NATIONAL IMMIGRATION PROJECT

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Practice Advisory

Navigating the Removal Proceedings of *J.O.P.* Class Members and Other Asylum Seekers with Prior Unaccompanied Child Determinations[1]

April 10, 2025

Since mid-2024, three important legal developments occurred that impact how noncitizens previously determined to be unaccompanied children (UCs) can seek asylum. First, in July 2024 new Executive Office for Immigration Review (EOIR) regulations went into effect that authorize immigration judges to terminate removal proceedings in a variety of situations, including where a respondent is pursuing asylum with U.S. Citizenship and Immigration Services (USCIS) as a UC.[2] Second, in November 2024, the *J.O.P.* Settlement Agreement (Settlement Agreement) went into effect.[3] The Settlement Agreement provides a number of protections to *J.O.P.* class members—certain individuals with prior UC determinations who filed an asylum application with USCIS by February 24, 2025. Third, on January 30, 2025, USCIS issued a memo describing how it will assess its jurisdiction over asylum applications filed by noncitizens with prior UC determinations—including those who did not file their asylum applications by the *J.O.P.* class member deadline.[4] This practice advisory provides strategies for practitioners to navigate removal proceedings for *J.O.P.* class members and other asylum seekers with prior UC determinations in light of these three legal developments.

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[1] Publication of the National Immigration Project, 2025. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). A prior version of this resource was produced by the Catholic Legal Immigration Network, Inc. (CLINIC). The authors of practice advisory are Rebecca Scholtz, National Immigration Project Senior Staff Attorney, and Michelle Mendez, National Immigration Project Director of Legal Resources and Training, who are part of the plaintiff class counsel team in *J.O.P. v. DHS*, No. 19-01944 (D. Md.). The authors would like to thank Kristen Jackson, Public Counsel's Interim Vice President, Chief Advocacy Officer, for her contributions to this resource. This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case.

[2] EOIR, Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46742 (May 29, 2024).

[3] Settlement Agreement, Doc. No. 199-2, *J.O.P. v. DHS*, No. 19-01944 (D. Md.), *available at* https://www.uscis.gov/sites/default/files/document/legal-docs/2024-JOP-settlement-agreement%20%28final%29.pdf.

[4] Memorandum from John Lafferty, Chief, USCIS Asylum Division, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children and Implementation of the J.O.P. Settlement Agreement (Jan. 30, 2025), https://www.uscis.gov/sites/default/files/document/memos/JOP_UAC_Procedures_Memo_1.30.25.pdf [hereinafter "2025 USCIS Implementing Memo"].

I. Background on UC Asylum Procedures and the *J.O.P.* Litigation

A. Definition "Unaccompanied Alien Child" (UC)[5]

The definition of UC is found at 6 U.S.C. § 279(g)(2), 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. Generally, children receive a UC determination when federal officials—typically employed by U.S. Customs and Border Protection (CBP)—apprehend them on their arrival in the United States. That initial UC determination triggers numerous important protections, including prompt transfer into the custody of the U.S. Department of Health and Human Services (HHS), 8 U.S.C. § 1232(b)(3), placement into removal proceedings under Immigration and Nationality Act (INA) section 240 rather than being subjected to expedited removal, 8 U.S.C. § 1232(a)(5)(D), and the special asylum procedures discussed below.

B. The TVPRA's UC Asylum Provisions

Recognizing the vulnerability and special needs of UCs, in 2008 Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. 110–457, 122 Stat. 5044. Among other protections for UCs, the TVPRA grants USCIS initial jurisdiction over their asylum applications.[6] Thus, while the default rule for individuals in removal proceedings is that the immigration court has exclusive jurisdiction over their asylum applications, *see* 8 CFR § 208.2(b), the TVPRA creates a statutory exception to that rule for UCs. As the Board of Immigration Appeals (BIA) has recognized, "unaccompanied [noncitizen] children have a statutory right to initial consideration of an asylum application by the DHS."[7]

The TVPRA also exempts UCs from the one-year deadline for filing asylum applications and from the safe third country bar to asylum.[8]

C. Background on the *J.O.P.* Lawsuit

The *J.O.P.* lawsuit challenged a 2019 USCIS policy that rescinded the previous, more protective USCIS policy—called the Kim Memo—on UC asylum jurisdiction.[9] For years, USCIS had followed the 2013 Kim Memo, which required USCIS to take initial jurisdiction over the asylum application of an individual in removal proceedings whom Immigration and Customs

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[5] This fact sheet uses the terms "unaccompanied child" or "UC" throughout to avoid the dehumanizing term "alien"—although the Trump administration has re-embraced the term "alien" after the Biden administration had rejected that term. *See, e.g.*, Memorandum from Sirce E. Owen, Acting EOIR Dir., Cancellation of Policy Memorandum 21-27 (Jan. 29, 2025), https://www.justice.gov/eoir/media/1387446/dl?inline.
[6] TVPRA § 235(d)(7)(B), *codified at* INA § 208(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied [noncitizen] child . . . .").
[7] *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 n.2 (BIA 2017); *see also Matter of M-A-C-O-*, 27 I&N Dec. 477, 479 (BIA 2018) ("[S]ection 208(b)(3)(C) of the Act limits an Immigration Judge's jurisdiction over an asylum application *filed by a UAC*. . . .").
[8] TVPRA § 235(d)(7)(A); *codified at* INA § 208(a)(2)(E).
[9] For background on the *J.O.P.* lawsuit, see the National Immigration Project's litigation page, https://nipnlg.org/work/litigation/jop-v-dhs.

Enforcement (ICE) or CBP previously determined to be a UC (unless there was an "affirmative act" by HHS, ICE, or CBP to terminate the UC finding *before* the applicant filed the initial asylum application).[10] USCIS was required to adopt the previous UC finding and take jurisdiction even if there was evidence that the applicant turned 18 or reunified with a parent or legal guardian before filing an asylum application.[11]

When USCIS rescinded the Kim Memo in favor of a more restrictive policy, four asylum seekers filed suit, alleging that the policy change was unlawful.[12] The U.S. District Court for the District of Maryland concluded that the plaintiffs were likely to succeed on the merits[13] and issued a nationwide preliminary injunction in 2019 that required USCIS to accept jurisdiction over UC asylum cases under the Kim Memo.[14] In December 2020, the court certified a nationwide class of asylum-seeking young people and expanded the preliminary injunction.[15] The parties eventually reached a settlement agreement, which was approved by the court on November 25, 2024 and went into effect on that day.[16]

D. *J.O.P.* Class Definition

An individual is a *J.O.P.* class member if they filed an asylum application (Form I-589) with USCIS on or before February 24, 2025, **and** they meet the following criteria:

- They were previously determined to be a UC;
- On the date they filed their I-589 with USCIS, they were 18 years of age or older, or had a parent or legal guardian in the United States available to provide care and physical custody; and
- USCIS has not adjudicated their I-589 on the merits.[17]

If the above requirements are met, the individual is a *J.O.P.* class member. *J.O.P.* class members are unlikely to have documentation from the government acknowledging their class membership, since such notice was not part of the Settlement Agreement. Practitioners can check for potential class membership by:

1. Locating the client's USCIS I-589 receipt notice to confirm that USCIS received the asylum application by February 24, 2025;

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[10] Memorandum from Ted Kim, Acting Chief, USCIS Asylum Division, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children, at 1-2 (May 28, 2013), https://www.uscis.gov/sites/default/files/document/memos/determ-juris-asylum-app-file-unaccompanied-alien-children.pdf.

[11] *Id.* at 2. If an applicant has no previous UC determination, then USCIS takes jurisdiction if it finds that the applicant met the UC definition on the date of initial filing of the asylum application. *Id.* at 3.

[12] *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 1, 2019).

[13] *See J.O.P. v. DHS*, 409 F. Supp. 3d 367 (D. Md. Aug. 2, 2019) (granting temporary restraining order).

[14] *See id.* (TRO order); Order Granting Preliminary Injunction, Doc. No. 70, *J.O.P. v. DHS*, No. 19-01944 (Oct. 15, 2019) (converting TRO to preliminary injunction).

[15] Order Granting Class Certification and Amending Preliminary Injunction, Doc. No. 144, *J.O.P. v. DHS*, No. 19-01944 (Dec. 21, 2020).

[16] Order Granting Joint Motion for Final Approval of Settlement Agreement, Doc. No. 205, *J.O.P. v. DHS*, No. 19-01944 (Nov. 25, 2024).

[17] *See J.O.P.* Notice of Final Class Action Settlement (Nov. 2024), https://nipnlg.org/sites/default/files/2024-11/JOP-class-notice-Eng.pdf.

2. Confirming that on the date the client filed their I-589, they had a prior UC determination (one common form of evidence of a prior UC determination is an ORR Verification of Release Form); and
3. Determining whether, on the I-589 filing date, the client had reached 18 years of age, or had a parent or legal guardian available in the United States to provide care and physical custody.

If the answer is "yes" to the three steps above, and the client has not received an adjudication on the merits of their asylum application from USCIS, then the client is a *J.O.P.* class member.

II. The *J.O.P.* Settlement Agreement

This section gives a brief summary of the Settlement Agreement but does not describe all of its benefits. For more information about the Settlement Agreement, see NIPNLG's webpage, nipnlg.org/work/litigation/jop-v-dhs, where you can find the full agreement, a November 2024 practice alert, and class notices in English and Spanish.

A. Settlement Agreement Protections for *J.O.P.* Class Members vis a vis USCIS

Under the *J.O.P.* Settlement Agreement, USCIS must accept jurisdiction over *J.O.P.* class members' asylum applications and hold them exempt from the one-year filing deadline.[18] USCIS must accept jurisdiction even if an immigration judge (IJ) concludes that the IJ and not USCIS has initial jurisdiction.[19] The Settlement Agreement also requires USCIS to adopt expedite procedures for class members facing certain exigencies, such as those in immigration detention, who have a removal order, or who received a retraction of a previous jurisdictional rejection as required by the Settlement Agreement.[20]

There is one exception to the Settlement Agreement's mandate that USCIS accept jurisdiction over a class member's asylum application: USCIS can reject jurisdiction if the class member is in removal proceedings and was placed in immigration detention as an adult (over age 18) before they filed their asylum application.[21] "Placed in adult immigration detention" does not include custody for the sole purposes of processing the class member for release on their own recognizance or release through another alternative to detention, such as an order of supervision, parole, enrollment in an alternative to detention program, or ICE bond.[22] If USCIS chooses to reject jurisdiction over a class member's asylum application based on pre-filing adult immigration detention, USCIS must provide the class member and their counsel (if any) with (a) the jurisdictional rejection; (b) a detailed description of the information leading USCIS to believe that the class member was placed in adult immigration detention; and (c) an opportunity to rebut the information within 30 days (or 33 days if the rejection and accompanying detailed description are served by mail).[23] If the class member successfully rebuts USCIS's information,

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[18] Settlement Agreement ¶ III.B.
[19] *Id.* ¶ III.D.
[20] *Id.* ¶ III.G.
[21] *Id.* ¶ III.C.1.
[22] *Id.*
[23] *Id.* ¶ III.C.2.

USCIS must retract the jurisdictional rejection within 30 days of receiving the class member's rebuttal.[24] If the facts permit, one argument individuals could make to rebut USCIS's allegation is that the class member first expressed fear or an intention to seek asylum to government officials before they were placed into adult immigration detention, and that USCIS should consider the "filing" date as the date of the first expression of fear.[25]

The Settlement Agreement also required USCIS to issue a memo implementing the Settlement Agreement and maintain it until at least February 24, 2028.[26] USCIS issued its implementing memorandum on January 30, 2025.[27] As described in Section II.C below, the USCIS memo applies both to class members and other individuals with prior UC determinations. In other words, the USCIS memo extends the USCIS benefits of the *J.O.P.* Settlement Agreement to people with prior UC determinations who file an asylum application after the February 24, 2025 class cut-off date.

B. Settlement Agreement Protections for *J.O.P.* Class Members vis a vis ICE

ICE is prohibited under the *J.O.P.* Settlement Agreement from opposing postponements of a class member's removal proceedings or arguing in those removal proceedings against USCIS initial jurisdiction.[28] And ICE must generally join or non-oppose class members' motions to dismiss or terminate to await USCIS adjudication of their pending I-589.[29] In cases where DHS chooses not to file any response to a class member's motion to terminate or postpone, the Settlement Agreement itself "serves as evidence of DHS's non-opposition."[30]

For class members with a final removal order, the *J.O.P.* Settlement Agreement prohibits ICE from removing them while they await USCIS's adjudication of their I-589, and, if USCIS approves their asylum application, generally allows the class member to file a joint motion to reopen their removal proceedings.[31]

For class members whose asylum applications USCIS rejects due to pre-filing adult immigration detention and whose asylum applications could otherwise be deemed untimely, DHS generally will agree to stipulate in their removal proceedings that the class member qualifies for an extraordinary circumstances exception to the one-year filing deadline.[32]

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[24] *Id.*
[25] The authors are not yet aware of any outcomes with attempting this argument. The argument is based on pre-Kim Memo USCIS asylum officer training materials, which recognized that a generous interpretation of "filing" might be appropriate. *See* USCIS Training Slides, The TVPRA and UAC Determinations, at 25 (Mar. 2013), *available at* https://nipnlg.org/sites/default/files/2023-04/138-7%20USCIS%20Training%20re%20UAC%20%28Mar.%202013%29.pdf. ("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.").
[26] Settlement Agreement ¶ III.A.
[27] 2025 USCIS Implementing Memo, *supra* note 4.
[28] Settlement Agreement ¶ III.H.
[29] *Id.*
[30] *Id.*
[31] *Id.* ¶¶ III.I (stay of removal provision); III.J (motion to reopen provision).
[32] *Id.* ¶ III.C.3 (stating that in these circumstances DHS "generally will agree to stipulate in their removal proceedings that the Class Member qualifies for an extraordinary circumstances exception under 8 U.S.C. §

The Settlement Agreement terminates on May 27, 2026,[33] which means that *J.O.P.* class members must take advantage of the above-described Settlement Agreement terms before that date.

C. USCIS Memorandum Implementing the *J.O.P.* Settlement Agreement

On February 24, 2025, USCIS's memo implementing the *J.O.P*. Settlement Agreement took effect.[34] The memo applies to *J.O.P.* class members, other individuals with prior UC determinations, and children without a prior UC determination who meet the statutory UC definition at the time they file their asylum application. Pursuant to the Settlement Agreement, the memorandum must remain in effect until at least February 24, 2028.[35]

For those with prior UC determinations made by CBP or ICE, whether or not they filed by the *J.O.P.* class cut-off deadline, the memo requires USCIS to take initial jurisdiction over their asylum applications.[36] The memo also allows USCIS to take initial jurisdiction over asylum applications filed by individuals whom an IJ previously determined was a UC at the time of filing the application.[37] The memo permits, but does not require, USCIS to reject jurisdiction over the asylum application of an individual in removal proceedings with a prior UC determination in one situation—if the applicant was placed in adult immigration detention after a prior UC determination but before filing their asylum application.[38] In this scenario, USCIS must provide the individual a rebuttal opportunity as described in Section II.A above.[39]

For those with no prior UC determination, the memo directs asylum officers to make an independent factual inquiry to determine if the applicant met the UC definition on the date they filed their asylum application.[40]

III. EOIR's Policy on UC Asylum Jurisdiction

EOIR is not a party to the *J.O.P.* Settlement Agreement and thus is not required to respect USCIS's exercise of initial asylum jurisdiction under USCIS's policy. However, in 2024, EOIR

1158(a)(2)(D), 8 C.F.R. § 208.4(a)(5), and has filed within a reasonable period given the circumstances under 8 C.F.R. § 208.4(a)(5) for purposes of the One-Year Deadline such that the One-Year Deadline does not bar the asylum application").

[33] Settlement Agreement ¶ II.S.

[34] 2025 USCIS Implementing Memo, *supra* note 4. On March 25, 2025, the Plaintiffs had raised to the court several ways in which the memo is inconsistent with the Settlement Agreement. Plaintiffs' Response to Defendants' First Compliance Report, Doc. No. 224, *J.O.P. v. DHS*, No. 19-01944 (Mar. 25, 2025). Those issues had not yet been resolved at the time of this resource's publication, and the January 30 USCIS memo remains in effect.

[35] Settlement Agreement ¶ III.A.

[36] 2025 USCIS Implementing Memo, *supra* note 4, at 3 (§ III.A).

[37] *Id.* at 4 (§ III.D).

[38] *Id.* at 3 (§ III.A). The memo specifies that "'[p]lacement in adult immigration detention' does not include custody for the sole purposes of processing the applicant prior to release on their own recognizance or release through another alternative to detention, such as an order of supervision, parole, enrollment in an alternative to detention program, or ICE bond." *Id.*

[39] *Id.* at 4 (§ III.C).

[40] *Id.* at 3 (§ III.B).

issued regulations giving IJs and the BIA authority to terminate removal proceedings of individuals who have filed for asylum with USCIS, under USCIS's procedures governing initial asylum jurisdiction over UCs.[41] The commentary accompanying the final rule notes that EOIR expanded the language for UC asylum-based termination in the final rule from the language it had originally proposed, to allow IJs and the BIA to terminate not only in "cases involving noncitizens determined by EOIR to be unaccompanied children . . . but also . . . cases in which USCIS would consider their asylum application as one filed by a unaccompanied child such that USCIS may exercise its initial jurisdiction" over the asylum application, including "where USCIS considers the application as one filed by a UC through USCIS policy or by court order."[42] The commentary further emphasizes that "expanding the applicability of this discretionary termination ground to capture all potentially qualifying noncitizens will help ensure that EOIR and USCIS are not duplicating adjudicatory efforts, and that the Departments are giving full effect to Congress's intent that qualifying asylum applications should be adjudicated by USCIS."[43]

Six years before the 2024 EOIR termination regulation, the BIA issued a decision, *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018), allowing IJs to assert initial asylum jurisdiction over certain respondents with prior UC determinations whom USCIS was simultaneously asserting initial jurisdiction over pursuant to USCIS's policy. In *Matter of M-A-C-O-*, the BIA concluded that the TVPRA asylum provision "does not prevent the Immigration Judge from determining whether initial jurisdiction over an application filed by [a noncitizen] who has turned 18 lies with the Immigration Judge or the USCIS."[44] The BIA also concluded that a prior UC determination was not binding on an IJ.[45] The BIA held that the IJ had not erred in taking jurisdiction over the respondent's asylum application, where the respondent had first filed *after* his 18th birthday.[46] However, neither *M-A-C-O-* nor any other authority *requires* the IJ to independently determine jurisdiction rather than terminate or postpone a case to allow USCIS—the agency Congress vested with initial jurisdiction—to adjudicate the asylum application pursuant to that agency's policy on initial jurisdiction. When IJs choose to independently determine jurisdiction rather than terminate or postpone a case to allow USCIS to adjudicate an asylum application pursuant to USCIS's jurisdiction policy, it creates unnecessary duplication. The 2024 EOIR final rule recognizes the value in avoiding duplicative adjudications and giving "full effect to Congress's intent that qualifying asylum application should be adjudicated by USCIS."[47]

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[41] 8 CFR §§ 1003.18(d)(1)(ii)(A) (IJ regulations); 1003.1(m)(1)(ii)(A) (BIA regulations).
[42] 89 Fed. Reg. at 46775.
[43] *Id.*
[44] 27 I&N Dec. at 479.
[45] *Id.*
[46] *Id.* at 480. *M-A-C-O-* explicitly did not reach the issue of respondents with previous UC determinations who filed an asylum application with USCIS while under 18 but after reunifying with a parent or legal guardian. *Id.* at 480 n.3. A 2020 EOIR memo that was rescinded during the Biden administration and reinstated in February 2025 states, "Immigration Judges retain authority . . . to determine whether [a noncitizen] met or meets the legal definition of a UAC at the time an asylum application is filed and, thus, to determine whether the Immigration Judge or USCIS has initial jurisdiction over the application, regardless of any prior classification of the applicant as a UAC." Memorandum from James R. McHenry III, EOIR Dir., Asylum Processing, at 1-2 n.1 (Dec. 4, 2020), https://www.justice.gov/eoir/media/1388066/dl?inline.
[47] 89 Fed. Reg. at 46775.

IV. Navigating Removal Proceedings While Awaiting USCIS Adjudication of a UC I-589

As discussed above, those entitled to file their asylum application initially with USCIS as UCs despite being in removal proceedings are those who, at the time of filing the asylum application, either (1) meet the definition of UC found at 6 U.S.C. § 279(g)(2), or (2) were previously determined to be a UC but who have reached the age of 18 or have a parent or legal guardian available in the United States to provide care and physical custody (unless they were placed into adult immigration detention before filing the I-589). A subset of young people in category (2) are *J.O.P.* class members if they filed their asylum application with USCIS by February 24, 2025. Those who are not *J.O.P.* class members yet fall under one of these two categories should file an asylum application with USCIS following applicable instructions.[48]

For most respondents entitled to file asylum applications with USCIS as UCs while in removal proceedings, it will benefit them to seek termination or postponement of their immigration court case while they await a USCIS adjudication of their asylum application.[49] This section describes (1) motions to terminate, (2) motions for administrative closure, and (3) motions for continuances or placement on the status docket. It concludes by describing arguments practitioners might consider if the IJ appears insistent on taking jurisdiction over a respondent's asylum application despite a UC asylum application pending with USCIS.

A. Motions to Terminate Under the 2024 EOIR Regulations

On July 29, 2024, EOIR regulations went into effect that give IJs and the BIA explicit authority to terminate removal proceedings in a variety of situations.[50] In some specified instances, termination is mandatory, while in other situations, termination is at the discretion of the IJ or BIA. Two termination grounds are most relevant for *J.O.P.* class members.

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[48] Practitioners should carefully follow USCIS instructions for filing asylum applications pursuant to the TVPRA provision to avoid getting a defensive receipt. *See*, *e.g*., "Where to File" section of USCIS I-589 webpage, https://www.uscis.gov/i-589 (describing where UC asylum applications should be filed).

[49] Whether termination is beneficial for a client in removal proceedings is a case specific inquiry. Among other things, counsel should consider whether the client is potentially amenable to expanded expedited removal. *See*, *e.g*., Memorandum from Benjamine C. Huffman, Acting DHS Sec'y, Guidance Regarding How to Exercise Enforcement Discretion, at 2 (Jan. 23, 2025), https://www.dhs.gov/sites/default/files/2025-01/25_0123_er-and-parole-guidance.pdf (directing DHS attorneys to consider seeking termination of pending removal proceedings in order to pursue expedited removal); Internal ICE Email Guidance, https://fingfx.thomsonreuters.com/gfx/legaldocs/gkpljxxoqpb/ICE_email_Reuters.pdf (stating that "there is no time limit on the ability to process" an "arriving" noncitizen for expedited removal). DHS's invocation of expanded expedited removal is subject to several pending lawsuits. *See Make the Road New York v. Huffman*, No. 25-00190 (D.D.C. filed Jan. 22, 2025), https://www.aclu.org/cases/make-the-road-new-york-v-benjamine-huffman; *Coalition for Humane Immigrant Rights v. Noem*, No. 25-00872 (D.D.C. filed Mar. 24, 2025), https://justiceactioncenter.org/case/chirla-v-noem-expedited-removal/. If a client is potentially at risk of expedited removal under DHS's expansive view of who is covered, the client may decide that the risk of termination outweighs its potential benefits. Unaccompanied children from non-contiguous countries are not amenable to expedited removal and must be placed into full removal proceedings under INA § 240 if DHS wishes to pursue their removal. 8 U.S.C. § 1232(a)(5)(D).

[50] EOIR, Efficient Case and Docket Management in Immigration Proceedings, 89 Fed. Reg. 46742 (May 29, 2024).

First, IJs and the BIA must terminate removal proceedings if the parties jointly file a motion to terminate, or if one party files a motion to terminate and the other party "affirmatively indicate[s] its non-opposition, unless the [IJ/BIA] articulates unusual, clearly identified, and supported reasons for denying the motion."[51] An individual seeking asylum with USCIS as a UC could contact the ICE Office of the Principal Legal Advisor (OPLA) asking them to join a motion to terminate, or to affirmatively indicate their non-opposition. If the respondent is a *J.O.P.* class member, the communication to OPLA should assert *J.O.P.* class membership, attach proof of class membership such as a copy of the USCIS receipt notice,[52] and remind OPLA that under paragraph III.H of the *J.O.P.* Settlement Agreement, "DHS will generally join or non-oppose Class Members' motion(s) to dismiss or terminate filed or otherwise made in order to await USCIS exercise of Initial Jurisdiction over their asylum application."[53] If OPLA joins or affirmatively indicates its non-opposition, then the respondent can file a motion to terminate citing the mandatory termination regulation, 8 CFR § 1003.18(d)(1)(i)(G).

Second, even if OPLA opposes termination, the regulations give IJs and the BIA discretion to terminate removal proceedings if the respondent has a pending UC asylum application with USCIS.[54] In the termination motion, the respondent should attach proof that the I-589 is pending with USCIS, such as the I-589 receipt notice and a printout of the USCIS Case Status Online webpage showing that the case remains pending. Respondents could also argue any favorable discretionary factors that are supported by evidence in the record and could consider anticipating any DHS opposition by arguing that DHS's current enforcement priorities are not a relevant discretionary factor for the IJ, as EOIR is not part of DHS and IJs must exercise independent authority evaluating the facts of the specific noncitizen's case. Respondents could also draw on the 2024 final rule commentary's recognition that terminating in these circumstances avoids duplicative adjudications and gives "full effect to Congress's intent that qualifying asylum application should be adjudicated by USCIS."[55] Further, given that Congress granted USCIS, not EOIR, initial jurisdiction over UC asylum applications, practitioners could argue that an IJ terminating proceedings to allow USCIS to adjudicate a case pursuant to USCIS's own jurisdiction policy facilitates "smooth coordination" among agencies, a goal of EOIR since the TVPRA went into effect in 2009.[56] This point is underscored by the fact that the *J.O.P.* Settlement Agreement and 2025 USCIS implementing memo prohibit USCIS from deferring to an IJ's determination that the IJ has initial jurisdiction[57]; thus an IJ's insistence on moving

[51] 8 CFR §§ 1003.18(d)(1)(i)(G) (IJ regulations); 1003.1(m)(1)(i)(G) (BIA regulations).
[52] The Settlement Agreement at Paragraph III.K provides a non-exhaustive list of evidence that OPLA must accept as evidence of class membership.
[53] While the *J.O.P.* Settlement Agreement gives DHS "discretion to oppose Class Members' motion(s) if it deems such opposition warranted based on the individual facts of the cases, as long as DHS's opposition is not based, in whole or in part, on a position that USCIS does not have Initial Jurisdiction over the Class Member's asylum application," Settlement Agreement ¶ III.H, if a particular OPLA office routinely opposes *J.O.P.* class members' motions to terminate, practitioners are encouraged to contact *J.O.P.* class counsel, at DG-JOPClassCounsel@goodwinlaw.com.
[54] 8 CFR §§ 1003.18(d)(1)(ii)(A) (IJ regulations); 1003.1(m)(1)(ii)(A) (BIA regulations).
[55] 89 Fed. Reg. at 46775.
[56] Memorandum from Michael C. McGoings, EOIR Acting Chief IJ, Implementation of the Trafficking Victims Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance), at 2 (Mar. 20, 2009), *available at* https://nipnlg.org/sites/default/files/2023-04/138-3%20EOIR%20Memo%20re%20TVPRA%20%28Mar.%202009%29.pdf.
[57] Settlement Agreement ¶ III.D; 2025 USCIS Implementing Memo, *supra* note 4, at 4 (§ III.D).

forward despite USCIS having taken initial jurisdiction will result in discoordination and inefficient use of agency resources.

B. Motion for Administrative Closure

In the alternative to or instead of a motion to terminate, practitioners could also file a motion for administrative closure based on the pending UC asylum application with USCIS.

Similar to the termination regulations, the EOIR regulations on administrative closure generally require IJs and the BIA to grant a motion for administrative closure if it is jointly filed or filed by one party and affirmatively non-opposed by the non-moving party.[58] Before filing a motion for administrative closure based on a pending UC I-589, the respondent could contact OPLA asking them to join the motion, or to affirmatively indicate their non-opposition. If the respondent is a *J.O.P.* class member, the communication to OPLA should assert *J.O.P.* class membership, attach proof of class membership such as a copy of the USCIS receipt notice,[59] and remind OPLA that under paragraph III.H of the *J.O.P.* Settlement Agreement, "DHS will join or non-oppose Class Members' motion[] for . . . administrative closure . . . that ha[s] been filed or made orally on the record in immigration proceedings in order to await USCIS exercise of Initial Jurisdiction over their asylum application."[60] If OPLA joins or affirmatively indicates its non-opposition, then the respondent can file a motion for administrative closure citing the mandatory regulation language, 8 CFR § 1003.18(c)(3).

EOIR guidance on administrative closure states that where a respondent requests administrative closure and DHS does not object, the IJ should generally grant administrative closure.[61] Given the *J.O.P.* Settlement Agreement's prohibition on DHS opposition to administrative closure in class members' cases, class members' requests for administrative closure should fall within this category.

If the respondent does not obtain OPLA's joinder or affirmative non-opposition in advance of filing, then the unilateral motion for administrative closure should argue all of the relevant factors supporting administrative closure in the individual's case, including the factors found at 8 CFR §§ 1003.18(c)(3)(i). The motion should emphasize that administrative closure is sought to await USCIS's exercise of its initial jurisdiction over the client's UC asylum application, that if USCIS grants asylum it will result in termination of the removal proceedings, and that if USCIS does not grant asylum, it will result in EOIR gaining jurisdiction over the asylum application. The class member should attach to the motion proof of the pending asylum application with USCIS and of the client's prior UC determination. If relevant, the motion could note that the client is a *J.O.P.* class member. Some of the arguments about smooth coordination between

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[58] 8 CFR §§ 1003.18(c)(3) (IJ regulations); 1003.1(*l*)(3) (BIA regulations).

[59] The Settlement Agreement at Paragraph III.K provides a non-exhaustive list of evidence that OPLA must accept as evidence of class membership.

[60] If OPLA opposes a *J.O.P.* class member's motion for administrative closure in violation of the Settlement Agreement, practitioners are encouraged to contact *J.O.P.* class counsel, at DG-JOPClassCounsel@goodwinlaw.com.

[61] Memorandum from David L. Neal, EOIR Dir., Administrative Closure, at 3 (Nov. 22, 2021), https://www.justice.gov/eoir/book/file/1450351/dl?inline=.

agencies described in the termination section above could be included in the motion for administrative closure as well.

C. Motion for Continuance and/or Status Docket Placement

In the alternative to a motion to terminate or a motion for administrative closure to await USCIS's adjudication of the asylum application, practitioners could file a motion for a continuance and/or for placement on the status docket, if the court has a status docket. A continuance is typically the least preferred type of postponement because it will result in another immigration court hearing date that will likely take place before USCIS has adjudicated the asylum application, given the USCIS asylum application backlog. However, if the IJ is not inclined to grant termination or administrative closure and otherwise seems poised to force the respondent to either proceed with an asylum merits hearing or accept a removal order, seeking a continuance and/or status docket placement in the alternative preserves all possible issues for appeal.

In evaluating continuance requests, IJs must follow the framework set forth in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). Practitioners can argue that a continuance to await USCIS adjudication of the pending UC I-589 is warranted under the *L-A-B-R-* framework because the USCIS adjudication will "materially affect the outcome of the removal proceedings."[62] A grant of asylum by USCIS would constitute grounds to terminate the removal proceedings.[63] Conversely, a USCIS decision not to grant asylum would cause the IJ to gain jurisdiction to adjudicate the asylum application. And if the IJ prematurely takes jurisdiction, doing so will not prevent USCIS's jurisdiction and concurrent adjudication, as USCIS prohibited under the Settlement Agreement and 2025 USCIS Implementing Memorandum from deferring to EOIR jurisdictional determinations.[64]

Practitioners should also be aware of a 2021 EOIR memo on continuances which suggests that IJs may scrutinize whether an individual seeking asylum with USCIS as a UC met the UC definition on the date they filed their application.[65] Practitioners could point out that this memorandum pre-dates the *J.O.P.* Settlement Agreement as well as the 2024 EOIR regulations, which, as noted above, suggest that IJs may properly defer to USCIS's determination of its own jurisdiction and avoid wasteful and redundant adjudications.

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[62] 27 I&N Dec. at 406.

[63] *See* INA § 208(c)(1)(A); 8 CFR § 1003.18(d)(1)(i)(D)(3) (termination is mandatory where the respondent has gained asylee status since the initiation of removal proceedings, if the noncitizen would not have been removable as charged if they had obtained such status before the initiation of proceedings).

[64] Settlement Agreement ¶ III.D; 2025 USCIS Implementing Memo, *supra* note 4, at 4 (§ III.D).

[65] Memorandum from James R. McHenry III, EOIR Dir., Continuances, at 3 (Jan. 8, 2021), https://www.justice.gov/eoir/media/1388071/dl?inline; *see also* Memorandum from James R. McHenry III, EOIR Dir., Use of Status Dockets, at 2 (Aug. 16, 2019), https://www.justice.gov/eoir/page/file/1196336/dl (referring to a "confirmed" unaccompanied child).

D. Potential Arguments in Response to an IJ's Intent to Take Jurisdiction over an Asylum Application Where the Respondent Has a UC Asylum Application Pending with USCIS

If an IJ indicates an intent to re-determine jurisdiction despite USCIS already having accepted the application pursuant to the *J.O.P.* Settlement Agreement and/or the 2025 implementing memorandum, practitioners should request a briefing schedule and the opportunity to submit arguments and evidence in support of USCIS initial jurisdiction. Practitioners may want to challenge any IJ jurisdictional re-determination to preserve the best possible record for appeal to the BIA and eventual petition for review in federal court.

If the IJ declines to defer to USCIS's jurisdictional determination and wishes to make their own jurisdictional determination, the jurisdictional analysis may be fact-intensive and complex. It may require testimony and arguments about when the respondent first "filed" for asylum—which has been interpreted to mean the time the child first expressed an intent to seek asylum to a government official—which may be particularly relevant in a case where the asylum application receipt date was after the child's 18th birthday.[66] It may also involve nuanced determinations about a caregiver's "availability" to provide adequate care at the time of filing.[67] Indeed, in the *J.O.P.* litigation, DHS recognized that "the question of whether a parent or legal guardian was available on the filing date can be an extremely complex factual issue and generally cannot be determined without . . . additional factfinding through [testimony]."[68]

Particularly given immigration court backlogs, IJs may find it difficult to allocate sufficient time to engage in the requisite level of fact-finding and evidence-gathering from someone who endured persecution as a child and to conduct complex factual analysis involving child welfare law concepts. However, the need for this expenditure of court resources is obviated if the IJ allows sufficient time—through termination, administrative closure, status docket placement, or continuances—so that USCIS can act in accordance with its jurisdiction and pursuant to its child-centered training and expertise.[69]

In addition to making any available client-specific arguments as described above about why the young person met the UC definition at the time of filing, and, as such, that *Matter of M-A-C-O-* does not apply, practitioners should consider including a brief argument challenging *M-A-C-O-*'s interpretation of the statute to preserve the issue for appeal and federal court review.

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[66] *See supra* note 25.

[67] *See, e.g.*, *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) ("[T]o be 'available to provide care' for a child, a parent must be available to provide what is necessary for the child's health, welfare, maintenance, and protection," including their physical and mental well-being); Citizenship and Immigration Services Ombudsman, Ensuring a Fair and Effective Asylum Process for Unaccompanied Children, at 8 (Sept. 20, 2012), https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac_from_web.pdf ("Exploring questions regarding parental behavior and whether it meets the child's physical, mental, and/or emotional needs is more appropriately within the purview of a trained clinician," particularly "where the UACs [sic] parents' or legal guardians' interests may be in conflict with their own").

[68] Defendants' Opposition to Motion to Certify Class, at 13, Doc. No. 126, *J.O.P. v. DHS*, No. 19-01944 (D. Md. filed July 13, 2020).

[69] *See, e.g.*, USCIS Refugee, Asylum, and International Operations Directorate, Children's Claims Lesson Plan (Dec. 6, 2024), https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf (detailing, inter alia, child-sensitive interview procedures).

Practitioners could rely on some of the arguments discussed in a 2012 CIS Ombudsman report that Congress's intention in creating the TVPRA asylum provisions was for the UC benefits to follow a young person throughout their immigration case that commenced with the UC determination[70]—and thus that the best reading of the statute is that those initially processed as UC are entitled to initial USCIS jurisdiction over their asylum applications regardless of whether they continue meet the UC definition on the date of filing. In light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which ended federal courts' automatic deference to federal agencies' interpretations of ambiguous statutes, the BIA's *M-A-C-O-* decision should receive a lower level of deference from a reviewing federal court.[71] Even if a particular court of appeals considers giving *Skidmore*[72] deference to the BIA's interpretation of the statute in *M-A-C-O-*, the BIA's arbitrary conclusion that IJs are not bound by a prior UC determination and inconsistent agency interpretation over the years should signal to the court of appeals that *M-A-C-O-* deserves no deference.

If the IJ insists on exercising asylum jurisdiction while the young person's I-589 is pending with USCIS, the practitioner could file the asylum application with the immigration court under protest or refuse to file and accept a removal order with the intention of appealing.[73] Both of these strategies present risks, and the decision must be made with the client's understanding and consent. Either way, if the IJ ultimately orders removal, the practitioner can appeal to the BIA, and, during the BIA appeal, the removal order is not final.[74] In addition to arguing that the IJ erred in taking jurisdiction over the I-589, the practitioner could ask the BIA to terminate and/or administratively close the case based on the pending I-589, citing the BIA's regulatory authority pursuant to 8 CFR § 1003.1(m)(1)(ii)(A) and 8 CFR § 1003.1(*l*)(3).

While a BIA appeal of a removal order is pending, practitioners also have options before USCIS. USCIS is not permitted to reject jurisdiction over an I-589 in deference to an IJ's jurisdictional determination.[75] The existence of a removal order on appeal to the BIA would be a basis to ask USCIS to expedite the client's I-589.[76] And if USCIS eventually grants the asylum application, *J.O.P.* class members can benefit from the Settlement Agreement's joint motion to reopen provision if they file the motion while the agreement is still in effect.[77]

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[70] Citizenship and Immigration Services Ombudsman, Ensuring a Fair and Effective Asylum Process for Unaccompanied Children, at 4 (Sept. 20, 2012), https://www.dhs.gov/sites/default/files/publications/cisomb-ensuring-fair-asylum-process-for-uac_from_web.pdf.

[71] *But see Garcia v. Barr*, 960 F.3d 893, 894 (6th Cir. 2020); *Harmon v. Holder*, 758 F.3d 728, 734 (6th Cir. 2014); *Mazariegos-Diaz v. Lynch*, 605 F. App'x 675, 675–76 (9th Cir. 2015) (unpublished); *Cortez-Vasquez v. Holder*, 440 F. App'x 295, 298 (5th Cir. 2011) (unpublished); *see also Salmeron-Salmeron v. Spivey*, 926 F.3d 1283, 1289 n.6 (11th Cir. 2019).

[72] *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).

[73] Practitioners could also consider filing an interlocutory appeal in this situation, perhaps appealing the IJ's refusal to grant termination under the regulations expressly authorizing termination in this scenario. Interlocutory appeals are generally disfavored by the BIA, however. *See* BIA Practice Manual, Ch. 4.14(c), https://www.justice.gov/eoir/reference-materials/bia/chapter-4/14. Thus, practitioners will need to be ready to continue litigating the case in immigration court while the interlocutory appeal is pending.

[74] 8 CFR §§ 1003.39, 1241.1

[75] Settlement Agreement ¶ III.D; 2025 USCIS Implementing Memo at 4 (§ III.D).

[76] Settlement Agreement ¶ III.G; 2025 USCIS Implementing Memo at 4-5 (§ V).

[77] Settlement Agreement ¶ III.J.

V. Considerations for Class Members with Final Removal Orders and Detained *J.O.P.* Class Members

Class members with final removal orders

J.O.P. class members with final removal orders are entitled to the same protections under the Settlement Agreement as other class members. Having a removal order is also a basis to request an expedited adjudication with USCIS.[78] Class members with final removal orders are also protected by a stay of removal that remains in place through the duration of the Settlement Agreement, *i.e.* through May 27, 2026, or until USCIS issues a final determination on the asylum application, whichever comes first.[79] Here is a sample letter a class member could provide to ICE asserting the *J.O.P.* stay, if the class member has an upcoming ICE check-in or if ICE is taking steps to remove the client in violation of the Settlement Agreement. Practitioners should also promptly reach out to class counsel if ICE appears to be taking steps to remove a class member in violation of the Settlement Agreement, at DG-JOPClassCounsel@goodwinlaw.com.

If USCIS grants asylum to a class member with a final removal order, paragraph III.J of the Settlement Agreement serves as evidence of DHS's non-opposition to a class member's motion to reopen, and the Settlement Agreement allows the class member to style their motion as a joint motion to reopen and include the following language: "Pursuant to the Settlement Agreement in *J.O.P. v. U.S. Department of Homeland Security*, No. 19-01944 (D. Md.), DHS is joining in the motion unless DHS files a response within 30 days opposing the motion."[80] DHS will generally join or not oppose a class member's motion to reopen following a USCIS asylum grant.[81] Many class members in this situation will choose to file a motion to reopen along with a motion to terminate under 8 CFR § 1003.18(d)(1)(i)(D)(3). Under the Settlement Agreement, DHS will generally join or not oppose a motion to terminate filed in conjunction with a motion to reopen in this scenario.[82]

Given that the *J.O.P.* Settlement Agreement's protections expire on May 27, 2026, it is wise for class members with final removal orders to take advantage of the Settlement Agreement's provisions before that date. For example, class members with strong asylum claims may wish to request that USCIS expedite their asylum application, and then, once granted, file a motion to reopen and terminate more than 30 days before May 27, 2026 so that they can benefit from the joint motion to reopen provision described above. Further, since the class member's *J.O.P.* stay will expire on May 27, 2026 (assuming that their USCIS asylum application remains pending until that time), it is wise to have a plan in place to protect the class member from removal after that date.

One potential plan for protecting a class member from removal after May 27, 2026 is a motion to reopen strategy. Practitioners could consider filing a motion to reopen that automatically triggers

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[78] Settlement Agreement ¶ III.G; *see also* 2025 USCIS Implementing Memo at 4-5 (§ V) (applying also to non-class members who file with USCIS as UCs).
[79] Settlement Agreement ¶ III.I.
[80] *Id.* ¶ III.J.1.
[81] *Id.* ¶ III.J.
[82] Settlement Agreement ¶ III.J.2.

a stay of removal. For example, a motion to reopen and rescind an *in absentia* removal order filed pursuant to INA § 240(b)(5)(C) stays a person's removal while the motion is pending with the IJ.[83] If the class member does not qualify for a motion to reopen with an automatic stay of removal, the class member should consider filing a motion to reopen coupled with a separate stay motion before May 27, 2026.[84] When filing motions to reopen, practitioners should remember the strict procedural requirements for such motions, including filing deadlines and number limitations. If a class member's motion to reopen is beyond the filing deadline or if the class member has already filed a motion to reopen, practitioners may consider an equitable tolling argument or a motion to reopen basis that is not number limited and is not subject to a filing deadline or has a more generous filing deadline. For example, there is no filing deadline for a motion to reopen to apply for asylum, withholding of removal, and protections under the Convention Against Torture based on changed country conditions in the country of nationality or the country to which removal has been ordered.[85] Motions to reopen based on Violence Against Women Act (VAWA) eligibility are not number limited[86] and have a one-year deadline, but this deadline may be waived in extraordinary circumstances or situations of "extreme hardship to the [noncitizen's] child."[87] The authors encourage practitioners who are National Immigration Project members to seek technical assistance on motions to reopen.[88]

Detained class members

Detained *J.O.P.* class members are entitled to the same protections under the Settlement Agreement as non-detained class members.[89] These protections include the right to a merits adjudication by USCIS even if they are in removal proceedings, exemption from the one-year filing deadline, and DHS's non-opposition in their removal proceedings to postponements to await USCIS adjudication.[90] While the stay of removal provision that applies to *J.O.P.* class members does not prevent a class member's detention, and the authors are aware of a few cases in which DHS has detained or re-detained class members who lack a removal order, practitioners should consider seeking a bond hearing and engaging in motions practice strategies before the IJ to win the class member's release. While EOIR regulations disfavor administrative closure when an individual is detained,[91] the authors are aware of situations in which an IJ has granted administrative closure of a class member's case (and their release from detention soon followed). Further, the Settlement Agreement's requirement that DHS generally non-oppose termination absent a respondent-specific reason to oppose can also help detained class members. The authors

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[83] INA § 240(b)(5)(C); 8 CFR § 1003.23(b)(4)(ii).
[84] For a detailed discussion of stays of removal, see National Immigration Project and American Immigration Council's Stay of Removal, *Practice Advisory: Stays of Removal* (Jan. 17, 2025), https://nipnlg.org/work/resources/stays-removal.
[85] INA § 240(c)(7)(C)(ii).
[86] INA § 240(c)(7)(A).
[87] INA § 240(c)(7)(C)(iv).
[88] National Immigration Project Technical Assistance Request Process, https://nipnlg.org/membership/technical-assistance.
[89] However, remember that if the individual was placed into adult immigration detention before filing the I-589, USCIS is permitted to reject jurisdiction under III.C of the Settlement Agreement and Section III.A of the 2025 USCIS Implementing Memo. In this situation, USCIS must provide the individual the opportunity to rebut USCIS's allegations, as described in Section II.A above.
[90] Settlement Agreement ¶¶ III.B-D, H.
[91] 8 CFR §§ 1003.18(c)(3)(i)(H); 1003.1(*l*)(3)(i)(H).

are aware of cases in which an IJ has granted a *J.O.P.* class member's motion to terminate, and their release from detention soon followed.

Immigration detention is also a basis for a *J.O.P.* class member to request an expedited adjudication with USCIS.[92] This may be a particularly helpful option where the IJ is not inclined to terminate proceedings or release the client, and the client will otherwise be forced to proceed on the merits of their asylum claim in immigration court while detained and without first having the opportunity to have USCIS adjudicate the claim. Practitioners may wish to seek a postponement of the immigration proceedings based on the expedite request, attaching to the postponement motion proof of the expedite request and providing an estimated timeframe by which the USCIS interview will take place.

For more information on the *J.O.P.* Settlement Agreement, see the National Immigration Project's *J.O.P.* webpage, https://nipnlg.org/work/litigation/jop-v-dhs.

[92] Settlement Agreement ¶ III.G; *see also* 2025 USCIS Implementing Memo at 4-5 (§ V) (applying also to non-class members who file with USCIS as UCs).