



**U.S. Citizenship
and Immigration
Services**

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Course

CHILDREN'S CLAIMS

TRAINING MODULE

RAIO Directorate – Officer Training / RAIO Combined Training Course

CHILDREN'S CLAIMS

Training Module

MODULE DESCRIPTION:

This module provides guidelines for adjudicating children's claims. Issues addressed include guidelines for child-sensitive interview techniques and considerations for the legal analysis of claims involving child applicants. While the legal analysis sections specifically address refugee and asylum claims, other sections, including those that address child development and procedural issues, are relevant to claims made by children for other immigration benefits.

TERMINAL PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you (the Officer) will apply adjudicative and procedural guidance in issues that arise in claims made by children, in particular unaccompanied children.

ENABLING PERFORMANCE OBJECTIVES

Examine the development of international law that protects the rights of children and children seeking refugee or asylum status.

Describe procedural considerations when working with child applicants.

Apply child-sensitive questioning and listening techniques that facilitate eliciting information from children.

Describe how persecution must be analyzed when looking at a claim of a child refugee or asylum-seeker.

Describe how nexus must be analyzed when looking at a claim of a child refugee or asylum-seeker.

INSTRUCTIONAL METHODS

Interactive presentation

Discussion
Practical exercises

METHOD(S) OF EVALUATION

Written exam

REQUIRED READING

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paras. 181–188, 213–219, Annex 1.

UNHCR, *Guidelines on International Protection No.8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (December 22, 2009), HCR/GIP/09/08, 28 pp.

UNHCR, *Resettlement Handbook*, Section 5.2, *Children and Adolescents*, Department of International Protection (July 2011), pp. 184-194.

UNHCR, *Children – BID Guidelines Information Sheet* (3 pp.) (June 2008).

Division-Specific Required Reading - Refugee Division

Division-Specific Required Reading - Asylum Division

Division-Specific Required Reading - International Operations Division

ADDITIONAL RESOURCES

Brief of American Medical Association, et al., *Roper v. Simmons*, 543 U.S. 551 (2005).

(Canadian Guidelines) Immigration and Refugee Board of Canada, *Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* (Ottawa: 30 Sept. 1996), hereinafter “Canadian Guidelines.”

Carr, Bridgette A., “Eliminating Hobson’s Choice by Incorporating a ‘Best Interests of the Child’ Approach into Immigration Law and Procedure,” *Yale Human Rights and Development Law Journal* 12, Spring 2009, pp.120–159.

Memorandum from Bo Cooper, INS General Counsel, to Doris Meissner, Commissioner, *Elian Gonzalez*, (3 Jan. 2000).

- Duncan, Julianne, *Best Interest Determination for Refugee Children: An Annotated Bibliography of Law and Practice*, United States Conference of Catholic Bishops, 15 October 2008.
- Geidd, Jay, "Inside the Teenage Brain," Frontline, PBS, January 2002.
- Memorandum from Joseph E. Langlois, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).
- Lustig, Stuart L., MD, MPH, et al., *Review of Child and Adolescent Refugee Mental Health: White Paper from the National Child Traumatic Stress Network Refugee Trauma Task Force*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), Boston, MA, 2003.
- Lutheran Immigration and Refugee Service (LIRS), *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*, June 1998.
- National Organization for Victim Assistance, "Children's Reaction to Trauma and Some Coping Strategies for Children," *Issues of War Trauma and Working with Refugees: A Compilation of Resources*, edited by Susan D. Somach, 56–62, Washington, DC: Center for Applied Linguistics Refugee Service Center, 1995.
- Office of Refugee Resettlement, Office of Health and Human Services, *Unaccompanied Minors Program*.
- Perry, Nancy W. and Larry L. Teply, "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," *Creighton Law Review*, 18, 1985, pp. 1369–1426.
- UN General Assembly, *Convention on the Rights of the Child*, G.A. Resolution 44/25, UN GAOR 20 Nov.1989.
- UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997).
- UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).
- UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries 2001-2003* (Geneva: July 2004).
- Walker, Anne Graffam, "Suggestions for Questioning Children," *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*, Lutheran Immigration and Refugee Service, 63–64. Baltimore, MD: LIRS, 1998.

Memorandum from William R. Yates, Associate Director for Operations, USCIS, to Regional Directors, et al., *The Child Status Protection Act – Children of Asylees and Refugees*, (HQOPRD 70/6.1) (17 August 2004).

Division-Specific Additional Resources - Refugee Division

Division-Specific Additional Resources - Asylum Division

Division-Specific Additional Resources - International Operations Division

CRITICAL TASKS

Task/ Skill #	Task Description

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
8/21/2014	Entire Lesson Plan	Lesson Plan published	RAIO Training
11/30/2015	Section 8.4, Nexus to a Protected Ground	Modified recommended PSG formulations for FGM and forced marriage	RAIO Training

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- Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.
- For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

The purpose of this module is to familiarize the student with guidelines for adjudicating children's refugee and asylum claims. The module will cover U.S. law and international guidance that bears on this issue, the procedural adjustments you must make when interviewing children, and the legal issues that must be considered when analyzing cases and making determinations.

The unique vulnerability and circumstances of children prompted USCIS and legacy INS to issue guidance relating to this vulnerable population. On Human Rights Day 1998, INS issued the *Children's Guidelines*, providing guidance on child-sensitive interview procedures and legal analysis of the issues that commonly arise in children's cases.

The *Children's Guidelines* resulted from a collaborative effort of INS and U.S. governmental and non-governmental organizations (NGOs), individuals, and the Office of the United Nations High Commissioner for Refugees (UNHCR). The Women's Commission for Refugee Women and Children was instrumental in the development of the guidance.

Changes in regulations and case law over the years have superseded much of the legal guidance set forth in the *Children's Guidelines*. However, guidance has been developed, and is provided in this module, based on current procedures and legal analysis that incorporate the principles of child-sensitive protection that were previously set forth in the *Children's Guidelines*.

A memorandum issued by RAIO's Asylum Division in 2007 serves as a resource on interviewing procedures for children.¹ It addresses the need to explore guardianship and parental knowledge and consent issues, which can assist in identifying unaccompanied children who may be victims of trafficking or other abuse.

During the last twenty years, the topic of child refugees and asylum seekers has drawn increasing attention from the international community. Human rights violations against children take a number of forms, such as abusive child labor practices, trafficking in children, rape, domestic violence, female genital mutilation, forced marriage, forced prostitution, and forced recruitment. Psychological harm may be a particularly relevant factor to consider. The effects of harm inflicted against a child's family member may also be a relevant factor to consider.

2 INTERNATIONAL GUIDANCE

As the issue of children as refugees and asylum-seekers has moved only relatively recently into the forefront of immigration law, relevant U.S. case law is somewhat scarce.² In the absence of case law, or when case law does not specifically address an issue, international instruments can provide helpful guidance and context on human rights norms.

The following international instruments and documents contain provisions specifically relating to children.³ They recognize and promote the principle that children's rights are universal human rights.

2.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations (U.N.) General Assembly on December 10, 1948.⁴ The UDHR sets forth a collective understanding of the rights that are fundamental to the dignity and development of every human being. Most relevant to your work are Article 14, which provides for the right to apply for asylum, and Article 25(2), which refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.

¹ See Joseph E. Langlois, USCIS Asylum Division, *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 14 August 2007), Section II.

² In addition to the sources cited below, the information in this section of the module derives from section I., Background and International Guidance, of the *Children's Guidelines*.

³ See RAIO modules on International Human Rights Law and Overview of UNHCR and Concepts of International Protection.

⁴ Universal Declaration of Human Rights. G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948.

2.2 Convention on the Rights of the Child

Many of the components of international policy regarding children derive from the U.N. Convention on the Rights of the Child (CRC).⁵ Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children.

Article 3(1) of the CRC provides that “the ‘best interests of the child’ should be the primary consideration” in all actions involving children.⁶ The “best interests of the child” principle holds that the state is ultimately responsible for ensuring that the basic needs of children are met and that the fundamental rights of children are protected. The internationally recognized “best interests of the child” principle is a useful measure for determining appropriate interview procedures for children, but it does not play a role in determining substantive eligibility for immigration benefits under the U.S. law. Additionally, under Article 12(1), children’s viewpoints should be considered in an age and maturity-appropriate manner.⁷

Because the United States has signed but not ratified the CRC, its provisions, including those noted above, provide guidance only and are not binding on adjudicators.⁸ However, having signed the CRC, the United States is obliged under international treaty law to refrain from acts that would defeat the object and purpose of the Convention.

On December 23, 2002, the United States ratified the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.⁹ The Optional Protocol calls for States Parties to prohibit and create criminal penalties for the sale of children, child prostitution, and child pornography.

Additionally, the United States ratified the Optional Protocol to the CRC on the involvement of children in armed conflict on January 23, 2003.¹⁰ In violation of current international standards that establish a minimum age for participation in armed conflicts, children under age eighteen are forcibly recruited by state-sanctioned armies or private militias to participate in military combat in some countries. Among other things, the Optional Protocol calls for States Parties to ensure that children under eighteen years of age do not take a direct part in hostilities, sets out safeguards for those under eighteen years of age who are voluntarily recruited into their nation’s armed forces, and prohibits

⁵ Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. G.A.O.R., Nov. 20, 1989.

⁶ CRC, Article 3.

⁷ CRC, Article 12.

⁸ Vienna Convention on the Law of Treaties, Art. 18(a), signed May 23, 1969, entered into force January 27, 1980.

⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. GAOR, May 25, 2000.

¹⁰ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. GAOR, May 25, 2000.

non-governmental armed groups from recruiting or using persons under eighteen years of age as soldiers. In 2008, the Child Soldiers Accountability Act became U.S. law, providing criminal and immigration penalties for individuals who recruit or use child soldiers.¹¹

2.3 The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Adoption Convention)

The Hague Adoption Convention establishes internationally agreed upon rules and procedures for adoptions between countries that have a treaty relationship under the Convention. The goal of the Convention is to protect the best interests of children, and also to protect birth parents and adoptive parents involved in intercountry adoptions.

The Hague Adoption Convention applies to all intercountry adoption initiated on or after April 1, 2008, by a U.S. citizen habitually resident in the United States seeking to adopt and bring to the United States a child habitually resident in any Convention country.

You will not see Hague applications or petitions because the USCIS National Benefits Center currently processes all Hague forms (Form I-800A and Form I-800). The U.S. Department of State grants final Form I-800 approval and issues the necessary Hague Adoption or Custody Certificates in the child's country of origin.

2.4 The United Nations High Commissioner for Refugees (UNHCR)

2.4.1 ExCom Conclusions

Over the years, the Executive Committee of the High Commissioner's Program¹² (or "ExCom") has adopted a number of conclusions concerning refugee children. Safeguarding the wellbeing of refugee children has long been a high priority of the UNHCR and the United States.

UNHCR ExCom Conclusion No. 47

In 1987, the Executive Committee issued its first conclusion devoted exclusively to children – Conclusion No. 47.¹³ This Conclusion urged action to address the human rights and needs of children who are refugees, highlighted the particular vulnerability of unaccompanied and disabled refugee children, and highlighted the need for action by UNHCR to protect and assist them. Conclusion No. 47 condemned specific violations of

¹¹ Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008). See Asylum Supplement, Bars to Applying for Asylum, below, for more detail on the CSAA.

¹² For additional information on the Executive Committee, see RAIO module, *UNHCR Overview*.

¹³ UN High Commissioner for Refugees, Conclusion on Refugee Children, 12 Oct. 1987. No. 47 (XXXVIII) - 1987.

basic human rights, including sexual abuse, trafficking of children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, and arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims.

Conclusion No. 47 also emphasized that all action taken on behalf of refugee children must be guided by the principle of the "best interests of the child."¹⁴

UNHCR ExCom Conclusion No. 59

In Conclusion No. 59, issued in 1989, the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children, particularly in regards to access to education.¹⁵ It also drew special attention to the needs of unaccompanied minors, emphasizing the need to develop legal methods to protect them from irregular adoption and forced recruitment into armed forces.

UNHCR ExCom Conclusion No. 107

The Executive Committee issued Conclusion No. 107 on Children at Risk in 2007. It recognizes that children should be prioritized in receiving refugee protection and assistance.¹⁶ It also calls for UNHCR, Member States, and others to identify children at heightened risk due to the wider protection environment and individual circumstances, and to work to prevent such heightened risks.

2.4.2 UNHCR Policies and Guidelines

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

Policy on Refugee Children

UNHCR's *Policy on Refugee Children*, issued in 1993, points out that children's needs are different from adults' due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm.¹⁷ Thus, governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group.

Refugee Children: Guidelines on Protection and Care

¹⁴ See section on Convention on the Rights of the Child, above.

¹⁵ UNHCR, Conclusion on Refugee Children, 13 Oct. 1989. No. 59 (XL), 1989.

¹⁶ UNHCR, Conclusion on Children at Risk, 5 Oct. 2007. No. 107 (LVIII), 2007.

¹⁷ UNHCR, Policy on Refugee Children, EC/SCP/82 (August 6, 1993).

In 1994 UNHCR issued *Refugee Children: Guidelines on Protection and Care*, incorporating international norms relevant to the protection and care of refugee children.¹⁸ These Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR's standards. For the survival and development of children, UNHCR endorses a "triangle of rights:" the "best interests" rule, a policy of non-discrimination towards all refugee children, and age-appropriate participation of children in issues affecting their lives.

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

In 1997, UNHCR published the *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*.¹⁹ The purpose of these Guidelines is threefold:

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

The Guidelines emphasize that all children are "entitled to access to asylum procedures, regardless of their age," and that the asylum process should be prioritized and expedited for children's cases. UNHCR recommends that adjudicators take into account "circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability." It also notes that children may face child-specific persecution, such as recruitment of child soldiers, forced labor, trafficking of children for prostitution, and female genital mutilation. Finally, UNHCR recommends that where there is "doubt as to the veracity of the account presented or the nature of the relationship between caregiver and child,...the child should be processed as an unaccompanied child."

UNHCR Guidelines on Determining the Best Interests of the Child

The *Best Interests Determination (BID) Guidelines* set forth the formal process that UNHCR has established to determine the best interests of refugee children confronted with major decisions regarding their care or durable solutions, such as the possibility of voluntary repatriation, local integration, or resettlement.²⁰ UNHCR commits to undertake

¹⁸ UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994).

¹⁹ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997).

²⁰ UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008.

a BID in three contexts: (1) identification of the most durable solution for unaccompanied and separated refugee children; (2) temporary care decisions for unaccompanied and separated refugee children in certain exceptional circumstances; and (3) decisions which may involve separating a child against his or her will from parents.

UNHCR'S Guidelines on International Protection No. 8: Child Asylum Claims

In 2009 UNHCR issued its *Guidelines on International Protection No. 8*, addressing child asylum and refugee claims.²¹ The Guidelines provide substantive and procedural guidance on making determinations on children's claims, highlighting the specific rights and protection needs of children during this process and also addressing the application of the exclusion clauses (bars to protection) to children. Recommending a child-sensitive interpretation of the 1951 Refugee Convention, the Guidelines point out that the definition of a refugee has traditionally been interpreted in light of adult experiences, which has led to incorrect assessments of the refugee and asylum claims of children.

UNHCR's Framework for the Protection of Children

Reflecting the priority it places on safeguarding the wellbeing of children of concern and an evolution in its policy and practice, in 2012 UNHCR published *A Framework for the Protection of Children*.²² It focuses on prevention and response to child abuse, neglect, violence and exploitation, building on UNHCR's policy and guidelines on the protection of children and relevant Executive Committee conclusions.

3 U.S. LAW

3.1 Definition of "Child"

The definition of the term "child," "minor," or "juvenile" for immigration purposes may differ depending on the context in which it is used.

- Under the CRC, eighteen years has been almost universally recognized as the legal age of adulthood.²³ Most laws in the United States recognize eighteen-year-olds as legal adults.²⁴ Under federal immigration law, however, there are a number of different statutory and regulatory provisions that govern specific contexts and set

²¹ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08.

²² UNHCR, *A Framework for the Protection of Children*, 26 June 2012.

²³ CRC, Article 1.

²⁴ Child Welfare Information Gateway, *Determining the Best Interests of the Child: Summary of State Laws*, U.S. Department of Health and Human Services' Administration for Children and Families, Washington, DC, 2005.

out specific definitions and categories of children.

Following are some of the different contexts and definitions:

- The INA defines a “child” as “an unmarried person under twenty-one years of age”²⁵ for purposes of eligibility for most immigration benefits under the INA, including derivative refugee or asylum status. In the case of a derivative, the child would not be the principal applicant, but rather would have derivative status based on a parent’s refugee or asylum claim. *See* Derivative versus Independent Status, below.
 - Refugee and IO officers adjudicate Refugee/Asylee Relative Petitions (Form I-730) for children up to age twenty-one.²⁶
 - An unmarried child of a principal applicant granted asylum may receive a derivative grant of asylum if the child was under twenty-one at the time the application was filed.²⁷
- For purposes of determining admissibility, “juvenile” is a term used in INA section 212 when discussing exceptions to criminal responsibility for persons under eighteen years of age.²⁸
- DHS regulations also use the term “juvenile” to describe an individual under eighteen for purposes of determining detention and release and parental notification.²⁹
- DHS regulations use the term “minor under the age of 14” for the following purposes:
 - A parent or legal guardian may sign for a person who is under fourteen (8 C.F.R. 103.5a(c)).
 - Service of any DHS document shall be made upon the person with whom the minor under fourteen lives, and if possible upon a near relative, guardian, committee, or friend (8 C.F.R. 103.5a(c) and 236.2).
- The Homeland Security Act of 2002³⁰ introduced a new term – “unaccompanied alien child” (or “UAC”) – to define a child who has no lawful immigration status in the United

²⁵ INA § 101(b)(1); INA § 101(c)(1).

²⁶ INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208; Memorandum from Joseph E. Langlois, Director, INS Asylum Division, to Asylum Office Directors, et al., H.R. 1209 – Child Status Protection Act, (HQIAO 120/12.9) (7 August 2002).

²⁷ *Id.*

²⁸ INA § 212(a)(2)(A)(ii).

²⁹ *See* 8 C.F.R. § 236.3.

³⁰ Homeland Security Act of 2002, Section 462, 6 U.S.C. § 279(g)(2).

States, has not attained eighteen years of age, and has no parent or legal guardian in the United States available to provide care and physical custody. This definition is discussed further in the Asylum Supplement. The Asylum Division has initial jurisdiction over the asylum claims filed by UACs, including those who are in immigration court proceedings.³¹

- When adjudicating children's refugee and asylum applications, the following definitions are helpful to know. For the Asylum Division, a "minor principal applicant"³² is a principal applicant who was under eighteen years of age at the time of filing an asylum application. In the refugee context, such applicants are generally referred to as unaccompanied refugee minors (URMs) or Unaccompanied or Separated Children (UASCs).

You will review all refugee and asylum claims for principal applicants under eighteen using this Training Module. However, for purposes of derivative determinations, this Training Module applies to all individuals under the age of twenty-one.

Barring unusual circumstances, under USCIS procedures and policies, children age fourteen and above are able and expected to sign their own applications and other documents. If available, a parent signs on behalf of children younger than fourteen.³³

3.2 Derivative versus Independent Status

Much of this module will focus on children applying independently as principal applicants for refugee or asylum status. Many will be unaccompanied or separated children. As principal applicants, they must establish that they are refugees. However, officers will also adjudicate claims in which a parent is the principal applicant and a child has derivative status.

Under the statute and DHS regulations, the child of a refugee or asylee is usually afforded the same status as his or her parent,³⁴ unless the child is ineligible for protection.³⁵

³¹ See Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, (HQRAIO 120/9.7) (14 August 2007).

³² Although most minor principal applicants are also UACs, some are accompanied by a parent or legal guardian (or have lawful immigration status in the United States) but are filing independently.

³³ 8 C.F.R. § 103.2

³⁴ 8 C.F.R. §§ 207.7 and 208.21(a).

³⁵ For additional information, see RAIO Training modules, *Persecutor Bar, Grounds of Inadmissibility, and National Security*.

You should follow the guidance covered in this Training Module when interviewing child beneficiaries. While the guidance covered in this Training Module is particularly relevant for children who raise independent claims, the procedural sections of this Training Module are useful for *all* cases involving children and young adults.

Refugee and International Operations Officers may adjudicate Refugee/Asylee Relative Petitions (Form I-730) filed for children outside of the United States who are derivative beneficiaries of refugees or asylees. This topic will be covered separately during the Refugee Division Officer Training Course. Asylum Officers will also adjudicate claims in which a child is included as a derivative applicant on a parent's claim.

While derivative status is statutorily available to children and spouses, there is no statutory or regulatory right of parents to be eligible for derivative status in the refugee and asylum context. The parent applicant must establish eligibility in his or her own right.³⁶

Children Who Turn Twenty-One Years of Age before the Interview

Under the INA, as amended by the Child Status Protection Act of 2002 (CSPA), an unmarried child of a principal applicant may qualify as a beneficiary on a petition or as a derivative on an application if the child was under twenty-one at the time of filing the petition or application.³⁷ Children who turn twenty-one after the date of filing, but before the adjudication are not ineligible for beneficiary or derivative status on that basis.

For refugee and asylum purposes, there is no requirement that the child have been included as a dependent on the principal applicant's application at the time of filing. The child must be included prior to the adjudication.

If, however, the child turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless the petition or application was pending on August 6, 2002.³⁸

Children Who Turn Twenty-One Years of Age before Adjustment

The CSPA also amends INA section 209(b)(3) to allow dependents who are the subjects of pending adjustment petitions who turn twenty-one on or after August 6, 2002, to

³⁶ *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

³⁷ INA §§ 201(f); 207(c)(2)(b); 208(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208. See also Memorandum from Joseph E. Langlois, Director, INS Asylum Division, to Asylum Office Directors, et al., *H.R. 1209 – Child Status Protection Act*, (HQIAO 120/12.9) (7 August 2002).

³⁸ William Yates, USCIS Associate Director for Operations, *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al, (Washington, DC, 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff, *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC, 23 July 2003).

continue to be classified as children for adjustment purposes (which avoids the need to file an independent petition).³⁹

As noted above, if an individual turned twenty-one prior to August 6, 2002, he or she is not eligible for continued classification as a child unless an application was pending with then-INS on August 6, 2002. While the Domestic Operations Directorate of USCIS issued revised guidance on the CSPA for family and employment-based petitions, which eliminated the requirement for a pending application on the CSPA effective date, this guidance memo does not apply to applications for children of refugees and asylees.⁴⁰ As a result, a dependent of a refugee or asylee who turned twenty-one years of age and whose principal's adjustment petition was adjudicated prior to the enactment of the CSPA lost his or her ability to adjust as a dependent of the principal applicant. While he or she did not lose the refugee or asylum status already granted, the former derivative does not gain the ability to adjust to legal permanent resident status as a principal applicant. In such situations, a *nunc pro tunc* (retroactive approval) procedure is permitted, although the need for such an adjudication will become increasingly rare as more time passes.

Child Applying as Derivative of One Parent in Refugee and Asylum Claims

If a child seeking refugee or asylum status is with one parent, USCIS does not need a parental release from the absent parent. However, in some circumstances for overseas cases, the Resettlement Support Center does require such a release based on the laws or regulations of the host country. Such a requirement does not affect the USCIS adjudication. See RAD Supplement regarding married children.

4 CHILD DEVELOPMENT

4.1 General Considerations

The needs of a child applicant are best understood if the applicant is regarded as a child first and an applicant second.⁴¹ Child applicants will generally approach the interview and adjudication process from a child's perspective, not as applicants for a legal status before a government official.

³⁹ INA § 209(b)(3) as amended by the Child Status Protection Act of 2002, P.L. 107-208.

⁴⁰ William Yates, USCIS Associate Director for Operations, *The Child Status Protection Act – Children of Asylees and Refugees*, Memorandum to Regional Directors, et al, (Washington, DC, 17 August 2004), pp.1-2; Michael Petrucelli, BCIS Deputy Director and Chief of Staff, *Processing Derivative Refugees and Asylees under the Child Status Protection Act*, Memorandum to Overseas District Directors (Washington, DC, 23 July 2003).

See also USCIS Asylum Division, Affirmative Asylum Procedures Manual; "INS Discusses Adjustment of Status Issues For Children of Asylees," 69 Interpreter Releases 847 (1992).

⁴¹ Jacqueline Bhabha and Wendy A. Young, "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," 75 Interpreter Releases 757, 760 (1 June 1998). (hereinafter Bhabha and Young)

Most of the information in this section is taken from the Lutheran Immigration and Refugee Service (LIRS) publication, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development*.⁴² This information, however, is applicable to any interview with a child.

Children's ages and stages of development affect their ability to apply for refugee and asylum status or other benefit and to articulate their claim and respond effectively in an interview.

4.2 Developmental Stages

Children worldwide develop physical, mental, and emotional capacity in universal stages, although culture and environment affect the outward display of the child's abilities and may cause delays in growth. According to these universal stages:

Children ages five and younger are fully dependent on their caretakers in all realms.

Between ages six and twelve, children begin to gain independent skills and the emotional, mental, and physical capacity to manage some life issues on their own.

At about age twelve, children begin to develop increasing ability to navigate on their own emotionally, physically, and mentally.⁴³

Adverse circumstances may delay a child's development, sometimes permanently. Severe malnutrition or illnesses affect growth if they occur at crucial developmental stages. For example, a child lacking nutrition at certain stages may miss developmental milestones. We may see this effect in stunted growth or other outward physical manifestations.⁴⁴

While general developmental stages have been studied for many years, new techniques that were developed during the 1990's now help researchers understand much about brain development that was poorly understood previously. The National Institute of Mental Health (NIMH) has funded longitudinal brain development studies from early childhood through young adulthood using non-invasive techniques.⁴⁵

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

⁴² LIRS, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (June 1998) hereinafter LIRS.

⁴³ Child Development Institute, "Stages of Social-Emotional Development In Children and Teenagers."

⁴⁴ *Id.*

⁴⁵ National Institute of Mental Health, *Brain Development During Childhood and Adolescence Fact Sheet*, Science Writing, Press & Dissemination Branch, 2011.

4.3 Factors that Influence Development

At each stage in development, numerous factors interact to shape the child's personality and abilities.⁴⁶ Factors influencing development are:

- chronological age;
- physical and emotional health;
- physical, psychological, and emotional development;
- societal status and cultural background;
- cognitive processes;
- educational experience;
- language ability; and
- experiential and historical background.

4.4 Factors that Accelerate or Stunt Development

Some children may seem to be much older or much younger than their chronological age. A number of environmental and experiential factors can stunt or accelerate dramatically the development of a child.⁴⁷ They include, but are not limited to:

- chaotic social conditions;
- experience with forms of violence;
- lack of protection and caring by significant adults;
- nutritional deficits;
- physical disabilities; and
- mental disabilities.

4.5 Effects of Stress and Violence

⁴⁶ LIRS, pp. 6-7.

⁴⁷ LIRS, p. 7.

Children who experience stress or emotional disturbances are more severely affected in their ability to reason or to control impulses than children who do not have such experiences.

Children who have been separated from parents and other traditional caretakers, even in non-violent situations, may be so severely traumatized that their mental and emotional development is delayed. When children are exposed to violence and war even while with protective adults, all aspects of their development are affected. If children are unprotected by parents or other competent adults during such situations, they are profoundly affected. Children who witness their parents or other caretakers harmed or killed are themselves deeply harmed. Children who are forced to harm others are also profoundly traumatized.⁴⁸

4.6 Culture and Development

Culture affects the appearance of maturity of children in complex ways. The norms of the group determine the type of education and productive work a child participates in or whether the child remains at home or spends periods with groups of youth. Many other factors determine how various developmental stages are expressed. Additionally, children's development is interrupted by the factors that caused them to flee their homes.⁴⁹

Children may act younger than their age if they are from a culture in which deference and respect to adults is a valued norm. They may, therefore, develop or express independent opinions only after reaching a culturally specified older age.

Example

Among Bhutanese refugee families, even adult children who continue to live with their parents are not expected to form independent political or social opinions but are expected to follow the guidance of their father who speaks for the whole family. When a young man marries and moves out of his father's home, he is expected to begin interacting with other men and offer opinions on community matters.

⁴⁸ Graça Machel, *UN Study on the Impact of Armed Conflict on Children*, UN GAO A/51/306 (3 August 1996); UN Children's Fund (UNICEF), *Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World*, (April 2009).

⁴⁹ Stuart L. Lustig, MD, MPH, et al., *Review of Child and Adolescent Refugee Mental Health: White Paper from the National Child Traumatic Stress Network Refugee Trauma Task Force*, Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS), Boston, MA, 2003.

Children may act older than their chronological age if they are the oldest child in a family and have been expected to manage complex household obligations, such as caring for the safety of younger children.

Example

A Congolese refugee girl of fourteen was culturally expected to assume the role of head of family after the death of her parents. She managed to survive and escape with two younger siblings. The younger siblings exhibited age-appropriate development of self-care and independence. The fourteen year old, on the other hand, because of her experience as caretaker, appeared to be a much older teen.

4.7 Preconceptions

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

- **All governments are corrupt**

The child may be arriving from a country where he or she has already had extensive interaction with or knowledge of a corrupt government.⁵⁰ Such a child may assume that the fraud, abuse of authority, and mistreatment of the citizens he or she witnessed in the country of origin is just as pervasive in the United States.

- **Others still at home will be harmed**

Especially when a child comes from a country in which informants and their family members are harmed, the child may not understand that the U.S. government has no interest in harming, or doing anything to bring about the harm of, his or her relatives still in the country of origin.⁵¹

- **He or she should feel guilty for fleeing**

It is not uncommon for any refugee or asylum applicant to experience "survivor's guilt" for having fled to a country of asylum, especially when family members were left behind.⁵²

- **Others will be privy to the testimony**

⁵⁰ LIRS, p. 35.

⁵¹ LIRS, p. 36.

⁵² LIRS, p. 36.

Many young people do not understand that in the setting of interviews conducted by RAIO officers, confidentiality protections generally prevent USCIS from sharing information with others without the applicant's consent. This misconception is most likely to hinder an interview when an applicant feels shame as a result of his or her mistreatment, most commonly in cases of sexual abuse.

You must earn the trust of the child applicant in order to dispel these preconceptions and put the applicant at ease.⁵³

5 PROCEDURAL CONSIDERATIONS

The majority of children who appear before you do so as a dependent of a parent who has filed an application or petition for an immigration benefit. However, this Training Module provides useful guidance for all individuals under the age of twenty-one and regardless of whether they are derivative or independent applicants.

While this Training Module is particularly relevant for children who raise independent refugee or asylum claims, the procedural sections may be useful for all cases involving children and young adults. Although young people between the ages of eighteen and twenty-one will be interviewed much in the same manner as adults, you should bear in mind that an applicant whose claim is based on events that occurred while under the age of eighteen may exhibit a minor's recollection of the past experiences and events.

5.1 Officers in the RAIO Directorate

All officers in the RAIO Directorate are trained on interviewing children and adjudicating their claims in the event that they are called upon to interview a child. It is in the child's best interests to be interviewed by an official who has specialized training in children's claims. To the extent that personnel resources permit, RAIO should attempt to assign officers with relevant background or experience to interview children.

5.2 Interview Scheduling

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

5.3 USCIS Initial Jurisdiction for Unaccompanied Alien Children's Asylum Cases

⁵³ See section 6, *Interview Considerations*.

For asylum procedural considerations, see ASM Supplement – Procedural Considerations.

6 INTERVIEW CONSIDERATIONS

Child applicants may be less forthcoming than adults and may hesitate to talk about past experiences in order not to relive their trauma. RAIO has designed the following procedures with children's behavior and cognitive ability in mind to help you interact more meaningfully with children during an interview.

6.1 Presence of a Trusted Adult at the Interview

It is usually appropriate for a trusted adult to attend an interview with the minor applicant in order to establish the interview conditions most likely to elicit a full story.⁵⁴ A child's lack of experience in talking with government officials can make testifying difficult, particularly when discussing traumatic events. A trusted adult is a support person who may help to bridge the gap between the child's culture and the environment of a USCIS interview. The function of the adult is not to interfere with the interview process or to coach the child during the interview, but to serve as a familiar and trusted source of comfort. As appropriate, you may allow the adult to provide clarification, but you should ensure that those children able to speak for themselves are given an opportunity to present the claim in their own words.

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

When conducting an interview of a child in the presence of an adult, you should assess whether the child is comfortable speaking freely in front of the adult. In order to ascertain the child's level of comfort with the adult, you may initially bring the child into the interview room alone, and ask if the child would like for the accompanying adult to be present. This approach will generally work best with adolescents. Where warranted, you may additionally ask the child at the end of the interview if he or she has anything to add in private. If at any point during the course of the interview you determine that the child is uncomfortable or afraid of the adult, you should continue the interview without that person. Given concerns regarding human trafficking, particularly in children, attention to the nature of the relationship between the child and the adult is particularly important.

⁵⁴ See UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: 1994) p. 102; and RAIO Training Module, *Interviewing - Introduction to the Nonadversarial Interview*, Sec.5.5: "In some interviews the applicant has another person present. In the case of children, this may be a "trusted adult" who participates in order to help the child feel at ease."

As appropriate and with the consent of the child, you are encouraged to interview the trusted adult, if any, in order to confirm his or her relationship to the child, any guardianship arrangement, and the adult's legal authority to speak on behalf of the child.⁵⁵ The adult may also have information about parental knowledge of and consent to the application. The trusted adult may also be able to provide information on the child's claim where the child's age at the time of harm or interview prevents him or her from fully detailing events. Where inconsistencies arise between the applicant's and the adult's testimony, an opportunity must be given to the child to reconcile inconsistencies apparent at the interview. Note that it is not a requirement that a witness or trusted adult be present at the interview.

6.2 Guardianship, Parental Knowledge, and Consent

If a child appears at the interview without a parent or guardian, you should inquire into the location of the child's parents, and whether the parents are aware of the child's whereabouts and that the child has applied for an immigration benefit.⁵⁶

You should elicit information about issues of guardianship and parental knowledge of and consent to the application. Questions of guardianship may be particularly important for unaccompanied minors because whether or not there is a parent or legal guardian informs your decision of whether to categorize the applicant as an unaccompanied minor or unaccompanied alien child (in the asylum context) or unaccompanied refugee minor (in the refugee context). Attention must be paid to the child's capacity to apply as a principal applicant, the parents' knowledge of the child's application, and the identity and trustworthiness of the guardian, if any. Additionally, the information you elicit is useful in identifying any potential conflict of interest and informing policy-making.

Below are questions and issues that you should take into account when conducting an interview with a minor principal applicant. These questions provide a general framework for exploration of issues of guardianship and parental knowledge and consent. Interview notes should reflect the below-requested information. A minor principal applicant's inability to demonstrate a guardianship arrangement or parental knowledge and consent does not foreclose the adjudication or approval of the application. If there is a concern regarding parental notification and confidentiality, or a concern for the child's welfare and/or safety, please contact your division's Headquarters for further guidance.

- With whom is the child living?

⁵⁵ See Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., *Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS*, (HQRAIO 120/9.7) (14 August 2007).

⁵⁶ *Id.*

- Did anyone accompany the child to the interview?
- Is there a guardianship arrangement (for purposes of the unaccompanied minor definition, guardianship refers to a formal – legal/judicial – arrangement)?
- If there is an adult caregiver but not a legal guardian, what arrangements has the adult made to provide for the child?
- Is there one or more living parent?
- Do the parents know that the child is applying for an immigration benefit?

6.3 Conducting a Non-Adversarial Interview

Although all interviews with child applicants are to be conducted in a non-adversarial manner, it is crucial when interviewing children that the tone of the interview allows the child to testify comfortably and promotes a full discussion of the child's past experiences.⁵⁷ Research into child development and particularly brain and cognitive development has shed light on obstacles to children's ability to encode and recall information and best practices that help overcome those obstacles.⁵⁸

In many cases, girls and young women may be more comfortable discussing their experiences with female officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation.⁵⁹ To the extent that personnel resources permit, offices should have female officers interview such applicants.

6.4 Working with an Interpreter

Interpreters play a critical role in ensuring clear communication between you and the child, and the actions of an interpreter can affect the interview as much as those of an officer.⁶⁰ As in all interviews, you should confirm that the child and the interpreter fully understand each other. You should also confirm that the child understands the role of the interpreter. This is particularly important in cases where the interpreter does not have the child's best interests at heart, such as when there is a possibility that the private

⁵⁷ 8 C.F.R. § 208.9(b).

⁵⁸ For additional information, see *European Asylum Curriculum*, Module 6.1 "Interviewing Children," May 2011 (Unit 3.2 discusses the Dialogical Communication Method); and Michael E. Lamb, et al., "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol," *Child Abuse & Neglect* 31, no.11-12, Nov.-Dec. 2007, pp. 1201-1231.

⁵⁹ See Phyllis Coven, INS Office of International Affairs, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (Gender Guidelines), Memorandum, May 26, 1995, p. 5.

⁶⁰ For additional information, see RAI0 module, *Interviewing - Working with an Interpreter*.

interpreter is part of a trafficking ring. In cases where the child appears to be uncomfortable with the interpreter, or where the interpreter does not appear to be interpreting correctly, you should stop the interview and reschedule with a different interpreter.

The identity of the interpreter is especially significant when children have been victims of sexual violence.⁶¹ In such situations, or when children have suffered abuse within the family, children may be very reluctant to share such information if the interpreter is of the opposite gender or if the interpreter is a parent, relative, or family friend. Every effort should be made to make sure that the child is comfortable testifying through the interpreter.

6.5 Building Rapport

The child may be reluctant to talk to strangers due to embarrassment or past emotional trauma.⁶² You may have to build rapport with the child to elicit the child's claim and to enable the child to recount his or her fears and/or past experiences. Where the child finds you friendly and supportive, the child is likely to speak more openly and honestly.

You must be culturally sensitive to the fact that applicants are testifying in a foreign environment and may have had experiences leading them to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception.⁶³ This fear may cause some children to be initially timid or unable to fully tell their story.⁶⁴

You may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed, such as general interests, family, pets, hobbies, and sports. You may wish to ask family members or the attorney about the child's interests before the interview to ease conversation. This rapport-building phase also permits you to assess the child's ability to answer questions.

Once the child appears comfortable, you should make a brief opening statement before beginning the formal interview.⁶⁵ You can explain in very simple terms in the opening statement what will happen during the interview and the roles that you, the applicant,

⁶¹ See Gender Guidelines, p. 5; and RAIO Training module, *Interviewing - Working with an Interpreter*.

⁶² LIRS, p. 45.

⁶³ UNHCR Handbook, para. 198.

⁶⁴ LIRS, p. 38; Nancy W. Perry and Larry L. Teply, "Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys," *Creighton Law Review* (vol. 18, 1985), pp. 1369-1426, reprinted in Jean Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (Charlottesville, Virginia: Lexis, 1997), pp. 584-585 (hereinafter Perry and Teply).

⁶⁵ For an example of an opening statement to be used in interviews of children, see ASM Supplement – Sample Opening Statement for Children.

interpreter, and/or attorney will play. Knowing what to expect will help ease the child applicant's anxiety.⁶⁶

The tone of the opening statement is intended to build trust and to assure the child that you will be asking questions to help you understand his or her claim. The statement gives children permission to tell you when they do not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that, unless the child consents, embarrassing or traumatic events from the past generally will not be shared with others, including family members, friends, or individuals from their home country.⁶⁷

6.6 "Reading" the Applicant

During the interview you must take the initiative to determine whether the child understands the process and the interview questions. You should watch for non-verbal cues, such as puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. While these behaviors may signal something other than lack of comprehension, they may also signal that a child is confused.⁶⁸ In such circumstances, you should pause, and if no appropriate response is forthcoming, rephrase the question.

Correspondingly, you should expect the child to be attuned to your body language. Children rely on non-verbal cues much more than adults to determine whether they can trust the person.⁶⁹ You should be careful neither to appear judgmental nor to appear to be talking down to the child.

6.7 Explaining How to Respond to Questions

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

If necessary, you may explain to the child how to use the "I don't know" response.⁷⁰

Example

⁶⁶ LIRS, pp. 45-46.

⁶⁷ See 8 C.F.R. § 208.6 on disclosure to third parties.

⁶⁸ LIRS, pp. 46-47.

⁶⁹ *Id.* at 27; Perry and Teply, p. 1380.

⁷⁰ *Id.* at 50.

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

Child: I don't know.

This approach helps to ensure that the child understands when to provide an "I don't know" response. This approach could also be used to let the child know that it is also fine to respond "I don't understand" when a question is not clear.

6.8 Reassuring the Applicant

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, you should offer verbal reassurances. You may empathize with the child by saying, "I know that it's difficult to talk about this, but it is important for me to hear your story."⁷¹ Additionally, a simple expression of interest (e.g., "I see" or "uh-huh") may be enough for the child to continue.

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

- Note, however, that it is important not to interrupt a child in the middle of a narrative response. See General Rules below in section on Child-Sensitive Questioning and Listening Techniques.

6.9 Taking Breaks

You should take the initiative in suggesting a brief recess when necessary. Sometimes a child's way of coping with frustration or emotion is "to shut down during the interview, to fall into silence, or respond with a series of 'I don't know' and 'I don't remember' responses."⁷² Many children may not take the initiative to request a recess if needed. A young child, for example, may stop answering questions or cry rather than interrupt you with a request to go to the bathroom or rest. The responsibility may fall to you to monitor the child's needs.

6.10 Concluding the Interview

⁷¹ Perry and Tepley, p. 1381, citing John Rich, MD. *Interviewing Children and Adolescents* (London: MacMillan & Co., 1968), p. 37.

⁷² Symposium: Child Abuse, Psychological Research On Children As Witnesses: Practical Implications Forensic Interviews And Courtroom Testimony, 28 PAC. L.J. 3 (1996), p. 70, (hereinafter Symposium).

As the interview draws to a close, you should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child's sense of security at the conclusion of the interview.⁷³ As with all cases, you should ask the child if he or she has any final questions or anything to add and inform the child of the next steps in the application process.

6.11 Child-Sensitive Questioning and Listening Techniques

Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. Your questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication. A child's mental development and maturity are important considerations when determining whether the child has satisfied his or her burden to establish eligibility for an immigration benefit, including that he or she meets the definition of a refugee.⁷⁴ In order to communicate effectively with a child applicant, you must ensure that both the officer and the child understand one another.

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

Example

The phrase "staying awake late" may indicate after 10 p.m. or later to you, while the phrase could mean early evening for a child.⁷⁵

Children's perceptions of death can cloud their testimony concerning such matters. Children may not know what happened or may feel betrayed by an adult who has died, and some may not understand the permanence of death.⁷⁶ Even older children may not fully appreciate the finality of death until months or years after the event.

Example

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

⁷³ UNHCR, *Interviewing Applicants for Refugee Status* (1995), p. 48.

⁷⁴ *UNHCR Handbook*, para. 214.

⁷⁵ *Perry and Teply*, p. 1383.

⁷⁶ *Perry and Teply*, p. 1419, citing R. Kastenbaum. "The Child's Understanding of Death: How Does it Develop?" *Explaining Death to Children* (E. Grollam, ed. 1967), p. 98.

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

GENERAL INTERVIEWING AND LISTENING RULES	
You should endeavor to:	
1	<ul style="list-style-type: none"> • Use short, clear, age-appropriate questions.⁷⁷ • Example: "What happened?" as opposed to "What event followed the arrest?"
2	<ul style="list-style-type: none"> • Avoid using long or compound questions.⁷⁸ • Example: "What time of year did it happen?" and "What time of day did it happen?" as opposed to "What time of year and what time of day did it happen?"
3	<ul style="list-style-type: none"> • Use one- or two-syllable words in questions; avoid using three- or four-syllable words.⁷⁹ • Example: "Who was the person?" as opposed to "Identify the individual."
4	<ul style="list-style-type: none"> • Avoid complex verb constructions.⁸⁰ • Example: "Might it have been the case....?"

⁷⁷ Symposium, p. 40.

⁷⁸ Ann Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (Washington, DC: ABA Center on Children and the Law, 1994), pp. 95-98 reprinted in LJRS, p. 63. (hereafter Walker); and Symposium, p. 40.

⁷⁹ Symposium, p. 40 (note that this technique is generally more important when conducting the interview in English without an interpreter).

⁸⁰ Symposium, p. 40.

5	<ul style="list-style-type: none"> • Ask the child to define or explain a term or phrase in the question posed in order to check the child's understanding.⁸¹
6	<ul style="list-style-type: none"> • Ask the child to define or explain the terms or phrases that he or she uses in answers, and then use those terms. • Example: If a child says that his father "disappeared," ask him what he means by "disappeared," and then use that term in questions involving that event.
7	<ul style="list-style-type: none"> • Use easy words, not complex ones.⁸² • Example: "Show," "tell me about...," or "said" instead of "depict," "describe," or "indicate."
8	<ul style="list-style-type: none"> • Tolerate pauses, even if long.⁸³
9	<ul style="list-style-type: none"> • Ask the child to describe the concrete and observable, not the hypothetical or abstract.⁸⁴
10	<ul style="list-style-type: none"> • Use visualizable, instead of categorical, terms.⁸⁵ • Example: Use "gun," not "weapons."
11	<ul style="list-style-type: none"> • Avoid using legal terms, such as "persecution."⁸⁶ • Example: Ask, "Were you hurt?" instead of "Were you persecuted?" • Example: Explain, "Asylum is a way to stay in the United States if

⁸¹ Walker, reprinted in LIRS, p. 63; Symposium, p. 40.

⁸² Walker, reprinted in LIRS, p. 63.

⁸³ Perry and Teply, p. 1380.

⁸⁴ Symposium, p. 40.

⁸⁵ *Id.*

⁸⁶ *Id.*

	there are people who hurt or want to hurt [you] back home and [you are] afraid of returning." ⁸⁷
12	<ul style="list-style-type: none"> • Avoid using idioms. • Idioms are phrases that mean something other than what the words actually say. Such phrases could be difficult for both the interpreter and the child applicant. • Example: Ask, "Do you understand?" not, "Is this over your head?"
13	<ul style="list-style-type: none"> • Use the active voice instead of the passive when asking a question.⁸⁸ • Example: Ask, "Did the man hit your father?" instead of "Was your father hit by the man?"
14	<ul style="list-style-type: none"> • Avoid front-loading questions.⁸⁹ • Front-loading a question places a number of qualifying phrases before asking the crucial part of the question. • Example: "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say...?"
15	<ul style="list-style-type: none"> • Keep each question simple and separate.⁹⁰ • Example: The question, "Was your mother killed when you were 12?" should be avoided. The question asks the child to confirm that the mother was killed and to confirm his or her age at the time of the event.

⁸⁷ Christopher Nugent and Steven Schulman, "Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children," 78 No. 39 INTERPRETER RELEASES 1569, 1575 (2001).

⁸⁸ Symposium, p. 40.

⁸⁹ *Id.*

⁹⁰ LIRS, p. 47.

16	<ul style="list-style-type: none"> • Avoid leading questions. • Research reveals that children may be more highly suggestible than adults and are more likely to answer according to what they think the interviewer wants to hear.⁹¹ Leading questions may influence them to respond inaccurately.
17	<ul style="list-style-type: none"> • Use open-ended questions to encourage narrative responses. • Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background.⁹² Try not to interrupt the child in the middle of a narrative response.
18	<ul style="list-style-type: none"> • Explain any repetition of questions. • Make clear to the child that he or she should not change or embellish earlier answers.⁹³ Explain that you repeat some questions to make sure you understand the story correctly. "Repeated questions are often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired."⁹⁴
19	<ul style="list-style-type: none"> • Never coerce a child into answering a question during the interview.⁹⁵ • Coercion has no place in any USCIS interview. For example, you may never tell children that they cannot leave the interview until they answer your questions.
20	<ul style="list-style-type: none"> • Accept that many children will not be immediately forthcoming about events that have caused great pain.

⁹¹ *Id.* at 26; Perry and Teply, pp. 1393-1396.

⁹² LIRS, p. 47.

⁹³ Walker, reprinted in LIRS, p. 64; Symposium, p. 23.

⁹⁴ Walker, reprinted in LIRS, p. 64.

⁹⁵ Symposium, p. 41.

7 CREDIBILITY CONSIDERATIONS

You must be sensitive to the applicants' cultural and personal experiences irrespective of the applicant's age. This becomes critical when assessing whether testimony is credible.⁹⁶ The task of making an appropriate decision when interviewing children, including making a credibility determination, requires that you be aware of the following issues involving the testimony of children.

7.1 Detail

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

For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults.⁹⁷ More probing and creative questions are required.

Example

The child may not know whether any family members belonged to a political party. You should probe further and ask the child whether his or her parents attended any meetings and when the meetings were held. You should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

Measurements of Time and Distance

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

Example

You should determine the child's ability to count before asking how many times something happened.⁹⁸

⁹⁶ For additional information, see RAIO modules, *Cross-Cultural Communication and Credibility*.

⁹⁷ *Canadian Guidelines*, p. 8.

⁹⁸ *Symposium*, p. 41.

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

Not only is imprecise time and date recollection a common problem for children owing to their cognitive abilities, it can also be a product of their culture.⁹⁹ The western mind typically measures time linearly, in terms of successive – and precise – named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events.

Example

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

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

Examples

Many Guatemalans still use the Mayan calendar of twenty-day months. In certain Asian cultures, a baby is considered to be “one” on his or her date of birth thereby causing, to the western mind at least, a one-year discrepancy between the child’s age and date of birth.

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

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

“I don’t know” Responses

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

Example

⁹⁹ For additional information, see RAI0 module, *Cross-Cultural Communication*.

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

7.2 Demeanor

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

Example

Different cultures view expressions of emotion differently: An individual raised in the United States might question the credibility of a child who, without crying or expressing emotion, is able to retell how his or her parents were killed in front of him. It could be, however, that the child was raised in a culture that deems improper any expression of emotion in front of an authority figure. Trauma, discussed below, may also affect demeanor.

Trauma

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

Any applicant, regardless of age, may suffer trauma that may have a significant impact on the ability of an applicant to present testimony.¹⁰⁰ Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation (emotionally separating oneself from an event). A child may appear numb or show emotional passivity when recounting past events of mistreatment. A child may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by retelling what happened. Inappropriate laughter or long pauses before answering can also be a sign of trauma or embarrassment.

¹⁰⁰ For additional information, see RAIO module, *Interviewing Survivors of Torture*.

These symptoms can be mistaken as indicators of fabrication or insincerity, so it is important for you to be aware of how trauma can affect an applicant's behavior.

Age and Developmental Considerations

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

- the child's age and development at the time of the events
- the child's age and development at the time of the retelling
- the child's ability to recall facts and communicate them

Other Considerations

You may encounter gaps or inconsistencies in the child's testimony. The child may be unable to present testimony concerning every fact in support of the claim, not because of a lack of credibility, but owing to age, gender, cultural background, or other circumstances.¹⁰¹ See section on Detail, above.

You should keep the following in mind:

- the impact of the lapse of time between the events and the retelling
- the difficulty for all individuals in remembering events that took place many years earlier; children who may have been very young at the time of an incident will have greater difficulty in recalling such events
- the needs of children with special mental or emotional issues
- the limited knowledge that children may have of the circumstances surrounding events

Example

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

- the role of others in preparing children for interview

All children have been coached to some degree. Some children may have been coached by a human trafficker or an ill-informed adult to tell a particular story, which the child repeats at the interview in order not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and you should

¹⁰¹ For additional information, see RAO module, *Credibility*; see also Bhabha and Young.

undertake a careful and probing examination of the underlying merits of the child's case.¹⁰² Quite often a child does not intend to deceive when making a fabrication or exaggeration; rather the statement may serve another purpose for the child such as to avoid anticipated punishment, to be obedient to the perceived authority figure (perhaps a legal representative, trusted adult, or you), to please others, or to protect a family member or friend.

7.3 Evidence

In evaluating the evidence submitted to support the application of a child seeking refugee or asylum status, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The *UNHCR Handbook* advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution.¹⁰³ In the concurring opinion to *Matter of S-M-J*, "the benefit of the doubt" principle in asylum adjudications is described thus:

[W]hile the burden of proof is borne by the asylum applicant, our law does not include a presumption that an applicant is unbelievable. If as adjudicators we intentionally or subjectively approach an asylum applicant and presume an individual to be a liar rather than a truth teller, we violate not only our duty to be impartial, but we abrogate the statute and regulations which govern our adjudications.¹⁰⁴

A child, like an adult, may rely solely on credible testimony to meet his or her burden of proof; certain elements of a claim, however, such as easily verifiable facts that are central to the claim, may require corroborating evidence.¹⁰⁵ A child, through his or her advocate or support person, is expected to either produce such documentation or offer a reasonable explanation as to why those documents cannot be obtained. What is reasonable will depend on the child's individual circumstances, including whether or not the child is represented and the circumstances of his or her flight. Additionally, a child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members.

Given the above-noted considerations of issues that may arise in children's cases, all efforts should be made during the interview to present the applicant with adverse information and to give the applicant an opportunity to provide an explanation.

¹⁰² *LIRS*, p. 51.

¹⁰³ *UNHCR Handbook*, para. 219.

¹⁰⁴ *Matter of S-M-J*, 21 I&N Dec. 722, at 739 (BIA 1997) (Rosenberg, L., concurring).

¹⁰⁵ *INA* § 208(b)(1)(B)(ii); see *Matter of S-M-J*, 21 I&N Dec. at 725.

Where adverse information is discovered after the interview, the office should consider scheduling a re-interview in order to give the applicant an opportunity to address the issue. It is inappropriate to rely on adverse information that the applicant has not had an opportunity to address.

Given the difficulties associated with evaluating a child's claim, you should carefully review relevant country conditions information.¹⁰⁶ While the onus is on the child, through his or her advocate or support person, to produce relevant evidence, including both testimony and supporting material where reasonable to expect it, you should also supplement the record as necessary to ensure a full analysis of the claim.¹⁰⁷

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

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

Example

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

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

8 LEGAL ANALYSIS

8.1 Introduction

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

¹⁰⁶ For additional information, see RAIO module, *Country Conditions Research; Matter of S-M-J*, 21 I&N Dec. at 726.

¹⁰⁷ In a 2010 First Circuit case, the diverging views of the majority opinion and the dissenting opinion illustrate how the credibility and persecution determination can be impacted based on whether or not the adjudicator accepts evidence from a myriad of sources in a child's asylum case. *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010), *vacated and remanded by Mejilla-Romero v. Holder*, 614 F.3d 572 (1st Cir. 2010) (expressly citing to the need for the case to be adjudicated under the INS Children's Guidelines on remand).

and places those issues within the context of U.S. and international law and UNHCR guidance.

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

In order to be granted protection, the child applicant must establish that he or she meets the definition of a refugee contained in the Immigration and Nationality Act, irrespective of age.¹⁰⁸ The *UNHCR Handbook* equally states, "[t]he same definition of a refugee applies to all individuals, regardless of their age." Consequently, the best interests principle, while useful for procedural and interview considerations, does not replace or change the refugee definition in determining substantive eligibility.

While the burden of proof remains on the child to establish his or her claim for protection, when assessing eligibility, you must consider the effects of the applicant's age, maturity, ability to recall events, potentially limited knowledge of events giving rise to the claim, and potentially limited knowledge of the application process.¹⁰⁹ You should also attempt to gather as much objective evidence as possible to evaluate the child's claim to compensate for cases where the applicant's ability to testify about subjective fear or past events is limited. Given the non-adversarial nature of the adjudication and the special considerations associated with adjudicating a child's claim, a close working relationship with the child's representative and support person may be necessary to ensure that the child's claim is fully explored.

8.2 Persecution

As in all refugee and asylum cases, you must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant domestic and international law.¹¹⁰

Harm that Rises to the Level of Persecution

Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary."¹¹¹ The harm a child fears or has suffered may still qualify as persecution despite

¹⁰⁸ INA §§ 101(a)(42)(A); 208(a)(2); *UNHCR Handbook*, para. 213.

¹⁰⁹ See section V.F., Evidence, for more on the child's burden of proof; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Geneva: February 1997), p. 10.

¹¹⁰ For additional information, see RAIO modules, *Refugee Definition and Past Persecution*.

¹¹¹ *UNHCR Handbook*, para. 52; see also *Bhabha and Young*, pp. 761-62.

appearing to be relatively less than that necessary for an adult to establish persecution.¹¹² This is because children, dependent on others for their care, are prone to be more severely and potentially permanently affected by trauma than adults, particularly when their caretaker is harmed.

As in all cases, adjudicators should analyze persecution as objectively serious harm that the applicant experienced or would experience as serious harm. The persecution determination relates to the harm or suffering imposed on an applicant by the persecutor, rather than only to the individual acts taken by the persecutor. In the cases of adults, this distinction is not usually determinative. But it can be important in some children's cases. A child who has very limited ability to remember, understand and recount the discrete actions of the persecutor can still establish that those actions imposed on him objectively serious harm that he experienced as serious harm. (Of course, having established persecution, the applicant must also establish that the persecutor imposed the persecution on the applicant on account of a protected ground, which may require additional evidence about the persecutor's actions, whether in the form of the applicant's testimony or some other type of evidence, such as testimony of others or country conditions.)

In *Mendoza-Pablo v. Holder*, the Court of Appeals for the Ninth Circuit considered the harms suffered by Mendoza-Pablo as a part of his family in assessing whether the events of his childhood constituted persecution and concluded that "the BIA's ruling that Mendoza-Pablo did not suffer past persecution because his exposure to persecution was 'second-hand' reflects an incorrect view of the applicable law."¹¹³ The court noted that case law made it clear that an infant can be the victim of persecution, even in the absence of present recollection of the actions and events that imposed the persecution, citing to *Benyamin v. Holder*, 579 F.3d 970, 972 (9th Cir. 2009) (the harm suffered as a result of enduring genital mutilation as a five-day-old infant constitutes persecution).¹¹⁴

Mendoza-Pablo was born in the mountains several weeks premature, shortly after his pregnant mother fled from Guatemalan government forces that had attacked her ancestral village, burned the village to the ground, and massacred its inhabitants, including several of Mendoza-Pablo's close relatives. The court noted that the specific attack was documented in credible human rights sources as part of a "fierce and largely one-sided civil war with insurgent groups predominantly of Mayan ethnicity."¹¹⁵ The newborn child suffered serious harms as a result. The court declined to isolate the initial acts taken by the persecutors in the applicant's village from their direct consequences for the applicant.

¹¹² See Marina Ajdukovic and Dean Ajdukovic, "Psychological Well-Being of Refugee Children," *Child Abuse and Neglect* 17:6, 843 (1993); Betty Pfefferbaum, "Posttraumatic Stress Disorder in Children: A Review of the Past 10 Years," *J. Am. Acad. Child Adolesc. Psychiatry*, 36:11, at 1504-05.

¹¹³ *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 (9th Cir. 2012).

¹¹⁴ *Benyamin v. Holder*, 579 F.3d 970, 972 (9th Cir. 2009).

¹¹⁵ *Mendoza-Pablo*, 667 F.3d at 1310.

Rather it viewed those initial acts as directly imposing a broader set of harms on the applicant (premature birth and early malnourishment with their ongoing health consequences, forced flight and permanent deprivation of home, etc.). These were harms which the persecutors imposed on the applicant and which the applicant did experience, regardless whether he had memory of the initial actions.

In *Jorge-Tzoc v. Gonzales*, the Court of Appeals for the Second Circuit noted, "Jorge-Tzoc was a child at the time of the massacres and thus necessarily dependent on both his family and his community . . . This combination of circumstances [displacement - initially internal, resulting economic hardship, and viewing the bullet-ridden body of his cousin] could well constitute persecution to a small child totally dependent on his family and community."¹¹⁶

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

The Seventh Circuit held in *Kholyavskiy v. Mukasey* that the adjudicator should have considered the "cumulative significance" of events to the applicant that occurred when he was between the ages of eight and thirteen.¹¹⁷ The applicant was subjected to regular "discrimination and harassment [that] pervaded his neighborhood" and his school. The harm included being regularly mocked and urinated on by other school children for being Jewish, being forced by his teachers to stand up and identify himself as a Jew on a quarterly basis, and being called slurs and being physically abused in his neighborhood.

Additionally, the Ninth Circuit held in *Hernandez-Ortiz v. Gonzales*, "[A] child's reaction to injuries to his family is different from an adult's. The child is part of the family, the wound to the family is personal, the trauma apt to be lasting...[I]njuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child."¹¹⁸

Hernandez-Ortiz involved two Mayan brothers from Guatemala who fled to Mexico in 1982 at the ages of seven and nine due to the Guatemalan army's arrival in their village,

¹¹⁶ *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).

¹¹⁷ *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571 (7th Cir. 2008).

¹¹⁸ *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007).

the beating of their father by soldiers in front of their mother, and the flight of their brother who was later killed by the army on suspicion of being a guerilla sympathizer.

Similarly, in *Ordonez-Quino v. Holder*, the First Circuit Court of Appeals considered the case of a Mayan applicant from Guatemala who had been internally displaced as a child when his family's home and lands were destroyed. In 1980, when he was about five or six years old, the applicant was injured in a bombing attack by the Guatemalan military, resulting in near-total hearing loss and developmental delays that affected him throughout his life. The Court disagreed with the BIA's conclusion that this "isolated" incident did not rise to the level of persecution.

Citing the decisions in *Jorge-Tzoc* and *Hernandez-Ortiz*, the Court held that the BIA's decision was not supported by substantial evidence. It noted, "there is no indication that the BIA considered the harms Ordonez-Quino suffered throughout this period from his perspective as a child, or that it took the harms his family suffered into account.... This combination of circumstances – bombing attacks, permanent injury, the loss of a home, the razing of lands, and internal displacement lasting years – could certainly support a finding of past persecution for an adult. Such a string of events even more strongly supports a finding of past persecution for a small child, whose formative years were spent in terror and pain."¹¹⁹

In a concurring opinion to *Kahssai v. INS*, Judge Reinhardt of the Ninth Circuit noted that the effects of losing one's family as a child can constitute serious harm. "The fact that she did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution. For example, when a young girl loses her father, mother and brother-sees her family effectively destroyed-she plainly suffers severe emotional and developmental injury."¹²⁰

While age should be taken into account in making the persecution determination, not all harm to a child, including physical mistreatment and detention, constitutes persecution. In *Mei Dan Liu v. Ashcroft*, the Seventh Circuit upheld a finding by the BIA that harm Liu experienced at the age of sixteen did not constitute persecution.¹²¹ Liu, a Chinese national, had been forcibly taken to the Village Committee Office and interrogated by police and pressured to confess involvement in Falun Gong. On two occasions, police and guards pulled her hair, causing her to cry, and pushed her to the ground. She was detained for

¹¹⁹ *Ordonez-Quino v. Holder*, No. 13-1215, --- F.3d ---, 2014 WL 3623012 (1st Cir. July 23, 2014).

¹²⁰ *Kahssai v. INS*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring opinion).

¹²¹ *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Santosa v. Mukasey*, 528 F.3d 88, 92 (1st Cir. 2008) (upholding the BIA's conclusion that Santosa did not establish past persecution in part because he suffered only "isolated bullying" as a child); cf. *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (suggesting that the hardships suffered by fourteen year old applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father's forcible removal from the home, could be sufficient to constitute past persecution).

two days. The police reported Liu's arrest to her school and she was expelled. One month later, the police searched Liu's home and questioned her and her mother, pushing her mother to the floor.

In holding that the evidence did not compel a finding that Liu suffered harm rising to the level of persecution, the court stated, "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution... There may be situations where children should be considered victims of persecution though they have suffered less harm than would be required for an adult. But this is not such a case. Though a minor, Mei Dan was near the age of majority – she was sixteen – at the time the events took place. Whatever slight calibration this may warrant in our analysis is insufficient to transform her experiences with the Chinese authorities from harassment to persecution."

Types of Harm that May Be Imposed on Children

The types of harm that may be imposed on children are varied. In addition to the many forms of persecution adults may suffer, children may be particularly vulnerable to sexual assault, forced marriage, forced prostitution, forced labor, severe abuse within the family, and other forms of human rights violations such as the deprivation of food and medical treatment.¹²² Cultural practices, such as female genital mutilation (FGM), may constitute persecution. When considering whether a cultural practice will amount to persecution, not only must the adjudicator consider whether the harm is objectively serious enough to rise to the level of persecution, but also whether the applicant subjectively experienced or would experience the procedure as serious harm. For example, if an individual applicant welcomed, or would welcome, FGM as an accepted cultural rite, then it is not persecution to that applicant. Existing case law does not definitively address how to determine whether FGM imposed in the past on a young child, who did not have the capacity to welcome or reject the practice, constitutes past persecution. However, since FGM is clearly serious harm objectively, you should consider FGM under such circumstances as persecution unless the evidence establishes that the child did not experience it as serious harm. An adult applicant's testimony about her own subjective experience as a young child, both of the event itself and her later experiences of the direct consequences, should be given significant weight. If, for example, an adult applicant testifies that she underwent FGM as a child but does not consider it to have been serious harm, then it generally would not be considered persecution. Alternatively, an adult applicant's testimony that she considers the FGM she underwent as a child to be serious harm generally would suffice to establish her subjective experience of persecution.

Fundamental rights of children are listed in the CRC. They include the right to be registered with authorities upon birth and acquire a nationality (Art. 7.1), to remain with

¹²² Bhabha and Young, pp. 760-61.

one's family (Art. 9.1), to receive an education (Art. 28), and to be protected from economic exploitation (Art. 32).¹²³ Where such rights are denied, the impact of these harms on the child must be explored in order to determine whether the violations, considered individually or cumulatively, amount to persecution.

Identification of the Persecutor – Private versus Public Actors

Children's claims may often involve forms of harm that have not traditionally been associated with government actors. Harms such as child abuse, forced labor, or criminal exploitation of children are often inflicted by non-state actors. Where a nexus to a protected ground can be established, the applicant must demonstrate both that the private persecutor has the requisite motivation to persecute and that the government is unable or unwilling to protect the child from the alleged persecutor.¹²⁴

The fact that a child did not seek protection in his or her country of origin does not necessarily undermine his or her case. You must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that you will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to the child's ability to affirmatively seek protection and government efforts to address criminal activities relating to children.¹²⁵

Reasonable explanations for why a child did not seek protection include evidence that:

- The applicant was so young that he or she would not have been able to seek government protection,
- The government has shown itself unable or unwilling to act in similar situations, or
- The applicant would have increased his or her risk by affirmatively

¹²³ Convention on the Rights of the Child.

¹²⁴ See *Matter of V-T-S*, 21 I&N Dec. 792 (BIA 1997); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); see also RAO module, *Persecution*.

¹²⁵ See *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly dangerous for a young female applicant to report father's abuse to government); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting not required if applicant can convincingly establish that doing so would have been futile or have subjected him or her to further abuse); see also *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 653 (8th Cir. 2007) (agreeing with a BIA finding that the applicant was too young to seek government protection); cf. *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (applicant failed to show that government was unwilling or unable to control the harm).

seeking protection.

8.3 Well-founded Fear of Future Persecution

General Considerations¹²⁶

Child-specific issues also arise in determining whether a child has a well-founded fear of persecution.¹²⁷ A well-founded fear of persecution involves both subjective and objective elements, meaning that an applicant must have a genuine fear of persecution and that fear must be objectively reasonable. For children, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. The *UNHCR Handbook* suggests that children under the age of sixteen may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.¹²⁸ “Minors under 16 years of age...may have fear and a will of their own, but these may not have the same significance as in the case of an adult.” You must evaluate the ability of a child to provide information “in the light of his [or her] personal, family and cultural background.”¹²⁹

The Sixth Circuit, in *Abay v. Ashcroft*, acknowledged the Children’s Guidelines’ reference to the *UNHCR Handbook* on the subject of a child’s subjective fear. In *Abay*, the Sixth Circuit court overturned an Immigration Judge’s finding that the nine-year-old applicant expressed only a “general ambiguous fear,” noting that young children may be incapable of articulating fear to the same degree as adults.¹³⁰

On the other hand, a child may express a subjective fear without an objective basis. In *Cruz-Diaz v. INS*, the Fourth Circuit noted that the seventeen-year-old petitioner who had entered the United States two years prior had a subjective fear of persecution but had not established an objectively reasonable fear with a nexus to one of the protected grounds.¹³¹

Personal Circumstances

You should examine the circumstances of the parents and other family members, including their situation in the child’s country of origin.¹³²

¹²⁶ For additional information, see RAIO module, *Well-Founded Fear*.

¹²⁷ *Matter of Acosta*, 19 I&N Dec. 211, 224 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987); see also RAIO module, *Well-Founded Fear*.

¹²⁸ *UNHCR Handbook*, para. 215.

¹²⁹ *UNHCR Handbook*, para. 216.

¹³⁰ *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004).

¹³¹ *Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996) (per curiam).

¹³² *UNHCR Handbook*, para. 218.

Family as similarly situated

You may be able look to the child's family as individuals similarly situated to the applicant. A well-founded fear of persecution may be supported by mistreatment of a child's family in the home country. The First Circuit Court of Appeals concluded that evidence of mistreatment of one's family is probative of a threat to the applicant.¹³³ Conversely, if the child's family does not relocate and is not harmed, the likelihood of an objectively reasonable fear may be reduced. The failure to relocate may nonetheless be overcome when it is due to a parent's conflict of interest rather than a decreased threat to the child.¹³⁴ Where there appears to be a conflict of interest between the child and the parents, you "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt."¹³⁵

Family's intentions

If the child was sent abroad by his or her parents or family members, the circumstances of that departure are relevant to the child's refugee or asylum application. "If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution...." that may suggest that the child has such a fear as well.¹³⁶ On the other hand, a family's actions toward a child – abandonment, neglect, or selling a child into slavery – may support a child's fear of persecution at the hands of relatives.

Child's arrival

The circumstances of a child's flight and arrival in a second country may provide clues as to whether the child has a well-founded fear of persecution.¹³⁷ If the child arrives in the company of other refugees who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child's fear is well-founded.

Internal Relocation

¹³³ *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); see also *UNHCR Handbook*, para. 43; *Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998).

¹³⁴ *Bhabha and Young*, 764.

¹³⁵ *UNHCR Handbook*, para. 219.

¹³⁶ *UNHCR Handbook*, para. 218.

¹³⁷ See 8 C.F.R. § 208.13(b)(2); *UNHCR Handbook*, para. 217.

It is generally not reasonable to expect a child to internally relocate by himself or herself; however, you should examine whether circumstances show that internal relocation would be reasonable.¹³⁸

8.4 Nexus to a Protected Ground

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

This Training Module looks briefly at the protected grounds in general and then turns to an analysis of membership in a particular social group because claims based on this ground are frequently novel and analytically complicated. Similarly, RAIO has addressed membership in a particular social group in a separate Training Module.¹³⁹

Burden of Proof

As with all claims, the burden falls to the applicant to establish the connection between the past or future persecution and one or more of the five protected grounds. Because children may lack, or have limited access to, the necessary documents or other evidence sufficient to support a finding of nexus to one of the protected grounds, you may have to rely on testimony of the child or of others, solely or in combination with other supporting evidence such as country conditions, to establish these elements.

Although the Board has issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents.¹⁴⁰ This distinction may be particularly important in analyzing a child's claim, especially if the child has no legal representation.

Inability to Articulate a Nexus to a Protected Ground

¹³⁸ Cf. *Lepe-Guitron v. INS*, 16 F.3d 1021, 1025-1026 (9th Cir. 1994) (finding that petitioner's seven-year period of lawful unrelinquished domicile, for purposes of a discretionary waiver of deportation, began on the date his parents attained permanent resident status, as he was a child at the time; and minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile (citing *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992)).

¹³⁹ See RAIO Training Modules, *Nexus and the Protected Grounds* and *Nexus – Particular Social Group*.

¹⁴⁰ See *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); INA § 208(b)(1)(B)(ii); 8 C.F.R. § 208.13(a); see also section 5.6, *Evidence*, and RAIO Training Module, *Evidence*.

Analyzing whether a child applicant has established a nexus to a protected ground in a refugee or asylum claim may be particularly difficult because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not mean that a nexus between the harm and a protected ground does not exist. The applicant's testimony is only one type of evidence. There must be sufficient evidence to support a finding of nexus, but the applicant's inability to testify about nexus will not preclude an officer from determining that nexus is established by other reliable evidence, whether that is the testimony of others, country conditions, or other relevant evidence.

The persecutor may have several motives to harm the applicant, some of which may be unrelated to any protected ground. There is no requirement that the persecutor be motivated *only* by the protected belief or characteristic of the applicant. Moreover, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic.¹⁴¹ When the child is unable to identify all relevant motives, a nexus can still be found if the objective circumstances support the child's claim of persecution on account of a protected ground.¹⁴²

No requirement for Punitive Intent

The inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. The Board of Immigration Appeals has held that a punitive or malignant intent is not required for harm to constitute persecution on the basis of a protected ground.¹⁴³ A persecutor may target the applicant on account of a protected characteristic in the belief that he or she is helping the applicant.

Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look

¹⁴¹ *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

¹⁴² INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996). If you are processing refugee applications overseas, you must determine if a reasonable person would fear that the danger arises on account of one of the five grounds. If you are adjudicating asylum applications under INA § 208, you must determine whether the applicant's possession of one of the five protected grounds is "at least one central reason" motivating the persecutor. See *RAIO Training Module, Nexus and the Protected Grounds* for further discussion. The "one central reason" standard was added to the statute by the REAL ID Act, and applies only to asylum adjudications. The Board has explained, however, that the "one central reason" language should be interpreted consistent with prior Board precedent that allows nexus to be established where the persecutor has mixed motivations. "Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments. The prior case law requiring the applicant to present direct or circumstantial evidence of a motive that is protected under the Act still stands." *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 214. These are the same cases governing mixed motivation cases in refugee processing, thus the substantive analysis in the two contexts is essentially the same.

¹⁴³ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

Inability to Articulate a Political Opinion

When a child claims persecution or a well-founded fear of persecution on the basis of political opinion, the age and maturity of the child must be taken into account. A young child may have difficulty articulating a political opinion. Because the level of children's political activity varies widely among countries, however, you should not assume that age alone prevents a child from holding political opinions for which he or she may have been or will be persecuted. The nexus inquiry is focused on the persecutor's state of mind, not the applicant's. The critical question in a political opinion claim is if the persecutor perceives the applicant as having a political opinion (regardless of whether it is a sincere, strong or well-expressed opinion and even regardless of whether the applicant actually has such an opinion) and if the persecutor targets the applicant on account of that perception.

In *Civil v. INS*, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views."¹⁴⁴ Although the court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by the petitioner cast serious doubts on the presumption that youth "are unlikely targets of political violence in Haiti." Similarly, in *Salaam v. INS*, the Ninth Circuit overturned a BIA finding of adverse credibility where the BIA held it was implausible that the petitioner had been vice president of a branch of an opposition movement at the age of eighteen.¹⁴⁵

It may also be possible for a child's claim to be based on imputed political opinion.¹⁴⁶ The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

Membership in a Particular Social Group

¹⁴⁴ *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998).

¹⁴⁵ *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000) (per curiam).

¹⁴⁶ *Matter of S-P*, 21 I&N Dec. 486 (BIA 1996); see *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (evidence that every family in a Guatemalan village lost a male member to the guerrillas and that the military raped a woman every eight to fifteen days, based on the mistaken belief that the villagers had voluntarily joined the guerrillas, compelled a finding that the applicant's rape by soldiers was on account of a political opinion imputed to her).

In order to establish eligibility for asylum based on membership in a particular social group, an applicant must establish that the group constitutes a particular social group within the meaning of the refugee definition; that the applicant is a member or is perceived to be a member of that group; and that the persecutor was or will be motivated to target the applicant on account of that membership or perceived membership in the particular social group.¹⁴⁷ The BIA clarified in a 2014 precedent decision that there is a three-prong test for evaluating whether a group constitutes a particular social group:

[A]n applicant . . . seeking relief based on “membership in a particular social group” must establish that the group is

- (1) composed of members who share a common immutable characteristic,
- (2) defined with particularity, and
- (3) socially distinct within the society in question.¹⁴⁸

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

Case law on particular social group continues to evolve. It is discussed in more detail in the RAIO Training Module, *Nexus - Membership in a Particular Social Group*, including the subsection on age as a characteristic. Children's cases, however, often involve complex and/or novel particular social group formulations, and the following points are important to keep in mind when analyzing whether a child has established eligibility for protection based on membership in a particular social group.

¹⁴⁷ *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). See also Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

¹⁴⁸ *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The Board in *M-E-V-G-* renamed the “social visibility” requirement as “social distinction,” clarifying that social distinction does not require literal visibility or “outwardly observable characteristics.” 26 I&N Dec. at 238. Rather, social distinction involves examining whether “those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *Id.* The Board also clarified that social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction. The Board defined particularity as requiring that a group “be defined by characteristics that provide a clear benchmark for determining who falls within the group.” *Id.* at 239. Membership in a particular social group can be established through “[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.” *Id.* at 244.

- Common bases for children's particular social group claims include family membership, gang violence, female genital mutilation, forced marriage, and abuse within the family.
- Other harms faced by children may include trafficking, gender-based violence, rape, forced prostitution, forced recruitment by rebels or para-military, and child exploitation. The appropriate particular social group depends on the facts of the case and may involve the trait of socially recognized lack of effective protection.

Example

A particular social group of "formerly trafficked [nationality]" may be appropriate for certain cases. It is similar to the particular social group of former child soldiers proposed by the Third Circuit in *Lukwago v. Ashcroft*, 329 F.3d 157 (3rd. Cir. 2003), in that group membership is based on a shared past experience. In such cases, in order to avoid circularity, the past experience of trafficking could not qualify the individual for protection (unless, of course, it had been imposed on account of some other protected ground). Instead, harm feared due to the status of having been trafficked could qualify. In terms of evaluating the particular social group for the *Acosta* test, the trait of being formerly trafficked is immutable, and the trait of being a national of a certain country is immutable or fundamental. The group must also have well-defined boundaries, and the assessment would need to include country conditions information indicating that that society distinguishes formerly trafficked individuals from others in society. The nexus analysis would need to be carefully articulated to show that the applicant was or would be harmed on account of the trait of having been trafficked. Whether future harm feared by an applicant on account of this particular social group would rise to the level of persecution would be very fact-dependent. The adjudicator would then need to examine whether the applicant will be targeted on account of his or her status of being formerly trafficked.

Example

While the Third Circuit in *Escobar v. Gonzales*, 417 F.3d 363 (3d. Cir. 2005), found that homeless children who live in the streets in Honduras did not constitute a particular social group in that case, this does not foreclose the possibility of a particular social group involving street children. It would be necessary to examine whether they had faced harm or fear future harm due to their status as street children. As with any particular social group case, it would be necessary to evaluate whether the trait of being a street child is immutable and whether a group of street children is sufficiently discrete and socially distinct. A child's inability to

control whether or not he or she is homeless may be an indication of immutability. Additionally, evidence that street children are targeted for social cleansing by authorities in that country or are subject to specific laws could potentially indicate that the group is discrete and socially distinct.

- Family alone can constitute a particular social group. If a person is targeted because of the family connection, then the particular social group of family is appropriate. This is true even if the original family member on whom the connection is based is not targeted due to a protected ground.¹⁴⁹ The shared familial relationship is the common trait that defines the group. In most societies, the nuclear or immediate family is socially distinct, while in some societies, more extended relationships may also be socially distinct. Possible formulations are “Immediate [or nuclear] family” or “Immediate [or nuclear] family of [X individual].”
- A particular social group for gang recruitment may not succeed where recruitment is conducted in order to fill the ranks of the gang and not on account of a protected ground; youths who resist gang recruitment generally do not constitute a particular social group.¹⁵⁰ Former gang membership also generally does not form the basis of a particular social group,¹⁵¹ as it is generally agreed that the shared characteristic of terrorist, criminal or persecutory activity or association, past or present, **cannot form**

¹⁴⁹ See, e.g., *Aldana-Ramos v. Holder*, --- F.3d ---, No. 13-2022, 2014 WL 2915920 (1st Cir. June 27, 2014).

¹⁵⁰ *Matter of S-E-G-*, 24 I&N Dec.579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec.591 (BIA 2008) (rejecting two proposed particular social groups related to gang recruitment: (1) “persons resistant to gang membership;” and (2) “young persons who are perceived to be affiliated with gangs.” The finding that gang recruitment does not constitute persecution on account of a protected ground is somewhat analogous to the Supreme Court’s holding in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (a Guatemalan guerrilla group’s attempt to recruit the respondent to join their group and the respondent’s refusal to do so does not establish a nexus to a protected ground such as political opinion). Neither *S-E-G-* nor *Elias-Zacarias* foreclose the possibility that under different facts, individuals who refuse recruitment or refuse to otherwise cooperate with gangs or guerillas could be members of a particular social group. See *Pirir-Boc v. Holder*, 750 F.3d 1077, 1081 (9th Cir. 2014) (holding that the BIA erred in relying on *S-E-G-* to find that “individuals taking concrete steps to oppose gang membership and gang authority” was not a socially distinct group without conducting an evidence-based inquiry into the facts of the individual case as required under *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)).

¹⁵¹ In asylum cases arising within some circuits, former gang membership may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct. See *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009). See also, USCIS Asylum Division Memorandum, *Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit* (Mar. 2, 2010). Even where former gang membership may be the basis of a particular social group, you must consider if the applicant is subject to a mandatory bar and whether the applicant merits a favorable exercise of discretion (balancing of factors). For mandatory bars, consider the serious non-political crime bar, as well as the other bars, including terrorist related inadmissibility grounds; also, past gang-related activity may serve as an adverse discretionary factor that is weighed against positive factors.

the basis of a particular social group.¹⁵² Nonetheless, there may be other protected grounds involved in a gang-related case. Always examine whether there are other factors involved in cases where an individual is targeted by gangs, such as political opinion, family connection, LGBT issues, or religion.¹⁵³

- “Females [of the applicant’s tribe or nationality] who are subject to gender-related cultural traditions” may be an appropriate particular social group formulation when the claim is based on FGM. You must assess whether FGM is persecution to an individual applicant, including in cases where FGM is imposed on a young child who does not have the capacity to welcome it as an important rite. As FGM is clearly objectively serious harm, the point of inquiry is the applicant’s perception of it.¹⁵⁴ If the applicant is still a young child who may not have the capacity to form an opinion about FGM, apply standard principles of supplementing the child’s testimony with other evidence, e.g., accompanying adult’s testimony, objective evidence in the form of country conditions reports concerning what the child was or would be subjected to.¹⁵⁵ It is also important to ask whether the applicant fears FGM to a child¹⁵⁶ or

¹⁵² See *Matter of W-G-R*, 26 I&N Dec. 208, 215 n.5 (BIA 2014); USCIS OCC Memorandum from Lynden Melmed, *Guidance on Matter of C-A* (Jan. 12, 2007); *Cantarero v. Holder*, 734 F.3d 82, 85-86; *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

¹⁵³ A decision that could be useful when assessing gang-related claims is *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010). The applicant organized Health Brigades to travel to rural parts of Colombia and offer volunteer health services. The guerrilla group, FARC, demanded she publicly attribute her Health Brigade work to the FARC; she refused and was attacked. Instead of addressing the potential particular social group (which the dissent did address in a concurring opinion), the court found that the facts made it clear that the FARC imputed an anti-FARC political opinion to her, which led to the increasingly violent nature of their persecution of her. In reaching its decision, the court noted, “in certain cases, ‘the factual circumstances alone may constitute sufficient circumstantial evidence of a persecutor’s . . . motives’.”

¹⁵⁴ In *Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1315 (9th Cir. 2012), the court noted that an infant can be the victim of persecution, even in the absence of present recollection of the events that constituted the persecution, citing to *Benjamin v. Holder*, 579 F.3d 970, 792 (9th Cir. 2009) (enduring genital mutilation as a five-day-old infant constitutes persecution). It is reasonable to consider FGM persecution if the applicant currently says it was serious harm. See *Matter of A-T*, 25 I&N Dec. 4, 5 (BIA 2009) (“It is difficult to think of a situation, short of a claimant asserting that she did not consider FGM to be persecution, where the type of FGM suffered by the respondent, at any age, would not rise to the level of persecution.”).

¹⁵⁵ In *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004), the Sixth Circuit overturned an Immigration Judge’s finding that the 9-year-old applicant expressed only a “general ambiguous fear,” noting that young children may be incapable of experiencing fear to the same degree as adults.

¹⁵⁶ *Kone v. Holder*, 596 F.3d 141, 153 (2d Cir. 2010) (remanding a petitioner’s claim for the BIA to consider whether “a mother who was herself a victim of genital mutilation” experiences persecution when her daughter may “suffer the same fate”); *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (recognizing that a petitioner for asylum and withholding of removal can demonstrate direct persecution based on the harm of “being forced to witness the pain and suffering of her daughter” if she were subjected to FGM); *Matter of A-K*, 24 I&N Dec. 275 (BIA 2007). *A-K* involved a Senegalese father who feared that his two USC daughters would be subjected to FGM. Note that under *A-K*, there is no nexus unless the parent fears FGM to their child in order to target the parent for the parent’s protected ground. *Matter of A-K* does not foreclose the possibility of FGM on a family member due to the applicant’s political opinion constituting persecution to the applicant.

whether an applicant fears FGM to another family member due to the applicant's political opinion.¹⁵⁷

- "Females [of the applicant's tribe or nationality] who are subject to gender-related cultural traditions" may also be an appropriate particular social group for forced marriage claims. As arranged marriages are an important tradition in many cultures, the issue is whether an individual subjectively experiences or would experience the marriage as serious harm. The analysis acknowledges that the harm from the forced marriage can continue even after the marriage ceremony.

8.5 Child-Specific Considerations Concerning Bars and Grounds of Inadmissibility

Firm Resettlement

The BIA has long held that a parent's resettlement status is imputed to his or her children.¹⁵⁸ The Ninth Circuit has also looked to "whether the minor's parents have firmly resettled in a foreign country before coming to the United States, and then derivatively attribute[d] the parents' status to the minor."¹⁵⁹ However, this may no longer be the case, and in interpreting whether a child is firmly resettled, you should apply the BIA's framework for analyzing firm resettlement in its 2011 decision, *Matter of A-G-G*.¹⁶⁰ In this decision, the BIA announced a new four-step framework for deciding firm resettlement cases that first focuses exclusively on the existence of an offer.¹⁶¹ For this reason, you should not rely on case law issued prior to May 2011 that conflicts with the holding in *Matter of A-G-G* and does not follow the BIA's new approach. See the RAIO Training Module, *Firm Resettlement*.

Serious Nonpolitical Crime

In all cases where the question arises as to whether there is reason to believe that an applicant has committed a serious nonpolitical crime, an adjudicating officer must consider an applicant's culpability in determining whether the crime is "serious" within the meaning of the INA. Relevant factors would include: (1) whether and to what extent

¹⁵⁷ An applicant may fear FGM to a family member due to the applicant's possession of a protected trait (political opinion or one of the four other grounds). See *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (threat of FGM to petitioner's wife in order to harm petitioner, a former Mungiki member, could constitute persecution to petitioner for having left the Mungiki).

¹⁵⁸ 8 C.F.R. § 208.15; *Matter of Ng*, 12 I&N Dec. 411 (BIA 1967) (holding that a minor was firmly resettled in Hong Kong because he was part of a family that resettled in Hong Kong); *Matter of Hung*, 12 I&N Dec. 178 (BIA 1967) (holding that because parents were not firmly resettled in Hong Kong, the minor child also was not firmly resettled there).

¹⁵⁹ *Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (holding that the parents' status is attributed to the minor when determining whether the minor has firmly resettled in another country).

¹⁶⁰ *Matter of A-G-G*, 25 I&N Dec. 486 (BIA 2011).

¹⁶¹ *A-G-G*, 25 I&N Dec. at 501.

the applicant acted under duress; (2) the applicant's intent, with age being a relevant factor; and (3) whether and to what extent the applicant knew they were committing a crime. This analytical approach is consistent with the purposes of the serious nonpolitical crime bar, and with basic principles of criminal and protection law. Age becomes a significant factor when this issue arises in a child's claim, as youth may be a relevant factor when assessing culpability.

For additional information regarding grounds of inadmissibility for refugees and bars to applying for or eligibility for asylum, see Division Supplements. See also RAIIO Training Module, *Inadmissibilities*, and the Asylum Division Lesson Plan, *Mandatory Bars to Asylum*.

9 OTHER IMMIGRATION STATUSES AVAILABLE TO CHILDREN

For additional information, see ASM Supplement – Other Immigration StatUSES Available to Children.

10 SUMMARY

10.1 International Guidance

It is important to look to international law for guidance when binding U.S. case law does not speak to the relevant issue. International instruments such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and several UNHCR Executive Committee Conclusions and UNHCR published policies provide insight and guidance regarding how to handle protection claims from minors.

10.2 Child Development

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

10.3 Procedural Considerations

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

Other procedural considerations necessary in children's cases include determining whether or not the minor applicant is unaccompanied, determining a minor's capacity to apply for protection, who may be able to speak on the child's behalf, and evaluating any conflicts between the child and the parents' interests.

10.4 Interviewing Considerations

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

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

Children, as adults, are not required to provide corroborating evidence and may rely solely on testimony when the testimony is credible. However, children cannot be expected to present testimony with the same degree of consistency or coherency as adults, and you must consider children's development levels and emotional states when evaluating their testimony.

10.5 Legal Analysis

The definition of a refugee contained in the INA applies to all individuals regardless of their age. Although children do not enjoy a lessened standard for refugee or asylum eligibility, there are considerations that must be taken into account when analyzing children's claims. First, the harm that a child suffered or fears may rise to the level of persecution even when the same harm claimed by an adult would not be considered persecution. Second, though the child may be able to express a subjective fear of persecution, he or she might not be able to articulate the objective reasons for that fear, such that evidence from other sources must be considered on this point. Third, an examination into the circumstances in which a child finds himself or herself – how he or she arrived in a second country, the location of his or her relatives, or the harm that has befallen his or her parents, for example – may reveal facts that support the child's refugee or asylum claim.

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

Other legal issues that may involve child-specific considerations include the application of some of the bars to refugee status or asylum, or inadmissibilities for refugee applicants.

PRACTICAL EXERCISES

There are no practical exercises for this module.

OTHER MATERIALS**Sample Opening Statement for Children**

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

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

If you do not know the answer to the question, that is okay too. Just tell me that you don't know the answer. No one can remember everything.

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

I understand that you may be nervous or scared to tell me about what happened to you. Unless there is some reason it would make you afraid, we will tell your parents about your application if we are able to, but I will not tell anyone else in [name of country of origin] about what you tell me today. Also, none of your friends or other family members will know anything about what you tell me, unless you write a special letter that allows me to share information with them.

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

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. USCIS Refugee Affairs Division, Standard Operating Procedure: Children's Cases (4 January 2011).
2. Memorandum from John W. Cummings, Deputy Director, INS Office of International Affairs, to Overseas District Directors, Guidelines for Children's Refugee Claims, (120/6.4) (30 Jan. 1999).

ADDITIONAL RESOURCES

1. UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines (2011).
2. UNHCR, Guidelines on Determining the Best Interests of the Child (2008).

SUPPLEMENTS

RAD Supplement – Married Minors

The Refugee Affairs Division and Department of State have independently issued guidance on how to adjudicate refugee cases involving married children.¹⁶² If UNHCR refers a case involving married minor, you may find a BID in the file under certain circumstances. If no BID is in the case file and you have concerns about the well-being of the married child, you must consult the team leader and request that a BID be done.

The information in this section is taken from Refugee Affairs Division Guidance

¹⁶² Memorandum from Terry Rusch, Director, Office of Admissions Bureau of Population, Refugees, and Migration, Department of State, to Overseas Processing Entities, Program Announcement 2010-03 Guidance on Processing Married Minors (8 Dec. 2009).

and Department of State Program Announcement 2010-03.

The following principles apply when processing married minors¹⁶³ for the U.S. Refugee Admissions Program (USRAP):

1. In general, a **marriage must be legally valid in the place of celebration.** Camp marriages may be accepted in certain circumstances.¹⁶⁴
2. **Married minors who are both under age 18 and are traveling without their parents.** United Nations High Commissioner for Refugees (UNHCR) Best Interest Determinations (BIDs)¹⁶⁵ are required for both children. The children are considered unaccompanied minors and may be placed in foster care.
3. **Married minors who are both under age 18 and at least one set of parents is traveling with the couple.** BIDs are not required. The married couple must have their own case, which should be cross-referenced with the parents' case so that they may be interviewed altogether.
4. **Married couple where one spouse is under age 18 and the other spouse is over age 18.** A BID is generally not needed for the minor, even if he/she is not traveling with the parents. A minor questionnaire should be completed by the RSC for the minor spouse.

An officer may request a BID (for UNHCR P1 or P2 referrals) if there are cases which fall outside the norm and the officer would like a closer examination of what is in the best interests of the child. Ex: a BID could be requested for a 16-year-old married to a 50-year-old or where there is some suspicion of abuse.

The UNHCR BID Guidelines do not explicitly address the issue of minors who are married. However, in the absence of guidance in the Guidelines, some UNHCR offices have addressed it and have come up with the following position: A formal BID is not required for unaccompanied and separated children who marry before

¹⁶³ Minors are under the age of 18.

¹⁶⁴ If a marriage is invalid based on a failure to comply with formal registration requirements, a marriage may still be valid for immigration purposes if the parties were prevented from formal perfection of the marriage due to circumstances relating to their flight from persecution. Examples of circumstances beyond the couple's control and relating to the flight from persecution would include inability to access host country institutions due to refugee camp policies or conditions, discriminatory government policies or practices, and other consequences of the flight from persecution. A couple who has been prevented from formal perfection of the marriage must also show other indicia of a valid marriage. The relevant considerations may include: holding themselves out to be spouses, cohabitation over a period of time, children born to the union, and the color of a marriage ceremony.

¹⁶⁵ BIDs are required for unaccompanied or separated children referred by UNHCR under Priority 1 or Priority 2.

they turn 18 years, and the marriage has been carried out in accordance with national law and Convention on the Rights of the Child (CRC) standards. Such individuals will no longer be considered unaccompanied or separated children. However, to ensure that the marriage has been carried out in accordance with national law and CRC standards, that the child has not been forced into marriage, and that the case is not one of child trafficking, it is recommended that a best interests assessment be conducted prior to determining the recommended durable solution.

RAD Supplement – Standard Operating Procedures for Children's Cases

Since 2003, refugee adjudications have required that a formal Best Interest Determination (BID) be prepared by UNHCR for each child referred to the United States Refugee Program (USRAP) as a principal applicant.¹⁶⁶ The requirement has been formalized in SOPs for Children's Cases adopted in January, 2011.¹⁶⁷ Officers must review the BID to verify that the child's protection needs are being met in the application and adjudication process.

Key Elements of a Valid BID

Was the BID prepared by a qualified child welfare professional?

Was the BID signed by the preparer or full BID panel?

Did the BID include a thorough exploration of the child's past and current family situation?

Did the BID provide information on how long the child has been living with the current caregiver?

Did the BID describe the child's relationship with his or her caregiver, including the physical/health, emotional/psychological and economic situation of the child?

Was a diligent search for family carried out (consistent with child and family safety and country conditions)?

Information To Be Elicited and Recorded in an Interview with Unaccompanied and Separated Children (UASC)

¹⁶⁶ Memorandum from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State, to U.S. Refugee Program Processing Entities, *Program Announcement 2001-01 USRP Policy on Resettling Unaccompanied Refugee Minors (URM's)* (20 November 2002). See also Bureau of Population, Refugees and Migration, Department of State, *Guidance for UNHCR and NGOs Referring Minor Cases* (16 May 2013).

¹⁶⁷ USCIS Refugee Affairs Division, *Standard Operating Procedure: Children's Cases*, (4 January 2011).

During the USCIS interview, in addition to the general procedures for conducting a refugee status interview, when interviewing UASCs, Officers should also:

Verify information in BID with child

Determine the capacity of child to have input into her or his claim

Verify parental information to the extent possible. If there is a living parent, the Officer should note the address and phone number (if known) of the child's parent, whether the parent is aware of the child's whereabouts, and whether the parent is aware that the child has applied for refugee status

When interviewing a separated child:

- Determine the validity and bona fides of the child's relationship to the relative, foster parent(s), caregiver(s) or guardian(s)
- Place caregiver(s) under oath
- Note caregiver's name, address, relationship to child, duration of relationship, and whether there is any legal relationship between the two
- Question caregiver as appropriate
- Assess the nature and durability of the relationship between the child and caregiver
- Assess the caregiver's financial ability and commitment to continue to care for the child if resettled together
- Ensure that your interview notes reflect discussion of the above topics
- Ensure that your interview notes reflect that the BID and the RSC minor questionnaire have been seen and reviewed

Information To Be Included in the Refugee Assessment

After the USCIS interview:

Document clearly in the Assessment whether the Officer concurs with the recommendations in the BID. This concurrence should be noted after "Justification" at the end of Section VI of the Refugee Application Assessment.

If the officer does not concur, an explanation of what the officer recommends should be included.

- Example 1: If a separated child is found to be a refugee, but the officer has concerns about the current guardian, the officer may conclude that "Child is found to be a refugee; however, case should be returned to UNHCR or the referring entity for resolution of the caregiving

arrangement prior to final USCIS approval.”

- Example 2: Unresolved custody issues may be addressed by noting, for example: “Child’s mother is in refugee camp. BID does not address her whereabouts or why child is not with her. Return case to UNHCR for further inquiry.”

Officer Responsibility for Child Safety

The officer must note any of the following:

1. A child is living alone.
2. A child is living with an inappropriate guardian.
3. A child is screened off the case and will now be alone.
4. The officer has any other concern about child safety.

These issues should be reported to the SRO or TL. The SRO or TL will report these concerns to the RSC or UNHCR to ensure the child’s safety and continued access to U.S. Refugee Admissions Program, as appropriate.

Conflicts between the Child’s and Parents’ Interests

In a refugee referral, if parent and child are together, UNHCR normally only recommends permanent separation of a child from the parent(s) if severe abuse or neglect is evident. The BID decision does not determine legal custody of the child.

Although the child welfare laws of the host country typically have mechanisms for a legal decision relating to child custody, in most of the countries in which we are interviewing refugees, the country of first asylum declines to intervene in refugee child/parent conflict, even in cases of severe abuse. In such cases, UNHCR generally asks biological parents to sign a release of custody document in cases in which a biological parent’s whereabouts are known and it is safe to do so. Cases in which the biological parent refuses to sign the release of custody and the foster caregiver(s) does not have legal custody of the child should be referred to RAD HQ for resolution and may need to be returned to UNHCR for further inquiry into the custody arrangement.

BID Process for Unaccompanied and Separated Refugee Children

In 2003 the U.S. Department of State announced that the United States abides by the “best interest” rule as stated in the Convention on the Rights of the Child. Furthermore, the United States relies on the formal Best Interest Determination

process of UNHCR to determine a course of action for an unaccompanied refugee child being referred to the USRAP for resettlement.¹⁶⁸

USCIS has participated in the Vulnerable Minors Working Group with other government departments and agencies as well as concerned NGO's to determine how best to implement U.S. policy in regard to child adjudications. Procedures issued in January, 2011 provide guidance to refugee officers adjudicating cases of unaccompanied and separated children (UASC).¹⁶⁹ In 2011 RAD adopted procedures for all refugee cases in which a child is the principal applicant. These procedures require you to:

1. Determine that the Best Interest Determination (BID) is in the file and is valid;
2. Verify the information in the BID and decide if you concur with the recommendations;
3. Review the BID for each UASC to ensure that child's safety and interests are being considered; and
4. Use child-sensitive methods when eliciting testimony and adjudicating the claim.

¹⁶⁸ Memorandum from Terry Rusch, Director, Office of Admissions, Bureau of Population, Refugees and Migration, Department of State, to U.S. Refugee Program Processing Entities, *Program Announcement 2001-01 USRP Policy on Resettling Unaccompanied Refugee Minors (URM's)*, (20 November 2002).

¹⁶⁹ USCIS Refugee Affairs Division, *Standard Operating Procedures: Children's Cases* (4 January 2011).

SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

1. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).
2. Matter of A-K-, 24 I&N Dec. 275 (BIA 2007); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004); Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004); Salaam v. INS, 229 F.3d 1234 (9th Cir. 2000); Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000); Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985).
3. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (25 March 2009).
4. Memorandum from Ted Kim, Acting Chief, USCIS Asylum Division, to Asylum Office Staff, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (HQRAIO 120/12a) (28 May 2013).
5. Memorandum from Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Directors, et al., Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS (HQRAIO 120/9.7) (14 August 2007).
6. Memorandum from Jeff Weiss, Acting Director, INS Office of International Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees), Guidelines for Children's Asylum Claims, (120/11.6) (10 Dec. 1998).

ADDITIONAL RESOURCES

1. American Bar Association, Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (August 2004), pp. 111

2. Bhabha, Jacqueline and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, Harvard University, Cambridge, MA, 2006, pp. 18–23, 108–137, 143–145, 188–191.
3. Bhabha, Jacqueline and Wendy A. Young. “Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers,” Interpreter Releases, Vol. 75, No. 21, 1 June 1998, pp. 757–773.
4. Neal, David L. Chief Immigration Judge, Executive Office for Immigration Review. Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, Memorandum for All Immigration Judges. (Washington, DC, 22 May 2007), 11 pages.
5. Nugent, Christopher and Steven Schulman. “Giving Voice To The Vulnerable: On Representing Detained Immigrant and Refugee Children,” Interpreter Releases, Vol. 78, No. 39, 8 October 2001, pp.1569–1591.
6. UNHCR, *Trends in Unaccompanied and Separated Children Seeking Asylum in Industrialized Countries, 2001–2003* (Geneva, July 2004), 14 pages.
7. Peters, Jean Koh, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (2nd ed. 2001).
8. Symposium: Child Abuse, Psychological Research on Children as Witnesses: Practical Implications Forensic Interviews and Courtroom Testimony, 28 PAC. L.J. 3 (1996), 92 pages. (NOTE: Myers, J., Saywitz, K., & Goodman, G., [1996] Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony. Pacific Law Journal, 28, 3–90.)

SUPPLEMENTS

ASM Supplement – Procedural Considerations

With the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, Congress gave USCIS initial jurisdiction over any asylum application filed by an unaccompanied alien child (UAC), including those in removal proceedings.¹⁷⁰ This law took effect on March 23, 2009. As a result, UACs filing for asylum who previously would have had their case heard by an immigration judge in the first instance now receive an affirmative interview with

¹⁷⁰ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), P.L. 110-457, Dec. 23, 2008. See Joseph E. Langlois, USCIS Asylum Division, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, Memorandum (Mar. 25, 2009).

you. In conducting the interview of a possible UAC in removal proceedings, you should verify that the applicant was a UAC at the time of filing such that USCIS has jurisdiction over the claim.

In most of these cases another Department of Homeland Security entity, either U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement (ICE), will have already made a determination of UAC status after apprehension, as required for the purpose of placing the individual in the appropriate custodial setting. In such cases, if the status determination by CBP or ICE was still in place on the date the asylum application was filed, you should adopt that determination without another factual inquiry. Unless there was an affirmative act by the Department of Health and Human Services (HHS), ICE, or CBP to terminate the UAC finding before the applicant filed the initial application for asylum, you should adopt the previous DHS determination that the applicant was a UAC. In cases in which a determination of UAC status has not already been made, you should make an initial determination of UAC status.

Minor Principal and Unaccompanied Minor Fields in RAPS

In August 2007, the Asylum Division incorporated a new mechanism in RAPS to capture data on minor principal applicants, both accompanied and unaccompanied.¹⁷¹ The mechanism allows the Asylum Division to track applicants who are unaccompanied minors and reminds you that modified procedures are in order when handling a minor principal applicant's claim. The ability to gather information on the adjudication of unaccompanied minors' applications assists the Asylum Division in developing or refining policy with regard to these cases.

Definition of Minor Principal, Unaccompanied Minor, and Unaccompanied Alien Child (UAC)

- **Minor Principal**

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

- **Unaccompanied Minor**

For purposes of making a determination in RAPS as to whether the applicant is an unaccompanied minor, an unaccompanied minor is very similar to an

¹⁷¹ Joseph E. Langlois, USCIS Asylum Division, Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS, Memorandum (Aug. 14, 2007). See the memo for more details about the commands used in RAPS to capture this data.

unaccompanied alien child (UAC). An unaccompanied minor is a child who is under eighteen years of age and who has no parent or legal guardian in the United States who is available to provide care and physical custody.¹⁷² This definition encompasses separated minors, e.g., those who are separated from their parents or guardians, but who are in the informal care and physical custody of other adults, including family members. Note that a child who entered the United States with a parent or other adult guardian but who subsequently left the parent's or guardian's care would be considered an unaccompanied minor.

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

• **Unaccompanied Alien Child (UAC)**

The Homeland Security Act of 2002 defines a UAC as a person under 18 years of age, who has no lawful immigration status in the United States, and who either has no parent or legal guardian in the United States or has no parent or legal guardian in the United States who is available to provide care and physical custody.¹⁷³ Other than defining a UAC as a person who has no lawful immigration status in the United States, the term "unaccompanied minor" as adopted in the August 2007 Asylum Division memo is the same as the term "unaccompanied alien child (UAC)." The definition of a UAC is important, as USCIS has initial jurisdiction over asylum applications filed by UACs even if the UAC is in removal proceedings.

Applications from Children without Parental Knowledge or Consent

A Child's Capacity to Apply and Who Speaks for the Child

Statutorily, subject to the filing bars, "[a]ny alien who is physically present in the United States or who arrives in the United States," without regard to immigration status, has the right to apply for asylum.¹⁷⁴ Under certain circumstances, however, children may lack the capacity to assert this right to apply for asylum. In the case of young children who lack the capacity to make immigration decisions, you will need to determine who has the legal authority to speak for the child. Generally, the parent will have the authority to speak for the child, unless (as discussed below)

¹⁷² See Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2) (defining the term "unaccompanied alien child").

¹⁷³ Section 462 of the Homeland Security Act of 2002, 6 U.S.C. § 279(g)(2).

¹⁷⁴ INA § 208(a)(1); § C.F.R. § 103.2(a)(2).

there are conflicts between the parent's and child's interests that prevent this.

There is no age-based restriction to applying for asylum. Where an asylum application is submitted on behalf of a child by someone other than the child's parent or legal guardian, however, USCIS need not "process...applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes."¹⁷⁵ In the case involving Elian Gonzalez, an application for asylum was filed on behalf of a six-year-old Cuban boy against the wishes of his father in Cuba. INS determined that the child did not have the capacity to seek asylum on his own behalf, and that it was his father who had authority to speak for him in immigration matters.¹⁷⁶ Important to INS's decision was the finding that Elian was not at risk of persecution or torture, that Elian's father had Elian's best interests in mind, and that the father did not have conflicts of interest that would prevent him from representing the child's best interests in immigration matters. The Eleventh Circuit upheld the INS policy, noting that line-drawing on the basis of age is an adequate approach to determining who may individually file for asylum.

In contrast, older children may have the capacity to assert a claim. In *Polovchak v. Meese*, a Seventh Circuit case involving a twelve-year-old boy's grant of asylum counter to his parents' wishes to return to Russia, the court evaluated the applicant's capacity to assert his individual rights as part of the court's procedural due process balancing test: "At the age of twelve, Walter was presumably near the lower end of an age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents; at age seventeen (indeed, on the eve of his eighteenth birthday), Walter is certainly at the high end of such a scale, and the question whether he should have to subordinate his own political commitments to his parents' wishes looks very different. The minor's rights grow more compelling with age, particularly in the factual context of this case."¹⁷⁷ While the court was not evaluating capacity to apply for asylum, its findings on age and capacity to assert individual rights are nonetheless instructive in the asylum context. Although the court acknowledged that a child may have the capacity to assert a claim, it found that the parents had a significant liberty interest in being notified of the claim and given an opportunity to participate

¹⁷⁵ Bo Cooper, INS General Counsel, *Elian Gonzalez*, Memorandum (Jan. 3, 2000).

¹⁷⁶ *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

¹⁷⁷ *Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir. 1985); see also 8 C.F.R. § 103.2(a)(2) (providing that a parent or legal guardian may sign an application or petition of a person under the age of fourteen); 8 C.F.R. § 236.3(f) (providing for notice to parent of juvenile's application for relief).

Confidentiality and Notification of Parents

Federal regulations governing asylum adjudications generally do not permit the disclosure to third parties of information contained in or pertaining to an asylum application without the written consent of the applicant.¹⁷⁸ As a general matter, however, we would notify the parent of a claim by a child when the parent does not seem to be the one submitting the claim. Where a child lacks capacity and a parent or legal guardian has the authority to speak for the child, that parent or legal guardian may not in fact be a third party as a legal matter, so that notification of the parent or legal guardian will not implicate the asylum confidentiality provisions in 8 CFR § 208.6.¹⁷⁹ Further, even in cases where a child has capacity to assert a claim, the parent's liberty interest in directing the interests of their child generally requires notification of and an opportunity to participate in the proceedings, unless such notification would pose a serious risk to the child (such as in cases involving abuse or where the parent is involved in the persecution). Where a child applies for asylum without the parents' knowledge and/or consent, many complex issues are raised, and the Asylum Office should contact HQASM to coordinate in addressing any issues relating to the child's capacity to apply for asylum, potential conflicts between a child's and the parents' interests concerning the asylum application, or notification of the parent.

Affirmative Asylum Process for Unaccompanied Alien Children

In 2008 the TVPRA made USCIS responsible for adjudicating all asylum claims of unaccompanied alien children (UACs). It was recognized that unaccompanied children would benefit from a non-adversarial interview in lieu of the adversarial process of the immigration courts.¹⁸⁰ Responsibility for adjudicating their protection claims has moved from the immigration courts to the affirmative asylum system of USCIS.

The TVPRA is discussed in detail in the ADOTC since most of its provisions do not apply to children seeking refugee status outside the United States.

¹⁷⁸ 8 C.F.R. § 208.6.

¹⁷⁹ See *Polovchak*, 774 F.2d at 735 (noting "the fundamental importance of the parents' interest in the residence, nurture and education of a minor child, then twelve or thirteen").

¹⁸⁰ Joseph E. Langlois, Chief, USCIS Asylum Division, to Asylum Office Staff, *Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, Memorandum (HQRAIO 120/12a) (Mar. 25, 2009).

ASM Supplement – Bars to Applying for Asylum

One-Year Filing Deadline

The TVPRA amended the INA to state that the one-year filing deadline does not apply to unaccompanied alien children.¹⁸¹ As of the TVPRA's effective date of March 23, 2009, when you determine that a minor principal applicant is unaccompanied, you should forego the one-year filing deadline analysis and conclude that the one-year filing deadline does not apply. The one-year filing deadline continues to be applicable for accompanied minor principal applicants (those with a parent or legal guardian) and for adult principal applicants. Additionally, as the unaccompanied alien child definition includes the element that the child may not have lawful immigration status, the one-year filing deadline must still be analyzed for in-status unaccompanied minors.

Accompanied minors and in-status unaccompanied minors may qualify for the extraordinary circumstances exception to the one-year filing deadline based on legal disability.¹⁸² While unaccompanied minors are specifically listed in the regulations as an example of a category of asylum applicants that is viewed as having a legal disability that constitutes an extraordinary circumstance for the purposes of the one-year filing deadline, the circumstances that may constitute an extraordinary circumstance are not limited to the examples listed in the regulations. The same logic underlying the legal disability ground listed in the regulations is relevant also to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.

As long as an accompanied minor applicant applies for asylum while still a minor (while the legal disability is in effect), the applicant should be found to have filed within a reasonable period of time. Depending on the circumstances of each case, after reaching the age of 18, the applicant may also establish that he or she has filed within a reasonable period of time.

In *Matter of Y-C-*, petitioner, an unaccompanied fifteen-year-old, attempted to file an asylum application with an Immigration Judge five months after being released from over a year in immigration custody.¹⁸³ The Immigration Judge refused to accept the application, but the petitioner successfully filed a second application within one year of being released from custody. The BIA found that the petitioner had established extraordinary circumstances because "he did not, through his own

¹⁸¹ See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). For additional information, see Asylum lesson plan, One-Year Filing Deadline.

¹⁸² 8 C.F.R. § 208.4(a)(5).

¹⁸³ *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

action or inaction, intentionally create these circumstances, which were directly related to his failure to meet the filing deadline." Note that this case was decided before the TVPRA's amendment to the INA to exclude unaccompanied minors from the one-year filing deadline took effect.

Safe Third Country

As of March 23, 2009, the provision in the INA that allows an individual to be barred from applying for asylum based on a safe third country agreement cannot be applied to an unaccompanied alien child.¹⁸⁴ The Safe Third Country Agreement between the United States and Canada, currently the only safe third country agreement between the United States and another country, already has an exception for unaccompanied minors. Even if future safe third country agreements are created, INA § 208(a)(2)(E), as created by the TVPRA, does not permit a safe third country agreement to apply to unaccompanied alien children.

Serious Nonpolitical Crime

The Child Soldiers Accountability Act of 2008 (CSAA), which was signed into law and became effective on October 3, 2008, creates both criminal and immigration prohibitions on the recruitment or use of child soldiers.¹⁸⁵ Specifically, the CSAA establishes a ground of inadmissibility at section 212(a)(3)(G) of the INA and a ground of removability at section 237(a)(4)(F) of the INA. These parallel grounds set forth that "[a]ny alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, United States Code" is inadmissible and is removable.

The statute also requires that DHS and DOJ promulgate regulations establishing that an alien who is subject to these grounds of inadmissibility or removability "shall be considered an alien with respect to whom there are serious reasons to believe that the alien committed a serious nonpolitical crime," and is therefore ineligible for asylum pursuant to INA section 208(b)(2)(A)(iii).¹⁸⁶ The regulations are pending publication. In the interim, the Congressional intent in enacting the CSAA, as well as the nature of the serious crime of the use of child soldiers, should be considered in determining whether an applicant is subject to the serious nonpolitical crime bar. It is still an open question whether the statute permits an

¹⁸⁴ See INA § 208(a)(2)(E); TVPRA, P.L. 110-457, § 235(d)(7)(A). See also INA § 208(a)(2)(A); Asylum lesson plan, Safe Third Country Threshold Screening.

¹⁸⁵ Child Soldiers Accountability Act of 2008 (CSAA), P.L. 110-340 (Oct. 3, 2008); see also Lori Scialabba and Donald Neufeld, USCIS, Initial Information Concerning the Child Soldiers Accountability Act, Public Law No. 110-340, Memorandum to Field Leadership (Dec. 31, 2008); CSAA, sec. 2(b)-(c).

¹⁸⁶ CSAA, sec. 2(d)(1). See also Asylum lesson plan, Mandatory Bars to Asylum and RAIO Training Module, *Discretion*.

exemption for children under the age of 15.

ASM Supplement – Other Immigration Statuses Available to Children

Special Immigrant Juvenile Status

Special Immigrant Juvenile (SIJ) status provides legal permanent residency under certain conditions to unmarried children present in the United States who are under twenty-one years of age.¹⁸⁷ First, a juvenile must be declared dependent on a state juvenile court or legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a State or juvenile court, and the juvenile court must find the child's reunification with one or both of his or her parents not viable "due to abuse, neglect, or abandonment, or a similar basis found under State law" and must determine that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." Second, the Department of Homeland Security must consent to the grant of SIJ status. In cases where the child is in the custody of the Department of Health and Human Services (HHS), the Secretary of HHS must specifically consent to juvenile court jurisdiction to determine the custody status or placement of an alien.

Victims of Trafficking or Criminal Activity

The T visa is available to aliens present in the United States who have been the victims of a severe form of trafficking in persons, who are physically present in the United States on account of such trafficking, and who "would suffer extreme hardship involving unusual and severe harm upon removal."¹⁸⁸ Aliens must comply with governmental requests for assistance in investigation or prosecution of the acts of trafficking, though persons unable to cooperate due to physical or psychological trauma or those under the age of eighteen are exempt from this obligation. After three years of continuous presence from the date of admission as a nonimmigrant, the T visa holder may adjust status.

The U visa is available to aliens who have "suffered substantial physical or mental abuse as a result of having been a victim" of qualifying criminal activity, which violated U.S. law or occurred in the United States.¹⁸⁹ The person must possess

¹⁸⁷ INA § 101(a)(27)(J).

¹⁸⁸ INA § 101(a)(15)(T)(i).

¹⁸⁹ INA § 101(a)(15)(U)(i). See USCIS Adjudicator's Field Manual, chapter 39, for further details.

information related to the criminal activity and have been helpful or be likely to be helpful in the investigation or prosecution of the criminal activity. Where the person is under sixteen years of age, a parent, guardian, or next friend may possess information and assist in the investigation or prosecution, in the place of the child under sixteen. A U visa holder may adjust status after three years of continuous presence from the date of admission as a nonimmigrant.

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

None

ADDITIONAL RESOURCES

1. Policy Memorandum from the Office of the Director, Guidance for Determining if an Adoption is Valid for Immigration and Nationality Act (INA) Purposes: Updates to Adjudicator's Field Manual (AFM) Chapters 21.4, 21.5, 21.6, 21.10 and 71.1; AFM Update AD12-10 (PM-602-0070) (9 July 2012).
2. Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, concluded at the Hague 29 May 1993, entered into force for the United States April 1, 2008.
3. USCIS' adoption website: www.uscis.gov/adoption.
4. U.S. Department of State's adoption website: www.adoption.state.gov.

SUPPLEMENTS

IO Supplement

Adoptions

Most RAIO adjudications involving adoptions are intercountry adoption applications and petitions, reviewed by Overseas Adjudications Officers. A special unit covers this subject during the IOTC. However, their work is described briefly here. Additionally, Refugee Officers sometimes have to sort out issues related to the validity of a claimed adoption during their adjudications.

Intercountry Adoptions

U.S. citizens adopt children from all over the world. International Operations officers adjudicate intercountry adoption cases filed by prospective adoptive parents (PAPs) residing both within and outside the United States.

In general, two separate intercountry adoption processes exist: 1) Orphan processing under INA § 101(b)(1)(F), and 8 CFR section 204.3, and 2) Hague Adoption Convention processing under INA §101(b)(1)(G), and 8 CFR section 204.300. Therefore, PAPs interested in adopting a child from another country must first decide on the specific country from which they will adopt. The procedures and laws USCIS officers apply in intercountry adoptions depend on whether the Hague Adoption Convention governs the adoption.

International Operations officers only adjudicate applications and petitions related to the Orphan process. The USCIS National Benefits Center in Lee's Summit, Missouri currently processes all Hague-related applications and petitions. In both processes, the USCIS officer will determine the prospective adoptive parents' suitability and eligibility to adopt a child and the child's eligibility to immigrate to the United States.

In addition to the two intercountry adoption processes described above, International Operations officers may also adjudicate Immediate Relative petitions on behalf of adopted children under INA § 101(b)(1)(E).