHS) from relying on the 2019 policy to subject an asylum applicant to the one-year deadline, to decline jurisdiction over asylum applications of those previously determined to be UCs, or for any other purpose. On December 21, 2020, the *J.O.P.* court amended the preliminary injunction to provide additional protections to members of a newly certified class, defined as follows:

> All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be an Unaccompanied Alien Child ("UAC"); and (2) who filed an asylum application that was pending with the United States Citizenship and Immigration Services ("USCIS"); and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual's asylum application on the merits.[4]

Thus, under the *J.O.P.* preliminary injunction currently in effect, USCIS should not treat as time barred asylum applications filed by individuals previously determined to be UCs.[5] The *J.O.P.*

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[3] *See, e.g.*, Memorandum from Jean King, EOIR Gen. Counsel, Legal Opinion Re EOIR's Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA (Sept. 19, 2017), https://cliniclegal.org/resources/childrens-issues/unaccompanied-children/11212017-eoir-foia-disclosures-unaccompanied; *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018).

[4] For tips on navigating the removal proceedings of *J.O.P.* class members in light of the amended preliminary injunction, see Catholic Legal Immigration Network, *Fact Sheet: Immigration Court Considerations for Unaccompanied Children Who File for Asylum with USCIS While in Removal Proceedings, in Light of* J.O.P. v. DHS, *No. 19-01944* (D. Md. filed July 1, 2019), https://cliniclegal.org/resources/asylum-and-refugee-law/fact-sheet-immigration-court-considerations-unaccompanied-children.

[5] Note, however, that pursuant to the *J.O.P.* preliminary injunction, USCIS is following its 2013 policy, which directed USCIS to adopt previous UC determinations, unless there had been a pre-filing "affirmative act" by U.S.

litigation is ongoing, and the parties are currently engaged in settlement negotiations.[6] Given that there has been no final outcome in *J.O.P.* and that, in contrast to the *Mendez Rojas* agreement, the *J.O.P.* injunction does not apply to the Executive Office for Immigration Review (EOIR), practitioners should act now to analyze individual *J.O.P.* class members' cases to determine whether and how to assert *Mendez Rojas* rights prior to the April 22 deadline. Conducting this analysis is critical to protecting a young person's right to pursue asylum, since a successful assertion of *Mendez Rojas* class membership should prevent both USCIS and EOIR from treating their asylum application as time barred—regardless of the ultimate result in *J.O.P.*

How *J.O.P.* Class Members Might Fall Within a *Mendez Rojas* Class

The *Mendez Rojas* agreement has two classes (Class A and Class B, each defined by various criteria), as well as a number of further provisions about who may be excluded from benefits under the agreement. This practice alert does not provide a complete description of the agreement; it is intended merely to flag specific ways in which the agreement may be relevant to some members of the *J.O.P.* class. Practitioners should carefully review the *Mendez Rojas* agreement and class counsel's practice materials for details.

J.O.P. class members are more likely to fall within Class B of the agreement than Class A. This is because Class A applies to those subjected to the expedited removal and credible fear process from which UCs are statutorily exempt.[7]

Class B, the "Other Entrants Class," is defined as all individuals who:

1. Were encountered by DHS upon arrival or within fourteen days of unlawful entry;
2. Expressed a fear of return to their country of origin;
3. Were released by DHS upon issuance of a Notice to Appear (NTA); and
4. Did not receive individualized notice of the one-year deadline to file an asylum application set forth in INA § 208(a)(2)(B).

To assess whether a client falls within Class B, practitioners representing *J.O.P.* class members should consider whether the individual case facts meet the above four criteria, including the requirement that the individual have expressed a fear of return. The *Mendez Roja*s practice advisory discusses each of these requirements in detail, including the time frame during which DHS must have issued the NTA and how to document the expression of the fear of return if it does not appear in a person's Form I-213. Note that while the *Mendez Rojas* agreement does not address this issue specifically, practitioners representing *J.O.P.* class members have taken the position that the client's release from DHS into the custody of the Office of Refugee Resettlement (ORR) satisfies the requirement of having been "released by DHS upon issuance of

Customs and Border Protection, U.S. Immigration and Customs Enforcement, or the U.S. Department of Health and Human Services to terminate the UC finding. Pursuant to an agreement that remains in effect as of the date of this practice alert, USCIS will not, in making jurisdictional determinations, rely solely on DHS database entries asserting a termination of a prior UC finding, unless the database documents that ICE placed the individual in ICE custody as an adult detainee. USCIS is placing other potential "affirmative act" cases on hold during the pendency of this agreement.

[6] *See* Order of Reference to United States Magistrate Judge, ECF No. 162, *J.O.P. v. DHS*, No. 19-01944 (Jan. 14, 2022).

[7] 8 U.S.C. § 1232(a)(5)(D).

an NTA." The templates for *J.O.P.* class members asserting *Mendez Rojas* class membership, linked below, contain sample language regarding the DHS release requirement.

Class B is further divided into two subclasses: B.I for those not in removal proceedings who either have not yet applied for asylum or applied for asylum after one year of their last arrival; and B.II for those in removal proceedings who have either not yet applied for asylum or applied for asylum after one year of their last arrival. Some *J.O.P.* class members will fall within Subclass B.I, if they filed more than a year after arrival and are not in removal proceedings because DHS has not yet filed an NTA with EOIR or EOIR has dismissed the case. Many *J.O.P.* class members will likely fall within Subclass B.II as individuals in removal proceedings who filed for asylum more than a year after arrival.

Considerations for *J.O.P.* Class Members in Asserting Rights Under *Mendez Rojas*

Practitioners who determine that their *J.O.P.* class member client is entitled to relief under the *Mendez Rojas* agreement should consider strategically how best to assert a claim for relief before the April 22, 2022 deadline. In conducting individualized analysis, practitioners should consider the following points.

First, the deadline for action to assert *Mendez Rojas* rights is April 22, 2022. Action means filing a written notice of class membership with an accompanying declaration in the appropriate place (see below), and filing an application for asylum if the individual has not yet done so. (Note that by definition, *J.O.P.* class members will have already filed an application for asylum with USCIS; individuals who have not yet filed an asylum application with USCIS but otherwise meet the *J.O.P.* class definition become *J.O.P.* class members upon filing with USCIS.)

Second, the *Mendez Rojas* settlement agreement does not specifically address individuals with previous UC determinations. Its provisions governing how to assert class membership are written as if an individual is either in removal proceedings OR has filed or will file an asylum application with USCIS. Because of the statutory protections discussed above, UCs often navigate both fora simultaneously. Thus practitioners will need to decide where their client's *Mendez Rojas* notice should be filed—with USCIS, with EOIR, or with both agencies. Some cases may provide a straightforward answer, while others may not. Here are a few general guidelines to consider:

1. By definition, a *J.O.P.* class member has previously filed an asylum application with USCIS. **Thus, all *J.O.P.* class members who qualify for protection under the *Mendez Rojas* agreement should file notice of class membership with USCIS.**
2. *J.O.P.* class members who do not have pending removal proceedings (*e.g.* because DHS has not yet filed the NTA with EOIR or because EOIR dismissed the proceedings) need not file a *Mendez Rojas* notice of class membership with EOIR.
3. *J.O.P.* class members who have pending EOIR proceedings,[8] whether before the immigration court or the Board of Immigration Appeals, should consider filing a notice of class membership with EOIR in addition to USCIS.

[8] The *Mendez Rojas* procedures for those who have final orders of removal are different from those in pending removal proceedings. The *Mendez Rojas* agreement allows such individuals to file one motion to reopen by April 22, 2022, if their removal order was based in whole or in part on the one-year deadline and was issued on or after June 30, 2016. *J.O.P.* class members who have received a final order of removal should review whether they qualify for relief under this provision.

a. Those *J.O.P.* class members who have filed an asylum application with EOIR and whose removal proceedings are not administratively closed should file a notice with EOIR in addition to USCIS.
b. Those *J.O.P.* class members whose removal proceedings are administratively closed and/or who have not filed an asylum application with EOIR will need to carefully consider the pros and cons of filing a notice of class membership with EOIR, given that doing so may be deemed to require the filing of a motion to re-calendar (in the case of an administratively closed proceeding), and/or the filing of an asylum application with EOIR notwithstanding that the I-589 remains pending before USCIS.

Third, and finally, when asserting rights under the *Mendez Rojas* agreement, practitioners representing *J.O.P.* class members should preserve other arguments for exemption from the one-year deadline that are unique to those previously determined to be UCs. The following templates for *J.O.P.* class members asserting notice of *Mendez Rojas* class membership contain sample language practitioners can adapt and use:

- Template Notice of *Mendez Rojas* Class B Membership for *J.O.P.* Class Member (USCIS)
- Template Notice of *Mendez Rojas* Class B Membership for *J.O.P.* Class Member (EOIR)

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For more on the *J.O.P. v. DHS* litigation, see the USCIS webpage about the case.

For more on the *Mendez Rojas* agreement, see the final agreement and practice materials authored by class counsel, or contact class counsel at mendezrojas@nwirp.org with questions.