

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT**ICE Directive 11089.1: Properly Applying the Unaccompanied Alien Child Statutory Definition****Issue Date:** December 29, 2020**Superseded:** None.**Federal Enterprise Architecture Number:** 306-112-002b

1. **Purpose/Background.** This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy governing its application of the “unaccompanied alien child” (UAC) statutory definition. The law generally requires the U.S. Department of Homeland Security (DHS) to transfer a UAC to the custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), within 72 hours of a determination that an alien is a UAC. A UAC is also afforded certain procedural safeguards and substantive advantages with respect to asylum eligibility, eligibility for voluntary departure, and detention that are not available to other aliens. This Directive establishes guidelines for ICE immigration officers to determine whether an alien meets the UAC statutory definition at the time of the ICE contact or document review as well as procedures for proper documentation of UAC determinations.
2. **Policy.** In general, UAC determinations should be made based on the facts and circumstances available to the ICE immigration officer at the time the determination is made. ICE immigration officers who contact an alien, including an alien previously determined to be a UAC, must determine whether the alien meets the UAC statutory definition at the time of that contact.¹ Likewise, ICE immigration officers must determine whether an alien meets the UAC statutory definition when reviewing the alien’s Notice to Appear (NTA) prior to it being filed with the Executive Office for Immigration Review (EOIR), as well as at any point where the ICE immigration officer becomes aware of information that may materially impact whether the alien is or continues to be a UAC pursuant to the statutory definition. If ICE immigration officers become aware of information establishing that a UAC: i) has obtained lawful immigration status; ii) has reached 18 years of age; and/or iii) has a parent or legal guardian in the United States who is available to provide care and physical custody,² then the officer must determine that the alien no longer meets the statutory definition of a UAC and appropriately document that re-determination after receiving approval from his or her supervisory chain-of-command, pursuant to this Directive.

¹ ICE immigration officers generally should not change or otherwise re-assess initial UAC determinations made by U.S. Customs and Border Protection (CBP) during the fulfillment of ICE’s responsibility to transfer a UAC to HHS custody within 72 hours of such a determination. If ICE immigration officers, during fulfillment of ICE’s responsibility to transfer a UAC to HHS, have a reason to believe CBP’s UAC determination for a particular minor is erroneous, an ICE Field Supervisor should raise the case to CBP for possible reconsideration of the initial UAC determination by CBP.

² See Section 5.1. of this Directive to assess the availability to “provide care and physical custody.”

- 2.1. Applying the UAC Statutory Definition.** ICE immigration officers must assess all reasonably available information when determining whether an alien meets the UAC statutory definition. This may include, but is not limited to, interviewing the alien and other witnesses, reviewing field interviews, databases, records, and other checks and documentation, as appropriate. Whether an alien meets the UAC definition requires an assessment of the current facts of the case. Therefore, ICE immigration officers must make a UAC determination each time an officer encounters an alien, or reviews the A-file and NTA of an alien previously determined to be a UAC, or otherwise obtains information through the course of the officer's duties that demonstrates the alien does not meet the UAC statutory definition.
- 2.2. Proper Handling of UAC and UAC Re-Determination Cases.** If an ICE immigration officer determines that an alien meets the UAC statutory definition, then the officer must process the UAC pursuant to relevant statutes, regulations, and policies governing UAC care and processing. If an ICE immigration officer determines that an alien does not meet the UAC statutory definition, then the ICE officer must process the alien pursuant to relevant policies and legal authorities generally governing aliens' care, detention, processing, and recordkeeping.³
- 3. Definitions.** The following definitions apply for the purposes of this Directive only:
- 3.1. Field Office Juvenile Coordinator (FOJC).** An officer designated by an Enforcement and Removal Operation (ERO) Field Office Director (FOD) to coordinate juvenile issues within the FOD's area of responsibility (AOR), including UAC issues.
- 3.2. Field Responsible Official (FRO).** The highest-ranking official in any ICE field location. This includes Special Agents in Charge (SACs), FODs, and any other officials who have been designated, in writing by the Director.
- 3.3. Field Supervisors.** Deputy FODs, Assistant FODs, Officers in Charge, Supervisory Detention and Deportation Officers, Deputy SACs, and Assistant SACs.
- 3.4. Headquarters Responsible Officials (HROs).** Executive Associate Directors (EADs) of ERO, Homeland Security Investigations (HSI), and Management and Administration (M&A); the Associate Director of the Office of Professional Responsibility; and the Assistant Directors, Officers, or equivalent positions who report directly to the Director, Deputy Director, Chief of Staff, or EAD for M&A.

³ Nothing in this Directive alters U.S. Citizenship and Immigration Services (USCIS) procedures for determining whether it has jurisdiction over an asylum claim filed by a UAC pursuant to section 208(b)(3)(C) of the Immigration and Nationality Act. Of course, USCIS may consider the UAC determinations made by ICE pursuant to this directive in applying its own procedures for making these jurisdictional determinations. Also, ICE immigration officers are reminded of the legal requirement that aliens previously determined to be UACs who reach 18 years of age and are transferred to DHS custody must be considered for "placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight." 8 U.S.C. § 1232(c)(2)(B).

- 3.5. **Immigration Officers.** Deportation Officers, Detention and Deportation Officers, and Special Agents.
- 3.6. **Unaccompanied Alien Child (UAC).** A child who: has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom there is 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.⁴
4. **Responsibilities.**
- 4.1. **HROs** are responsible for ensuring compliance with the provisions of this Directive within their respective Directorate or Program Office.
- 4.2. **FROs** are responsible for:
- 1) Implementing the policy and procedures set forth in this Directive within their respective geographic AORs;
 - 2) Ensuring ICE immigration officers within their AORs properly document their UAC determinations and re-determinations pursuant to Section 5.2. of this Directive;
 - 3) Ensuring that ICE immigration officers within their AORs are properly trained on and familiar with the contents of this Directive, as well as applicable laws, regulations, and policies; and
 - 4) Approving or rejecting UAC re-determinations made by ICE immigration officers within their AORs, or delegating such approval authority to field supervisors within their AORs.
- 4.3. **Field Supervisors** are responsible for ensuring ICE immigration officers under their supervision comply with this Directive and, as assigned by FROs, for working with ICE immigration officers under their supervision on UAC re-determination cases.
- 4.4. **ICE Immigration Officers** are responsible for:
- 1) Applying the UAC statutory definition for each alien contact and for each UAC NTA they review;
 - 2) Obtaining FRO (or FRO designee's) review on all UAC re-determination cases;
 - 3) Properly documenting UAC determinations and re-determinations pursuant to Section 5.2. of this Directive; and

⁴ See 6 U.S.C. § 279(g)(2).

- 4) Ensuring that all UAC screening, care, custody, removal, and transfer actions comply with applicable laws, regulations, and policies.

4.5. The Office of the Principal Legal Advisor (OPLA):

- 1) Provides legal and prudential counsel on UAC matters, including statutory and regulatory authority, ongoing litigation, and caselaw developments;
- 2) Represents DHS before EOIR in removal proceedings involving UACs and other aliens;
- 3) Brings to the attention of ERO or HSI, as appropriate, any information relevant to whether an alien does or does not meet the UAC statutory definition; and
- 4) Provides to EOIR adjudicators timely and accurate information in ICE's possession relevant to an alien's characterization as a UAC (including a UAC re-determination by HSI or ERO).

5. Procedures/Requirements.

5.1. Applying the UAC Statutory Definition. ICE immigration officers must determine whether an alien meets the UAC statutory definition each time an alien is contacted, when the A-file and NTA of an alien previously determined to be a UAC is reviewed, and at any point where an ICE immigration officer becomes aware of information that may materially impact whether the alien is or continues to be a UAC pursuant to the statutory definition. An alien must satisfy each of the following threshold criteria in order to meet the UAC statutory definition:

- 1) The alien has no lawful immigration status in the United States. ICE immigration officers must determine whether an alien has lawful immigration status. Lawful immigration status means admission as a lawful permanent resident or nonimmigrant (if the period of admission has not expired), asylee status, or refugee status.
- 2) The alien has not attained 18 years of age. ICE immigration officers must make age determinations based upon the totality of the evidence and circumstances. Evidence that may factor into determining if an alien has reached 18 years of age includes, but is not limited to, official government-issued documents such as birth certificates, and other objective documentation (e.g., baptismal certificates, school records, and medical records) that indicate the alien's date of birth, prior statements from the alien or the alien's family members, and law enforcement or other government records. For cases in which the age is not easy to ascertain with available evidence, ICE immigration officers should contact their local FOJC for further guidance.
- 3) The alien has no parent or legal guardian in the United States, or no parent or legal guardian in the United States who is available to provide care and physical custody. If an alien has no parent or legal guardian in the United States, then the alien will satisfy

this element of the UAC statutory definition. If the alien does have one or more parent(s) or legal guardian(s) in the United States, ICE immigration officers must first identify and locate the parent or legal guardian and then analyze whether the parent or legal guardian is, “available to provide care and physical custody.”

- a) *Location, Identity, and Relationship Verification.* ICE immigration officers must first determine whether a potential parent or legal guardian is located in the United States. Once an adult has been located in the United States, an ICE immigration officer will confirm the identity and relationship of that individual to the UAC. This may be done through identity documents such as birth certificates and passports, information received from foreign governments, as well as other information such as statements from the alien and the parent or legal guardian.
- b) *Available to Provide Care and Physical Custody.* ICE immigration officers are guided by the ordinary, everyday meaning of “available,” which is defined as “having sufficient power or force to achieve an end; . . . capable of use for the accomplishment of a purpose: immediately utilizable.”⁵ ICE immigration officers must assess whether an alien’s parent or legal guardian in the United States is immediately capable of providing care and physical custody for such alien.⁶ ICE immigration officers must make such assessments on a case-by-case basis, based on the totality of the circumstances, including current facts and readily accessible information. Factors that may inform this assessment include, but are not limited to: statements from the alien and the parent or legal guardian; information about the parent or legal guardian’s housing or residential situation (e.g., whether the parent or legal guardian is currently confined in civil or criminal custody); information obtained from foreign government officials; location of the parent or legal guardian relative to the alien’s location; capacity of the parent or legal guardian to travel promptly to the alien’s location; allegations of neglect or abuse; orders from a state court or documents from child welfare agencies; or whether the alien regularly resides with the parent or legal guardian. Information showing that an alien previously determined to be a UAC is residing with a parent or legal guardian would generally establish that the alien no longer meets (and may, in fact, have never met) the UAC statutory definition.

5.2. Documenting a UAC Determination or Re-Determination. ICE immigration officers must document every UAC determination or re-determination of aliens who may be minors.

- 1) UAC Determination. ICE immigration officers must note their UAC determinations in the applicable case management system (e.g., the ENFORCE Alien Removal Module) in the following instances:

⁵ See Webster’s Third New International Dictionary of the English Language Unabridged 150 (2002).

⁶ See *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (affirming the classification of a child as an unaccompanied minor when his parent was present in the United States and holding that for a parent to be “available to provide care” for a child, the parent “must be available to provide what is necessary for the child’s health, welfare, maintenance, and protection”).

- a) It is the first time ICE is contacting the alien or reviewing a UAC NTA and the alien meets the UAC statutory definition; or
 - b) It is not the first time ICE is contacting or processing the alien, the alien was previously determined to be a UAC, and the alien continues to meet the UAC statutory definition.
- 2) **UAC Re-Determination.** If an ICE immigration officer determines that an alien previously determined to be a UAC does not meet the UAC statutory definition, the officer must obtain FRO (or FRO designee) approval before documenting such a re-determination.
- a) If, after such supervisory review, it is determined that the alien continues to meet the UAC statutory definition, the officer must note this determination in the applicable case management system (e.g., the ENFORCE Alien Removal Module); or
 - b) If, after such supervisory review, it is determined that the alien does not meet the UAC statutory definition, the officer must document the re-determination using the *Unaccompanied Alien Child Re-Determination, Memorandum to File*. The officer must place that memorandum and any supporting information in the alien file (A-File) and include a corresponding note in the applicable case management system (e.g., the ENFORCE Alien Removal Module).
- 5.3. Placing into Removal Proceedings.** ICE immigration officers must assess the circumstances of each case to determine the appropriate removal proceedings for the alien under the Immigration and Nationality Act (INA). For such aliens already placed into removal proceedings under section 240 of the INA, ICE immigration officers and/or their supervisor must notify the OPLA field location handling the case before EOIR about the UAC re-determination so that all applicable action may be taken, including but not limited to notifying EOIR about the re-determination and moving the case off of the UAC docket.
- 6. Recordkeeping.** ERO and HSI will record determinations and re-determinations whether an alien meets the UAC statutory definition in the appropriate ICE systems, and this information will be retained for 75 years in accordance with DHS records schedule DAA-0563-2013-0001. ERO and HSI will also record this information in documentation, which will be retained permanently and transferred to the National Archives after 100 years in accordance with the USCIS A-File records schedule (N1-566-08-011).
- 7. Authorities/References.**
- 7.1. Immigration and Nationality Act of 1952, as amended (INA), Pub. L. No. 82-414, 66 Stat. 163.**

- 7.2. *Homeland Security Act of 2002*, as amended (HSA), Pub. L. No. 107-296, 116 Stat. 2153.
- 7.3. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, as amended (TVPPRA), Pub. L. No. 110-457, 122 Stat. 5044.
- 7.4. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px), (C.D. Cal. Jan. 17, 1997).
- 7.5. 6 U.S.C. § 279(g)(2) (2018).
- 7.6. Memorandum from Secretary John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* (Feb. 20, 2017).
- 7.7. ICE, Enforcement and Removal Operations, Juvenile and Family Residential Management Unit, *Field Office Juvenile Coordinator Handbook* (Sept. 2017).
- 7.8. U.S. Customs and Border Protection Form 93, *UAC Screening Addendum*, as updated.
- 7.9. Form I-770, *Notice of Rights and Disposition*, as updated.
- 8. **Attachments.**
 - 8.1. *Unaccompanied Alien Child Re-Determination, Memorandum to File.*
- 9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

T TONY H
PHAM

Digitally signed by T
TONY H PHAM
Date: 2020.12.29
08:53:39 -05'00'

Tony H. Pham
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement