



U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

September 19, 2017

MEMORANDUM TO: James R. McHenry III,
Acting Director
Executive Office for Immigration Review

FROM: Jean King, General Counsel *JK*

SUBJECT: Legal Opinion re: EOIR's Authority to Interpret the term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA

I.

You have asked the Office of General Counsel ("OGC") for a legal opinion addressing two issues: (1) whether the Department of Homeland Security's ("DHS") determination regarding an alien's status as an unaccompanied alien child ("UAC") is legally binding on the Executive Office for Immigration Review ("EOIR"); and (2) if an alien had UAC status previously but no longer meets the definition of UAC, does the alien lose the protections of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). OGC's opinion is that Immigration Judges are not bound by DHS's determination regarding whether a respondent is or is not a UAC. Instead, Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination bears on a respondent's eligibility for relief, or as part of a determination regarding the applicability of the initial jurisdiction provision set forth in section 208(b)(3)(C) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1158(b)(3)(C). It follows that a respondent who was previously designated as a UAC upon apprehension for purposes of placement in removal proceeding and/or an appropriate custodial setting may no longer be eligible for relief under the TVPRA if an Immigration Judge determines that the respondent no longer meets the definition of UAC.

II.

In 2008, Congress enacted the TVPRA as a "comprehensive scheme" designed to provide certain protections for UAC with respect to their apprehension, custody, placement in removal

proceedings, and eligibility for certain forms of immigration relief. *See* 8 U.S.C. § 1232 et seq.; *see also* H.R. Rep. 110-941 at 215-16 (summarizing section 235 of the TVPRA).

Critically, an alien's eligibility for these protections rests on his or her classification as a UAC. The Homeland Security Act (HSA) provides that:

The term unaccompanied alien child means a child who – (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom – (i) there is not parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g) (2002). The TVPRA incorporates the definition of UAC contained in the HSA by cross-reference. *See* 8 U.S.C. § 1232(g) (“for purposes of this section the term unaccompanied alien child has the meaning given such term in . . . 6 U.S.C. § 279(g).”).

Several federal departments and agencies share responsibility for implementation of the TVPRA. Components within DHS are responsible for the apprehension and processing of UAC. Upon apprehension, an ICE or CBP officer makes a determination as to whether an alien is younger than eighteen and unaccompanied. *See* 8 U.S.C. § 1232(b)(2). With the exception of children from Mexico and Canada who meet certain criteria, DHS must generally transfer all UAC to the Department of Health and Human Services (“HHS”). 8 U.S.C. § 1232(b)(3). HHS is responsible for the care, custody, and placement of UAC. 8 U.S.C. § 1232(c), 6 U.S.C. § 279(g). The statute also directs that “[t]he Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of the alien which shall be used by [DHS and HHS] for children in its custody.” 8 U.S.C. § 1232(b)(4).

The TVPRA contains a number of provisions that directly implicate EOIR's authority. First, any UAC sought to be removed by ICE (except for certain children from Mexico and Canada) are not subject to expedited removal but instead must be placed in removal proceedings before EOIR. *See* 8 U.S.C. § 1232(a)(5)(D). Second, the TVPRA amends the procedures for UAC seeking asylum by transferring initial jurisdiction over such cases from EOIR to the United States Citizenship and Immigration Services (“USCIS”). INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C). Third, the TVPRA waives the requirement that a UAC must apply for asylum within one year of arrival to the United States, as well as the bar to applying for asylum if an alien could be removed to a “safe third country.” *See* 8 U.S.C. § 1158(a)(2)(E). Finally, the TVPRA provides that UAC do not have to post bond or prove that they have the financial means to depart the United States in order to qualify for voluntary departure in removal proceedings. *See* 8 U.S.C. § 1232(a)(5)(D).

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

III.

The Attorney General has not promulgated regulations implementing the TVPRA, nor is there case law explicitly discussing EOIR's authority with respect to administering the statute. Accordingly, the starting point is the language of the statute itself and the context of the governing statute as a whole. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). When interpreting a comprehensive statute such as the TVPRA and the INA, the "goal is to fit, if possible, all parts into a harmonious whole." *Id.* at 133. As a whole, the TVPRA reflects Congress's intent that while DHS is required to make a determination of UAC status for custodial purposes and as a prerequisite to initiating removal proceedings, EOIR's Immigration Judges may exercise their independent adjudicatory role to determine a respondent's status as a UAC when such a determination bears on issues arising during the course of removal proceedings.

Section 1232(g) states that "for purposes of this section the term unaccompanied alien child has the meaning given such term in . . . 6 U.S.C. § 279(g) (emphasis added)."¹ For DHS's purposes, the TVPRA requires certain DHS officers to determine whether an alien meets the definition of UAC upon apprehension to ensure both prompt transfer to HHS and placement in removal proceedings. *See* 8 U.S.C. §§ 1232(a)(3), (b)(3). The TVPRA also requires HHS to develop procedures to determine whether a child in its custody remains a UAC. *See* 8 U.S.C. § 1232(b)(1); 6 U.S.C. § 279(b); *see also D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016) (discussing HHS authority).² However, those statutes nowhere state that a DHS or HHS determination regarding UAC status made for these limited purposes is binding on EOIR when such a determination bears on EOIR's adjudicatory authority under section 240 of the Act. To the contrary, the TVPRA contains a number of provisions that explicitly implicate EOIR's authority. Together, these provisions convince us that Immigration

¹ The fact that Congress placed the definition of UAC in 6 U.S.C. § 279, which is DHS's organic statute, does not undermine an Immigration Judge's authority to make a UAC determination when it bears on issues within an Immigration Judge's jurisdiction. Indeed, 6 U.S.C. § 279(c) explicitly states that "nothing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act . . . from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State."

² EOIR does not have any responsibility over the apprehension, physical custody, or decision to place any alien in removal proceedings. *See* 6 U.S.C. § 251 et. seq.; *see also* 8 U.S.C. §§ 1103(a), 1103(g); *see generally Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011). Nor does EOIR have any authority over HHS's safety and suitability assessments for UAC. *See* 8 U.S.C. §§ 1232(b)(1); 1232(c)(2),(3); 6 U.S.C. § 279(b).

Judges have independent authority to decide whether a respondent meets the definition of UAC as a prerequisite to resolving certain issues in removal proceedings.

Through section 8 U.S.C. § 1232(a)(5)(D), enacted as a part of the TVPRA, Congress plainly provided that certain UAC are entitled to a determination of their rights and eligibility for relief during a removal proceeding conducted by an Immigration Judge. That section provides that:

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country ... shall be ... placed in removal proceedings under *section 240 of the Immigration and Nationality Act* (8 U.S.C. 1229a)[.]

During proceedings under section 240 of the Act, an Immigration Judge has jurisdiction to determine whether a respondent is removable and to adjudicate applications for relief from removal, if any. Specifically, section 240 of the Act and its implementing regulations require Immigration Judges to: “conduct proceedings for deciding the inadmissibility or deportability of an alien,” INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1); determine whether a respondent “satisfies the applicable eligibility requirements” for relief from removal; INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4); and “at the conclusion of the proceeding decide whether an alien is removable from the United States.” INA § 240(c)(1), 8 U.S.C. § 1229(a)(c)(1). In exercising this authority, an Immigration Judge “must exercise his or her independent judgment and discretion and take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases.” 8 C.F.R. § 1003.10(b).

Given Congress’s explicit reference in 8 U.S.C. § 1232(a)(5)(D) to removal proceedings under section 240 of the Act, and an Immigration Judge’s broad statutory and regulatory jurisdiction to conduct such proceedings, we conclude that an Immigration Judge has independent authority to decide whether or not a respondent qualifies as a UAC for purposes of disposing of any case coming before the immigration courts. This conclusion is also consistent with the general rule that Immigration Judges have jurisdiction over all matters related to the proper adjudication of a removal case unless such jurisdiction is expressly withheld by an Act of Congress or through a regulation issued by the Attorney General. *See e.g. Matter of Herrera Del Orden*, 25 I&N Dec. 589 (BIA 2011) (“Given the Immigration Judge’s broad overall authority to conduct removal proceedings we conclude that he or she is presumed to have jurisdiction to gather and receive evidence pertinent to an application for relief from removal unless the Attorney General expressly withholds it.”).

Indeed, certain provisions of the TVPRA “necessarily” require a determination regarding UAC status as incidental to determining whether a respondent “satisfies the applicable eligibility

requirements” for relief from removal. Section 208(a)(2)(E) of the INA, 8 U.S.C. § 1158(a)(2), which was added by the TVPRA is one such provision. That statute provides that UAC shall not be subject to the one-year time bar and/or the “safe third country” limitation for asylum applications. In all cases, involving asylum, an Immigration Judge must determine whether the respondent “satisfies the applicable eligibility requirements” for asylum. *See* INA § 240(c)(4)(A); *see also* 8 C.F.R. § 1240.1(a)(1)(ii) (stating in any removal proceeding pursuant to section 240 of the Act the Immigration Judge shall have authority to determine applications under section 208). To the extent that an Immigration Judge has jurisdiction over the adjudication of an asylum application filed by a potential UAC, this statute must be read as requiring the Immigration Judge to make a determination regarding UAC status as a prerequisite to granting asylum where the one year bar or safe-third country limitation would otherwise be implicated. A contrary interpretation could result in EOIR issuing asylum benefits and rights to respondents who are otherwise statutorily ineligible for them.

Moreover, section 1232(a)(5)(D)(ii) also requires an Immigration Judge to determine UAC status as a prerequisite to granting voluntary departure at the conclusion of removal proceedings. That statute provides that a UAC does not need to post bond or prove that he or she has the financial means to depart the United States in order to qualify for voluntary departure after the completion of removal proceedings. All other respondents are required to post bond or prove financial means to depart as a prerequisite to being granted voluntary departure. *See* INA § 240B(b); 8 U.S.C. § 1229c(b). Because only an Immigration Judge has authority to grant voluntary departure under INA § 240B(b), this suggests that Immigration Judges have independent authority to determine whether a respondent qualifies as a UAC for purposes of waiving the “financial means” requirement imposed by statute.

The TVPRA does explicitly limit an Immigration Judge’s jurisdiction during removal proceedings in one instance: Section 208(b)(3)(C) of the Act, provides that:

An asylum officer (as defined in section 235(b)(1)(E)) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act)

8 U.S.C. § 1158(b)(3)(C).

Congress enacted this provision as an exception to the rule that once removal proceedings commence an Immigration Judge has exclusive jurisdiction over a respondent’s asylum application, if any. *See* 8 C.F.R. §§ 1003.14(b), 1208.2(b). Nothing in the language of this statute limits an Immigration Judge’s authority to make a determination of UAC status as a prerequisite to determining the threshold jurisdictional question: whether he or she has jurisdiction over a respondent’s asylum application. Rather, it is a familiar rule that a federal court always has jurisdiction to determine its

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

own jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). The Immigration Courts are no different. An Immigration Judge “has the authority to consider and decide whether he has jurisdiction over a matter presented to him. In other words, an Immigration Judge has jurisdiction to determine his jurisdiction.” *Matter of Bulnes-Nolasco*, 25 I&N Dec. 57, 59 (BIA 2009). Accordingly, we believe that an Immigration Judge has authority to make an independent determination as to whether a respondent is or is not a UAC for purposes of determining whether he or she has initial jurisdiction over the respondent’s asylum application.³

For the forgoing reasons, we conclude that Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination is required to decide a respondent’s eligibility for relief, or as part of a determination regarding whether the Immigration Judge has jurisdiction over a respondent’s asylum application, *see* INA § 208(b)(3)(C).

IV.

You also asked whether an alien who had UAC status at either the time of apprehension or placement in removal proceedings loses the protections of the TVPRA if the alien’s status changes.

Again, the starting point is the language of the statute itself, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and the specific context in which that language is used. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As discussed above, the TVPRA’s protections apply starting from the initial moment of the child’s encounter with the DHS, which requires prompt transfer to ORR custody and placement in removal proceedings under section 240 of the Act. However, there is nothing in the TVPRA like the statutory provisions under the Child Status Protection Act to lock in an individual’s UAC status for all time. *Compare* INA §§ 201(f), 203(h)(1)(A), 8 U.S.C. §§ 1151(f), 1153(h)(1)(A) with 8 U.S.C. § 1232(g). Rather, the plain language of the statute suggests that a UAC’s status could change either (1) because the individual is no longer under 18 and has aged out of the definition of a UAC; (2) because the individual is no longer unaccompanied, after a parent has been

³ As a legal matter, DHS’s determination of UAC status is not binding on an Immigration Judge. Rather, an Immigration Judge has independent legal authority to decide whether he or she has jurisdiction over an asylum application and may decide the corresponding question of UAC status. Nevertheless, we note that the agency has advised Immigration Judges that, as a matter of policy, they need not *sua sponte* re-determine a respondent’s UAC status in cases where ICE does not object to a continuance or administrative closure to allow a respondent to pursue an asylum application with USCIS. This advice was in line with a guidance document issued by the Office of the Chief Immigration Judge advising Immigration Judges “to exercise discretion . . . to ensure coordination among government agencies responsible for the implementation of the asylum jurisdictional provision of the TVPRA.” See EOIR, Office of the Chief Immigration Judge, Implementation of the Trafficking Victim’s Protection Reauthorization Act of 2008 Asylum Jurisdictional Provision (Interim Guidance) (March 20, 2009).

located to provide care and custody; or (3) because the individual has been granted legal status during the pendency of the removal proceedings. *See* 8 U.S.C. § 1232(g). This indicates that Congress did not intend for all of the TVPRA's protections to apply permanently to any alien who was designated as a UAC at the time of apprehension or placement in removal proceedings. As discussed above, there are three provisions in the TVPRA that implicate EOIR's jurisdiction and an Immigration Judge's authority to waive certain statutory requirements governing applications for relief from removal.

First, INA § 208(b)(3)(C), 8 U.S.C. § 1158(b)(3)(C), provides that "an asylum officer shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child." Although the statute appears in a section of the TVPRA entitled "Permanent Protections for Certain At-Risk Children," the language of the statute strongly suggests that it creates two requirements: the filing of an asylum application and UAC status on the date of filing. Two circuit courts have issued decisions (one unpublished) adopting this interpretation through petitions for review filed from Board decisions affirming an Immigration Judge's authority to exercise initial jurisdiction over an asylum application filed by a former unaccompanied child.⁴ *See Harmon v. Holder*, 758 F.3d 728 (6th Cir. 2014) (finding that although the alien was a UAC when the alien entered the United States, the alien was older than 18 at the time of filing the asylum application and was not entitled to USCIS initial jurisdiction); *Mazariegos-Diaz v. Lynch*, 605 F. App'x 675, 676 (9th Cir. 2015). Therefore, the most natural reading of the statute is only a respondent who was a UAC *at the time of filing* the asylum application (either in Immigration Court or before USCIS) is eligible to apply for asylum with USCIS in the first instance.

Second, under 8 U.S.C. § 1232(a)(5)(D)(ii), a UAC, if otherwise eligible for voluntary departure, is not required to post a voluntary departure bond or to bear other costs attributable to the granting of such relief. Specifically, the statute provides that "[a]ny unaccompanied alien child sought to be removed by the Department of Homeland Security . . . shall be placed in removal proceedings [and] . . . eligible for relief under section 240B of the Act (8 U.S.C. § 1229a) at no cost to the child." We acknowledge that there is some ambiguity in the statute. The statute could be read to apply to any respondent designated as a UAC when DHS "seeks to remove" the child (that is, at the time the child is placed in removal proceedings) or only to a respondent who continues to be a UAC at the time he or she applies for voluntary departure. OGC's view is that the language "sought to be removed" merely imposes a duty on DHS to place such individuals in removal proceedings but does not permanently waive the departure bond/financial means requirement for any individual initially designated as a UAC by DHS. Rather, the language "at no cost to the child" is better read as alleviating a UAC of the burden

⁴ We note that these cases demonstrate that EOIR has exercised authority to determine UAC status for the purposes of applying INA § 208(b)(3)(C), which further supports our determination that Immigration Judges have independent authority to make UAC determinations.

to prove that he or she has the means to depart while he or she *remains an unaccompanied alien child*. Accordingly, we think that the most natural reading of the statute permits Immigration Judges to determine UAC status at the time that a respondent applies for voluntary departure and as a prerequisite to waiving the financial means/departure bond requirement that applies to all other respondents.

Third, INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E),⁵ waives the requirement that UAC must apply for asylum within one year of arrival to the United States. Specifically, INA § 208(a)(1), 8 U.S.C. § 1158(a)(1), provides that any alien who is physically present in the United States may file for asylum. Subparagraph (B), however, specifies that the right to asylum “shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States.” INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B). The TVPRA modified this exception, adding that subparagraph “(B) shall not apply to an unaccompanied alien child.” INA § 208(a)(2)(E), 8 U.S.C. § 1158(a)(2)(E). As discussed above, the plain language of the statute does not support a permanent UAC designation based on an alien’s status at the time of entry or apprehension. Rather, INA § 208(a)(2)(E) only applies to respondents who meet the definition of UAC, which is not a permanent status. There is, however, some ambiguity over when the one-year deadline begins to run. Specifically, the statute can be interpreted as relieving a respondent from complying with the one-year time limit while he or she is a UAC, but the clock continues running. Alternatively it can be read as tolling the one-year filing deadline during the time a respondent is a UAC such that the one year clock begins when the respondent loses UAC status. OGC believes that the best interpretation is that the one-year deadline is tolled while a respondent is in UAC status and begins running when a respondent loses such status.⁶

⁵ As discussed above, this provision also waives the “safe third country limitation” on applying for asylum for UAC. For practical purposes, however, the safe third country limitation has very limited applicability because the only safe third country agreement currently in effect is an agreement between the United States and Canada and it only applies in certain limited circumstances. See EOIR, Office of the Chief Immigration Judge, OPM 04-09, *U.S. - Canada Agreement Regarding Cooperation in the Examination of Refugee Status Claims - “Safe Third Country”* (Dec. 28, 2004). This makes an in-depth discussion of this provision unnecessary at this time.

⁶ We also note that that an asylum application may be considered after the 1-year filing deadline if the applicant can establish “extraordinary circumstances.” INA § 208(a)(2)(D). One such extraordinary circumstance is if the alien is under a legal disability during the 1-year period after arrival (e.g., the alien was an unaccompanied minor) as long as the alien filed the application within a reasonable period given those circumstances. 8 C.F.R. § 1208.4(a)(5)(ii). The Act and regulations do not define “minor” and the Board has not issued a precedential decision addressing this issue. Accordingly, an Immigration Judge or the Board may construe the term minor more broadly than the definition of UAC for purposes of excusing the one-year filing deadline.

Finally, we are aware that the TVPRA was enacted as an important step to “protecting unaccompanied alien children [who had] been forced to struggle through an immigration system designed for adults.” Cong. Rec. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein, cosponsor of original Senate version). For the reasons discussed above, however, and in light of the language of the statute, we do not believe that Congress intended to provide permanent protections to all respondents based on their status at entry. Rather, our interpretation is consistent with the purpose of the TVPRA, which is to provide protections and rights to individuals who remain unaccompanied, under the age of eighteen, and without legal status during removal proceedings.

V.

For the above stated reasons, we conclude that Immigration Judges are not bound by DHS’s determination regarding whether a respondent is or is not a UAC. Instead, Immigration Judges may resolve any dispute about UAC status during the course of removal proceedings when such a determination bears on a respondent’s eligibility for relief, or as part of a determination regarding the applicability of the initial jurisdiction provision set forth in section 208(b)(3)(C) of the Act. We also conclude that under the plain language of the statute, an alien may lose certain protections of the TVPRA if the alien’s status changes. The implications that result from a UAC’s status change will depend on the specific statute at issue being applied by the Immigration Judge.

