



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

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September 16, 2004

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children

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I. Introduction

This OPPM provides guidance and suggestions for adjudicating cases where the respondent is an unaccompanied alien child (defined later). The suggestions focus primarily on assisting the judge in ensuring that the respondent understands the nature of the proceeding, effectively presents evidence about the case, and has appropriate assistance. Issues of age, development, experience and self-determination impact on how a court deals with a child respondent and are highlighted in the OPPM.

When the respondent is a child, the immigration judge faces fundamental challenges in adjudicating the case: does the respondent understand the nature of the proceeding, can the respondent effectively present evidence about the case, and is there anyone who can properly advocate for the respondent’s interest? Issues of age, development, experience and self-determination impact how a court deals with a child respondent.

Organizations involved in handling children’s asylum claims have developed special guidance for adjudicators. Canada’s Immigration and Refugee Board was the first to draft such guidance: Child Refugee Claimants: Procedural and Evidentiary Issues (1996). The following year the United Nations High Commissioner for Refugees issued Policies and Procedures for Unaccompanied Children Seeking Asylum. Finally, in 1998 the former Immigration and Naturalization Service distributed Guidelines for Children’s Asylum Claims to its asylum officers. Copies of these guidelines have been distributed to all Immigration Courts, and judges have been encouraged to consult them as appropriate.

None of these documents specifically addresses the issues that arise when children’s asylum claims are presented in an adversarial setting. Therefore, in developing guidelines for the kinds of cases that we handle, the Office of the Chief Immigration Judge (OCIJ) sought additional guidance, primarily in materials developed for juvenile and family courts. The guidelines that follow are informed both by the asylum-specific documents mentioned above and by writings of judges and litigators in other areas of the law.

II. Definition of unaccompanied alien child

These guidelines use the terms “child” and “children” in a way that is slightly different from the definitions provided in the Immigration and Nationality Act (Act). The Act defines a “child” as an unmarried person under 21 years of age. Sections 101(b)(1) and 101(c)(1). The regulations follow this statutory definition. The regulations also define a “juvenile” as an alien under the age of 18. 8 C.F.R. § 1236.3. The regulations also use (but do not define) the word “minor” when describing aliens under 14 years of age. 8 C.F.R. § 1236.2.

The Homeland Security Act of 2002 transferred responsibility for detained alien children from the former INS to the Department of Health and Human Services. It also introduced a new term -- unaccompanied alien child – to define a child who has no lawful immigration status in the United States, has not attained 18 years of age, and who has no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody.

These guidelines use the term “unaccompanied alien child” as defined in the Homeland Security Act: a person under 18, without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is able to provide care and physical custody. Once a person attains the age of 18, he or she would not fall within the definition. For these guidelines, all references to child or children should be construed with that definition.

III. Basic principles

Several principles are central to these guidelines:

- A. Authority of guidelines Every immigration judge is expected to employ child sensitive procedures whenever a child respondent or witness is present in the courtroom. However, it is equally true that all such cases are not alike, and the procedures appropriate for a very young child may differ significantly from those appropriate for a teenager. These guidelines are suggestions that should be applied as circumstances warrant. All immigration judges understand that special attention is required for cases involving child witnesses or unaccompanied alien child respondents. The way that special attention is shown is left to a case-by-case determination by the individual judge.
- B. Best interest of the child Issues of law -- questions of admissibility, eligibility for relief, etc. -- are governed by the Immigration and Nationality Act (INA or Act) and the regulations. The concept of “best interest of the child” does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.

- C. Legal and personal representation Neither the INA nor the regulations permit immigration judges to appoint a legal representative or a guardian ad litem. Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent needs a legal representative. Likewise, although there is no independent court role for a personal representative or guardian ad litem, if such services are made available to respondents they have the potential to increase a child's understanding of the proceeding and to improve the child's communication with his or her legal representative.
- D. Applicability to all immigration judges All judges must be able to handle cases involving unaccompanied alien children. Circumstances in a particular court may require specialized dockets for children's cases, and responsibility for such dockets may be assigned to certain judges. However, all immigration judges are trained to handle these cases. It is the responsibility of every immigration judge to be familiar with these guidelines and related training materials.
- E. Additional considerations While these guidelines are written for cases involving unaccompanied alien children, some provisions will apply in other cases where children are accompanied by a parent or guardian or where children testify as witnesses. Additionally, the guidelines mention, but do not address in detail, other topics that apply whenever a child is present as respondent or witness. These topics include the effect of age and development on a child's ability to participate in the proceeding; gender, mental health (including possible post-traumatic stress syndrome); and general cultural sensitivity issues; and appropriate questioning and listening techniques for child witnesses. OCIJ has provided training to immigration judges on some of these issues and will continue to do so in the future. These guidelines should be viewed as one component of that training.

IV. Ensuring an appropriate courtroom setting

Claims in Immigration Court are raised in an adversarial setting in a courtroom. Recognizing that cases involving unaccompanied alien children may make special demands on all parties, consideration should be given in appropriate circumstances to some modifications to the ordinary courtroom operations and configuration. These modifications may include:

- A. Courtroom orientation The courtroom is usually an unfamiliar place for children. Many family and juvenile court experts recommend allowing children to visit an empty courtroom prior to their scheduled hearing. Under the supervision of court personnel, the children should be permitted to explore the courtroom, sit in all the locations (including, especially, the judge's bench and the witness stand), and to practice answering simple questions in preparation for testimony. To the extent that resources permit, court administrators should be receptive to requests by legal representatives or custodians for unaccompanied alien children to visit our courts prior to the initial hearing. Additionally, they should be open to other ways to familiarize unaccompanied alien children with court operations.

- B. Scheduling unaccompanied alien children's cases Wherever possible, courts should conduct cases involving unaccompanied alien children on a separate docket or at a fixed time in the week or month. If the number of cases do not warrant a separate docket, courts should try to schedule children's cases at a specific time on the regular docket, but separate and apart from adult cases. Such a docket or schedule will improve the ability of custodians to transport the children and of legal service providers to assist them. Similarly, courts should keep detained dockets for adults and children completely separate. Courts should try to ensure our dockets do not have the effect of forcing detained alien children to be transported or held with detained adults.
- C. Courtroom modifications Immigration judges do not have the luxury of equipping their courtrooms with special furniture designed on a child's scale. However, judges can and should permit reasonable modifications: allowing counsel to bring pillows or booster seats for young respondents; permitting young respondents to sit in one of the pews with an adult companion or permitting the companion to sit at counsel's table; allowing a young child to bring a toy, book or other personal item into the courtroom; permitting the child to testify while seated next to an adult or friend, rather than in the witness stand; etc. Simple, common sense adjustments need not alter the serious nature of the proceedings. They can, however, help foster an atmosphere in which a child is better able to present a claim and to participate more fully in the proceeding.
- D. Assessing the use of video conferencing It is important to note that Congress made no distinction between hearings conducted in person and hearings conducted by video conference. Video conference generally will be appropriate unless circumstances dictate otherwise. Therefore, when handling cases involving unaccompanied alien child respondents, if under ordinary circumstances the hearing would be conducted by video conference, the immigration judges should determine if particular facts are present in the case to warrant an exception from the usual practice.
- E. Removing the robe. Like the courtroom, the robe is a symbol of the judge's independence and authority. For this reason, OPPM 94-10, "Wearing of the Robe During Immigration Judge Hearings," provides that a robe shall be worn in every proceeding when any of the parties is present with the immigration judge. While most unaccompanied alien children will be far more interested in the judge's behavior than the judge's attire, the robe may be disconcerting for younger respondents. If a judge determines in a particular case that dispensing with the robe would add to the child's ability to participate, OPPM 94-10 is modified to permit the judge to remove the robe for that case.

V. Ensuring appropriate courtroom procedures

There is a consistency in the published recommendations for improvements in handling children's cases. Many of these recommendations come not from child psychologists but from lawyers and judges. Although most suggestions pertain to juvenile and family court cases, they have applicability in immigration cases as well, despite the added complexities of language and cultural differences. By carefully controlling how the proceedings are conducted, immigration judges can effectively discharge their obligation under the INA and the regulations in a way that takes full account of the best interest of the unaccompanied alien child. The following suggestions have relevance to most, if not all, cases where children are respondents:

- A. Explain the proceeding at the outset Judges should consider making a brief opening statement at the beginning of each proceeding to explain the purpose and nature of the proceeding, to introduce the parties and discuss each person's role, and to explain operational matters such as tape recording, note taking, telephonic or video conference appearances, etc.
- B. Pay particular attention to the interpreter Judges should allow time for the interpreter and the unaccompanied alien child to establish some rapport by talking about unrelated matters before testimony is taken. Judges should also watch for any indication that the child and the interpreter are having difficulty communicating. Any statement to be translated should be made in English at an age-appropriate level and translated at that level for the child respondent.
- C. Be aware of time As in any case, the judge should give the parties a full opportunity to present or challenge evidence. However, stress and fatigue can adversely impact the ability of an unaccompanied alien child to participate in his or her removal proceeding. Consistent with case completion goals, immigration judges should seek not only to limit the number of times that children must be brought to court, but also to resolve issues of removability and relief without undue delay. As appropriate, judges should require the parties to narrow issues through pre-trial conference and stipulations. Additionally, if a child is called to testify, judges should seek to limit the amount of time the child is on the stand. Similarly, judges should recognize that for emotional and physical reasons children may require more frequent breaks than adults.
- D. Prepare the child to testify As with any witness, judges should be confident that the child is competent to testify in the proceeding, including whether the child is of sufficient mental capacity to understand the oath and give sworn testimony. The explanation of the oath should vary with the age of the witness: promise "to tell the truth" or promise "to tell what really happened" etc. Children should be told that it is all right for them to say, "I don't know" if that is the correct answer, and to request that a question be asked another way if the child does not understand it. Explain also that the child witness should not feel at fault if an objection is raised to a question.

- E. Employ child-sensitive questioning Language and tone are especially important when children are witnesses. Proper questioning and listening techniques will produce a more complete and accurate record. Although the Immigration Court process is adversarial, judges should insist that questions are phrased in age-appropriate language and tone. Attachment A contains a detailed set of instructions from the DHS guidelines. Immigration judges should consult these suggestions and adapt them to the courtroom setting to the extent possible.
- F. Make proper credibility assessments Judges should recognize that children, especially young children, usually will not be able to present testimony with the same degree of precision as adults. Do not assume that inconsistencies are proof of dishonesty, and recognize that a child's testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.
- G. Control access to the courtroom As a general matter, it is best to have as few people in court as possible. Children may be reluctant to testify about painful or embarrassing incidents, and the reluctance may increase with the number of spectators or other respondents.

VI. Coding unaccompanied alien child cases

It is important that the Immigration Courts code these cases so that they can readily be identified. Courts for many years have used the J-code in ANSIR to designate cases involving children. However, the J-code alone does not permit us to distinguish children who are with a parent or legal guardian from unaccompanied alien children.

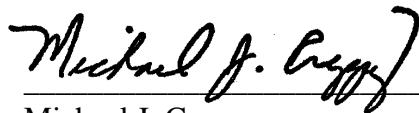
Beginning immediately, court administrators should assign the J-code in ANSIR only to cases where a child in proceedings has a parent or legal guardian in the United States who is providing care and physical custody. Those children, obviously, will not be in the custody of the Department of Homeland Security or the Office of Refugee Resettlement. If, on the other hand, a child in proceedings meets the definition of an unaccompanied alien child -- has no parent or guardian in the United States or no parent or legal guardian in the United States available to provide care and physical custody -- the court administrator should use a new ANSIR code, UJ. In most if not all instances, those unaccompanied alien children will be in the custody of DHS or the custody of ORR. The UJ code should remain on the record unless the child is released from DHS custody or ORR custody to a parent or legal guardian. If the court staff or the judge become aware that the child has been released from DHS custody or ORR custody to a parent or legal guardian, the case should be re-coded J-1. The J-1 code should also be used if an unaccompanied alien child attains the age of 18 while still in proceedings.

These new codes should be used for all new case filings. Additionally, for pending cases court staff should change the case identifier from J to UJ if the respondent meets the definition of an unaccompanied alien child.

The use of these three codes is temporary until the new CASE system is operational in all courts. Although it is an interim procedure, it will permit us to report on the number and disposition of unaccompanied alien children cases in our courts.

VII. Training

Immigration judges can play an active part in training programs for pro bono attorneys. Mock trials and other efforts are effective ways of increasing the available pool of representatives. When judges are invited to participate, these requests should be promptly forwarded to OCIJ for approval. Recognizing that docket demands must come first, this office is committed to assisting in such efforts.

A handwritten signature in black ink that reads "Michael J. Creppy". The signature is written in a cursive style and is positioned above a horizontal line.

Michael J. Creppy
Chief Immigration Judge

Attachment

Attachment A

The following suggestions are drawn from the Guidelines for Children's Asylum Claims issued by the Immigration and Naturalization Service (now the Department of Homeland Security) in 1998. Specifically, they are found in the section entitled "Child-Sensitive Questioning -- And Active Listening -- Techniques."

As a general rule, use short, clear, age appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask "Who was the person?" rather than "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case ... ?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

Choose easy words over hard ones: use expressions like "show," "tell me about," or "said" instead of complex words like "depict," "describe," or "indicate."

Tolerate pauses, even if they are long.

Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visual terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.

Avoid the use of technical legal terms in questions, such as "persecuted" or "persecution." Instead of "Were you persecuted?", ask "Were you hurt?"

Use the active voice when asking a question (e.g., "Did the man hit your father?"). Avoid the passive voice (e.g., "Was your father hit by the man?").

Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, "When you were in the house, on Sunday the third, and the man with the gun entered, did the man say ... ?" should be avoided.

Keep each question simple and separate. For example, a question like "Was your mother killed when you were 12?" should be avoided. The question asks about the child's mother and the child's age at the same time.

Generally, avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.

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. Try not to interrupt the child in the middle of a narrative response.

If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is 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.

Coercion has no place in any hearing. Children are never to be coerced into answering questions during the hearing. For example, telling a child that she cannot leave the hearing until she answers the questions posed by counsel or the judge should never occur.

Do not expect children to be immediately forthcoming about events which have caused great pain.

Before asking how many times something happened, the immigration judge should determine the child's ability to count. Children may try to answer without the requisite skill, resulting in irrelevant, inconsistent, misleading, or erroneous responses.

Children may not know the specific circumstances that led to their flight from their home countries and, even if they know the circumstances, they may not know the details of the circumstances. The child may also have limited knowledge of conditions in the home country, as well as his or her vulnerability in that country. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates).

Imprecise time and date recollection may be a common problem for children. Many aliens, 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. 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." To be sure, these answers may appear vague, but they may be the best and most honest testimony the child has to offer.

It should be noted that children can not be expected to present testimony with the same degree of precision as adults with respect to context, timing, and details.