AILA Recommendations on Legal Standards and Protections for Unaccompanied Children

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Summary of the Issue

Since 2011, the United States has experienced a dramatic increase in the number of unaccompanied children from El Salvador, Guatemala and Honduras apprehended at our southwestern borders. The escalation in the movement of unaccompanied alien children (UACs) is a regional humanitarian crisis driven primarily by the rapid growth in crime, violence and poverty that has affected Mexico and several Central American countries for many years. The children making the difficult and treacherous migration journey are now younger (many under 13), and a higher percentage are girls. The number of unaccompanied children apprehended by U.S. Customs and Border Protection (CBP) jumped from 17,775 in FY2011 to 41,890 in FY2013. Estimates are that more than 90,000 unaccompanied children will enter the United States in the current fiscal year (ending September 30).

This humanitarian crisis affects not only the United States but the entire Central American region. The UN High Commissioner for Refugees (UNHCR) reports that Mexico, Panama, Nicaragua, Costa Rica, and Belize have all experienced a spike in migrants coming to their countries to seek asylum. UNHCR reports that from 2008 to 2013 there was a 712 percent increase in asylum applications from nationals of El Salvador, Guatemala and Honduras.[1]

On June 2, calling the situation "an urgent humanitarian crisis," President Obama announced that coordination of the U.S. response to this crisis would done by the Federal Emergency Management Agency (FEMA). On July 8, the President announced he was seeking a supplemental appropriations of $3.7 billion to enable the government to respond to the crisis. In a previous letter to Congress, the President wrote that he would be working with Congress to provide "the DHS Secretary additional authority to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador."[2]

AILA Recommendations

AILA is concerned that the administration may try to bypass the legal standards governing the care and protection of unaccompanied children developed over the past two decades, or seek congressional authority to do so. The current legal standards protecting unaccompanied children are among the most carefully developed in the world, and should not be undermined when confronted with a temporary humanitarian crisis. Fast-tracked repatriations that curtail due process may block a child from seeking protection, obtaining counsel, and otherwise obtaining fair and impartial review of his or her case. The current regional humanitarian crisis presents an opportunity for the United States to demonstrate its leadership, and it should not scale back its protections for vulnerable children.

[1] For 2008-2012 stats, UNHCR Statistical Online Population Database. For 2013 stats, on file with UNHCR headquarters, Washington, DC.
[2] June 30, 2014 Letter from President Obama to Congress, available at www.aila.org/uac.

- The administration should not extend the "contiguous country" process currently used for Mexican children to children from non-contiguous countries. Applying the contiguous country process, or elements of it, to children from other countries would compromise the important protections the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) provides to ensure physical safety and proper screening for humanitarian protection.

- As specified in statute, every unaccompanied child should have the opportunity to consult with legal counsel and appear before an immigration judge in removal proceedings before he or she is deported. Summary removal procedures, such as expedited removal or pre-hearing voluntary departure, should never be used for children.

- The Department of Justice Executive Office for Immigration Review (EOIR) should be funded to hire enough judges and staff so it can provide prompt hearings for unaccompanied children without compromising standards of due process and fairness. With about 350,000 cases in the current EOIR backlog, scheduling delays are a leading reason cases cannot move forward promptly. Under no circumstances should pressure be placed on immigration judges to handle cases at a faster rate by denying legitimate requests for continuances.

- No child should face deportation alone. But unfortunately, most still do. The government should provide counsel for children in removal proceedings when they cannot afford a private attorney. The lack of counsel compounds the vulnerability of children as they move through our nation's complicated removal system. Even children who have survived trauma or persecution or live in fear of return are often left to navigate the laws on their own and present their claims without any legal assistance.

- EOIR's Legal Orientation Program (LOP) and Legal Orientation Program for Custodians (LOPC) should be sufficiently funded to ensure that every child receives the benefits of these programs. Although the LOP is not a substitute for legal representation, it is the only opportunity for most unaccompanied children to obtain information about their rights and responsibilities under the law, information vital for them to be able to make informed decisions about how to proceed. Research shows that LOP participants move through the immigration court process an average of 13 days faster than detainees who do not have access to LOP, resulting in significant savings for both the immigration court and the Department of Homeland Security (DHS) immigration detention system.

- The Asylum Division of the United States Citizenship and Immigration Services (USCIS) should be funded to hire more asylum officers to promptly adjudicate asylum applications. Asylum officers have better training than CBP and Immigration and Customs Enforcement (ICE) officers in reviewing the petitions of vulnerable individuals. Currently, the Asylum Division has a substantial backlog in asylum applications, and increasing its capacity would improving overall efficiency in the process.

- Care, screening and protection for Mexican children should be brought on par with all other unaccompanied children. Mexican children are treated differently under the TVPRA and face nearly automatic repatriation, with limited screening for relief, without the advice of counsel. Their deportation decisions are not made by immigration judges, but by CBP officers and agents. All unaccompanied children should be screened by a professional with training in child welfare, trauma, counseling, and international humanitarian and immigration law, and should appear in removal proceedings before an immigration judge.

- Although the administration is facing enormous operational pressures, it should ensure that pressure is not placed on these vulnerable children to make quick decisions that may jeopardize their well-being. Many of the unaccompanied children who come to the border have been trafficked, persecuted in their home countries, or subjected to domestic violence, abuse, and neglect. These traumatized children may require medical care and even counseling before they can share intimate details of their suffering and appear before a judge.

- Unaccompanied children should be cared for and housed in the least restrictive environment, as mandated by law. They should be separated from non-relative adults while in the government's physical custody. An unaccompanied child should not be held in secure facilities unless a determination is made that he or she poses a danger to himself, herself or others.

- DHS should not expand the use of detention for families as a means to address the crisis or to deter future arrivals. In 2009, ICE was forced to close a Texas family detention facility after being sued for abuses and poor conditions. Family detention is now used only on a limited basis. Instead of detention, DHS should greatly expand the use of alternatives to detention, that are both effective and far less costly.

Legal Protections for Unaccompanied Children

The law governing the treatment of migrant children is set forth primarily in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and the 1996 settlement agreement reached in the lawsuit of *Flores v. Reno*[3], brought on behalf of all migrant children in custody. An "unaccompanied alien child" is legally defined as a child who has no lawful immigration status in the United States, is less than 18 years of age, and has no parent or legal guardian in the country present or available to provide care and physical custody.[4] The TVPRA establishes two sets of standards for unaccompanied children: one for those from countries that share a border with the United States (referred to as contiguous countries, specifically Mexico and Canada); and one for children from non-contiguous countries.

The Care of Unaccompanied Children from Non-Contiguous Countries

Within 72 hours of identification by any federal government agency as a UAC, children from non-contiguous countries must be transferred into the custody of the Department of Health and Human

[3] No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997)
[4] 6 U.S.C. § 279(g).

Services (HHS) Office of Refugee Resettlement (ORR).[5] Once a child is in ORR custody, ORR screens the child to identify medical and other immediate needs. ORR is required to place the child in the least restrictive setting that is in the best interest of the child.[6] Typically, ORR will try to identify a relative who is able to care for the child. However, those children who remain in the government's legal and physical custody may not be detained with non-relative adults. Moreover, ORR is required to place the child in non-secure facilities unless ORR has made a determination that the child poses a danger to himself or others or has been charged with having committed a criminal offense.[7] Those who do not have a suitable relative remain in the custody of ORR and are typically placed in non-secure facilities, such as group homes, until their immigration case is resolved.

The TVPRA requires that all unaccompanied children be placed into removal proceedings before an immigration judge under Immigration and Nationality Act (INA) §240, though an unaccompanied child from a contiguous country who meets certain criteria (see below) may be permitted to voluntarily withdraw his or her application for admission.[8] Finally, ORR is required to make every effort to provide legal counsel to unaccompanied children and to coordinate with the immigration courts to provide legal orientation programs to their custodians 8 U.S.C § 1232(c)(4) and (c)(5).

Unaccompanied Alien Children from Contiguous Countries

Unaccompanied children from contiguous countries are protected under less rigorous standards. Within 48 hours of apprehending these children, CBP (or another federal agency that has apprehended the child) must determine: (1) whether the child is not a victim of trafficking or at risk of being trafficked; (2) whether the child does not have a fear of returning to her country based on a credible fear of persecution; and (3) whether the child cannot make an independent decision to withdraw her application for admission into the United States. 8 U.S.C § 1232(a)(2). Only if the answer to all three questions is "no" may CBP allow the unaccompanied child to voluntarily withdraw her application for admission, and immediately repatriate her without the review of an immigration judge. These children receive no further opportunity to access the protections that international and U.S. law provide. If the answer to any one of these questions is "yes," then CBP must transfer the child to the custody of ORR and treat the child like an unaccompanied child from a non-contiguous country.

A 2011 report by the Appleseed Foundation found that in most cases "no meaningful screening is being conducted" by CBP as required by the TVPRA.[9] The report attributed this failure to the CBP's general

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[5] 8 U.S.C. §1232(b)(3). "**Transfers of unaccompanied alien children.** Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child."

[6] U.S.C § 1232(c)(2). The *Flores* Settlement mandates that the government "release a minor from its custody without unnecessary delay," as long as detention is not required to ensure a child's appearance at immigration court, or for safety reasons. *Flores* Settlement, ¶ 14.

[7] U.S.C § 1232(c)(2)(A).

[8] 8 U.S.C. §1232(a)(5)(D). "**Placement in removal proceedings**. Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be—

(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act(8 U.S.C. 1229a);
(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and
(iii) provided access to counsel in accordance with subsection (c)(5)."

[9] "Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors," Appleseed Foundation, 2011. http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf.

lack of resources and expertise; the fact that border patrol facilities are not a suitable environment for interviewing minors; and the lack of training for CBP officers and agents to conduct the screenings. The report concluded:

> [M]inors are not being informed of their rights, have little or no comprehension regarding their options, and are encouraged to believe that they have no real choice other than to return to Mexico, regardless of their circumstances. On the whole, then, unaccompanied Mexican children still are being returned to whatever conditions led them to migrate north, even if those conditions include an abusive home environment, or exploitation by traffickers, gangs, and drug cartels.

Expedited Removal

Expedited removal is a truncated administrative deportation process that bypasses immigration judge hearings and allows enforcement agents to make removal decisions with the stroke of a pen. AILA has strong concerns about the lack of due process, oversight and adequate redress that accompanies the expedited removal process. Asylum seekers who are subject to expedited removal receive limited protection. Border Patrol is required to ask all noncitizens in expedited removal whether they have a fear of return to their home country. If a noncitizen expresses fear, Border Patrol is required to refer him or her to the Asylum Division of USCIS for a full "credible fear" interview. If a noncitizen is found by an asylum officer to have such a credible fear, he or she is placed in removal proceedings before an immigration judge pursuant to INA § 240, at which time he or she can request asylum.

The TVPRA requires all unaccompanied children to be placed in removal proceedings before an immigration judge pursuant to Immigration and Nationality Act §240. As previously mentioned, CBP may permit a child from a *contiguous country* to voluntarily withdraw his or her application for admission—and bypass immigration court—only if the child has not indicated risk factors for trafficking or fear of return and has the capacity to voluntarily withdraw the application for admission and chooses to do so after a meaningful advisal of their rights.[10]

AILA opposes any application of expedited removal to unaccompanied children and would not recommend the use of the adult credible fear screening process for unaccompanied children. Research demonstrates that the expedited removal process fails to protect even *adults* who have legitimate fears of returning home. In 2005, the bipartisan United States Commission on International Religious Freedom (USCIRF) conducted an extensive study of Border Patrol's use of expedited removal and found serious flaws in the protections afforded to legitimate asylum seekers through the expedited removal process.[11] In particular, it found that CBP was not following proper procedures in screening and referring individuals for credible fear interviews.

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[10] Additionally, existing regulations codify the permanent injunction in the 1984 litigation *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985) and require CBP to give juveniles notice of rights, including the right to a hearing. *See* 8 C.F.R. §236.3(g)-(h) and Form I-770.

[11] United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (February 8, 2005), *available at* http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal.

In 2013, AILA submitted 19 case examples of individuals in whose cases CBP never asked about fear of return in the first place or ignored statements of fear. In response to receiving these examples, the DHS Office for Civil Rights and Civil Liberties has opened an investigation.

Different Screening and Removal Procedures for Children from Contiguous and Non-Contiguous Countries under TVPRA

<table>
<tr><th colspan="2">Process for Unaccompanied Alien Children</th></tr>
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A child is apprehended by either Border Patrol or Office of Field Operations
The child will undergo initial processing at a Border Patrol Station or a port of entry.
The child will be screened for UAC status (less than 18 and no available parent/legal guardian) and to determine if the child is a national of a contiguous country.

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<tr><th>Contiguous (Mexico or Canada)</th><th>Non-contiguous</th></tr>
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Within 48 hours of apprehension, Border Patrol agents screen the child to determine that:

The child has not been a victim of a severe form of trafficking and there is no credible evidence that the child is at risk of being trafficked upon return;
The child does not have a fear of returning owing to a credible fear of persecution; and
The child is able to make an independent decision to withdraw application or admission.

Use of CBP UAC Screening Form 93 & Form I-770 Notice of Rights and Request for Disposition.
If the child does not meet all three criteria, then transferred to ORR.
If determined that the child meets all the criteria, the child is allowed to withdraw the admission. The child is then repatriated.

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CBP notifies ICE and ORR. Within 72 hours of apprehension, the child is transferred by ICE to HHS/ORR custody.
ORR ensures that the child be promptly placed in the least restrictive setting that is in the best interest of the child.
ORR screens the child to determine whether:

The child has been a victim of a severe form of trafficking in persons;
There is credible evidence that the child is at risk if returned;
Whether the child has a possible claim to asylum.

The child is placed in removal proceedings before an immigration judge pursuant to Immigration and Nationality Act §240.

While proceedings are pending, the child is released to the custody of a family member or to an ORR shelter or foster home.
If not eligible for any relief (SIJS, Asylum, T/U visa), the child is ordered removed and repatriated.

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Acronyms:
CBP: Customs and Border Protection
HHS: Health and Human Services Agency
ORR: Office of Refugee Resettlement (a division of HHS)
ICE: Immigrations and Customs Enforcement
SIJS: Special Immigrant Juvenile Status