



**U.S. Immigration
and Customs
Enforcement**

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Senior Official Performing the Duties of the Director

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FROM: Christopher Kelly
Assistant Director
Office of Policy and Planning

SUBJECT: *Properly Applying the Unaccompanied Alien Child
Statutory Definition Directive*

Purpose

To request your approval of the attached U.S. Immigration and Customs Enforcement (ICE) *Properly Applying the Unaccompanied Alien Child Statutory Definition Directive*, Memo to File, and Broadcast Message.

Background

An unaccompanied alien child (UAC) is defined in statute as a child who: i) has no lawful immigration status in the United States; ii) has not attained 18 years of age; and iii) 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.¹ To qualify as a UAC an individual must satisfy each of the three requirements. 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.² A UAC determination does not provide lawful status, but it does afford certain procedural safeguards and substantive advantages with respect to asylum eligibility, eligibility for voluntary departure, and detention that are not available to other aliens.

Section 11(e) of Executive Order (EO) 13767, *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), directed the Secretary of Homeland Security to take appropriate action to require that all DHS personnel are trained to ensure that UACs are properly processed, receive appropriate care and placement while in the custody of DHS, and, when appropriate, are safely repatriated in accordance with law. In his memorandum entitled, *Implementing the President's Border Security and Immigration Enforcement Improvement Policies*, 10-11 § L (Feb. 20, 2017), former DHS Secretary John Kelly instructed the Director of U.S. Citizenship and Immigration Services (USCIS), the Commissioner of Customs and Border Protection (CBP), and the Director of ICE, “to develop uniform written guidance and training ... regarding the proper processing of unaccompanied alien children” and, in so doing, to, “establish review procedures to confirm that alien children who are initially determined to be ‘unaccompanied alien children’ as defined in [6 U.S.C. 279(g)(2)] continue to fall within the statutory definition when being considered for the legal protections afforded to such children as they go through the removal process.”

Additionally, former DHS Secretary Kirstjen Nielsen signed an action memorandum entitled, *Re-designation of Unaccompanied Alien Children Who No Longer Meet the Statutory Definition and Verification of Sponsor's Immigration Status* (Jan. 8, 2018), authorizing ICE to re-designate UACs as accompanied juvenile aliens, when appropriate, upon release of the alien by HHS to a parent or legal guardian. The memorandum also instructed USCIS to rescind its policy memorandum entitled, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 20, 2013) and replace it with one that reverts to the pre-2013 policy allowing USCIS asylum officers to make independent UAC determinations based on the facts at the time the asylum application was filed.

Discussion

One of ICE's core functions is to maintain the integrity of the nation's immigration system by enforcing U.S. immigration laws. Permitting individuals access to procedural safeguards and

¹ 6 U.S.C. § 279(g)(2).

² *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (P.L. 110-457).

substantive advantages when they are not statutorily qualified enables them, or their parents and legal guardians, to exploit the nation's immigration system.

Over the last several years, ICE has developed operational guidelines, handbooks, and training materials to inform its UAC care, custody, transfer, and removal procedures. Many of these materials have been drafted with input and cooperation from CBP, the Executive Office for Immigration Review (EOIR), HHS, USCIS, and the Department of State. Among other things, these materials address care requirements established by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), custody transfer rules, Notices to Appear (NTAs), legal sufficiency, age redeterminations, routine reporting procedures, repatriation requirements, and litigation issues. Together, they cover almost the entire UAC immigration lifecycle. However, the agency currently lacks an ICE-wide policy establishing how to properly apply the UAC statutory definition or consistently document UAC determinations. Furthermore, ICE generally does not revisit initial UAC determinations, which conflicts with guidance from the EOs and DHS guidance referenced above. The Directive will address ICE's responsibility to make UAC determinations each time a UAC or alien minor is encountered.

Directive and Memorandum to File

Pursuant to the EO 13767 and DHS Secretary direction, this Directive sets forth ICE policy governing proper application of the UAC statutory definition. It also establishes procedural guidelines and factors for consideration when ICE immigration officers determine whether an alien meets the UAC statutory definition. ICE immigration officers must document every UAC determination or re-determination and obtain supervisory approval for all re-determinations.

Operational Considerations

ICE has generally relied upon prior UAC determinations made by CBP when taking custody of a child for the purpose of transferring the child to HHS custody. This Directive maintains that practice. Requiring ICE immigration officers to make independent UAC determinations within the TVPRA's 72-hour custody transfer timeline, based on information that has likely not changed since CBP's initial UAC determination at the time of encounter or apprehension, would create a risk of operational delays that might place ICE in violation of the law.

When ICE immigration officers learn that a UAC has gained lawful immigration status or has reached 18 years of age, ICE has generally continued to process the alien as a UAC, despite not being a UAC as defined by statute. This is also true for aliens discharged by HHS to the custody of a sponsor, including when an alien is transferred by HHS to the care and physical custody of a parent or legal guardian in the United States.

Pursuant to EO 13767 and DHS Secretary direction, this Directive considers the discharge to a parent or legal guardian to be a changed circumstance that calls into question whether the alien continues to meet the UAC statutory definition. In such cases, ICE immigration officers must assess all reasonably available information to determine if the alien continues to meet the UAC statutory definition, or if a re-determination may instead be appropriate.

In practice, this Directive requires ICE immigration officers to assess the totality of circumstances upon learning that HHS has discharged an alien to the custody of a parent or legal guardian. In most cases, such a discharge may be sufficient to justify a UAC re-determination; however, the Directive instructs ICE immigration officers to consider the totality of circumstances and lists several factors for consideration to help inform the UAC re-determination decision. *See* Section 5.1.

Importantly, the Directive recognizes that the UAC definition is predicated in part on a parent or legal guardian's "availability to provide care and physical custody." Both the care and custody requirements must be assessed; physical custody alone may be insufficient and, in certain instances, could require ICE immigration officers to determine that an alien continues to meet the UAC statutory definition due to the lack of available care. This is one of several reasons why the Directive requires supervisory review and approval prior to any UAC re-determination.

Policy Implications

Issuing this Directive has several policy implications for the alien and the agency. When ICE immigration officers determine that an alien does not or no longer meets the UAC statutory definition, it will lead to the loss of procedural safeguards and substantive advantages for the alien that Congress specifically afforded UACs out of a desire to protect UACs from trafficking and exploitation. An alien determined to not to be a UAC could result in the alien being:

- Denied the right to an initial non-adversarial asylum interview with a USCIS asylum officer;
- Subjected to the Immigration and Nationality Act (INA) one-year filing deadline for an asylum application;
- Removed from EOIR's UAC docket;
- Placed into an alternative removal pathway, such as under sections 235(b)(1) or 241(a)(5) of the INA;
- Denied access to HHS-provided post-release legal and child welfare resources;
- Unable to voluntarily withdraw an application for admission or voluntarily depart the United States; and/or
- Excluded from UAC repatriation protections.

Legal Issues

Pursuant to former DHS Secretary Kirstjen Nielsen's January 8, 2018 memorandum, USCIS issued a new Policy Memorandum entitled, *Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children* (May 31, 2019). Among other things, the USCIS Policy Memorandum reverts to a pre-2013 policy which allowed USCIS asylum officers to make independent UAC determinations based on the facts at the time the asylum application was filed.

USCIS has faced litigation challenging its procedures. For example, on August 2, 2019, the United States District Court for the District of Maryland in the case of *J.O.P. v. U.S. Dept. of Homeland Security*, No. 19-1944 (D. Md. filed July 1, 2019), issued a temporary restraining order enjoining USCIS from applying its May 31, 2019 Policy Memorandum and converted that

order to a preliminary injunction on October 15, 2019. Pursuant to the order, USCIS may not rely on the 2019 Policy Memorandum to reject jurisdiction over any asylum application filed by a UAC if that application would have been accepted under its 2013 policy. The court further ordered USCIS to retract any adverse decisions already rendered for cases applying the 2019 Policy Memorandum and to reinstate consideration of such cases under the 2013 policy.

In accordance with the court's order, USCIS is reviewing all asylum applications where USCIS determined that it did not have jurisdiction under the 2019 Policy Memorandum.

Clearances

The ICE Office of Policy and Planning worked with ERO, HSI, Management and Administration (M&A), the Office of Human Capital (OHC) Labor Relations, the Office of Information Governance and Privacy (IGP), the Office of Professional Responsibility (OPR), and the Office of the Principal Legal Advisor (OPLA) to review and clear this Directive and Memorandum to File. OHC and OPLA concluded that the Directive and Memorandum to File do not require a duty to bargain.

Recommendation:

I recommend approval of the Directive, Memorandum to File, and Broadcast Message. Please indicate your decision below:

Approve: _____ Disapprove: _____

Modify: _____ Need more discussion: _____

Attachments:

1. ICE Directive, *Properly Applying the Unaccompanied Alien Child Statutory Definition*
2. Memorandum to File, *Unaccompanied Alien Child Re-Determination*
3. Broadcast Message
4. Duty to Bargain Scorecard
5. Executive Order (EO) 13767, *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017),
6. Memorandum from Secretary John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvement Policies* 10-11 § L (Feb. 20, 2017).
7. Memorandum for Secretary Kirstjen Nielsen, *Re-designation of Unaccompanied Alien Children Who No Longer Meet the Statutory Definition and Verification of Sponsor's Immigration Status*, (Jan. 8, 2018).