BY SARAH C. WHITING & DAVORIN J. ODRCIC

The Intersection of Family Law and Immigration Removal Proceedings

There is a growing movement to apply the "best interests of the child" standard in immigration cases in which noncitizen parents face removal and possible separation from their U.S. citizen children. Because family law practitioners may be asked to participate as expert witnesses in removal proceedings, it is important to learn how family law intersects with immigration law.

The best interests of children are paramount in our family courts. This concept is starting to flow into other areas of law, too – most recently immigration law. This is particularly true when the immigration issues involve children who are U.S. citizens, and their parents are not.

Politics aside, this is *always* a difficult situation. By way of background, immigrants who are not in this country legally (overstayed their visa, crossed at the border, etc.) face what is called "removal proceedings" that are initiated by the federal government. Noncitizens who are not legally present in the U.S. and noncitizens who are legally present but who are accused of violating a requirement of their legal status may find themselves facing deportation.

Some noncitizens get the chance to make their case to an immigration judge in an attempt to avoid removal. Individuals who find themselves in front of an immigration judge in immigration court face the possibility that the judge will order them deported, or "removed," from the U.S.

But in many cases, noncitizens can ask the judge to grant them some form of "relief from removal," which will allow them to stay in the U.S. Parents who are not in the U.S. legally but have minor children who are U.S. citizens are starting to have another argument against removal as there is a growing movement to apply the "best interests of the child" standard in immigration cases where noncitizen parents face removal and possible separation from their U.S. citizen children.

This article provides an overview of the legal process parents meet when they formally face removal from the U.S., as well as the arguments made in favor of remaining a U.S. resident. We conclude with the role of guardians ad litem and "best interests" in a court's decision about whether a parent should be granted relief from removal.

Initiation of Removal Proceedings

Removal proceedings are initiated through the service of a notice to appear on the noncitizen respondent and then filing the notice to appear with the immigration court that has jurisdiction.

The notice to appear must contain the allegations in support of removal, the specific statute under the Immigration & Nationality Act that the Department of Homeland Security (DHS) alleges the respondent violated, as well as the time and place where proceedings will be held.[1] The notice to appear is a template form that contains language to satisfy other statutory requirements, such as explaining the consequences of failing to appear before the hearing, the respondent's right to be represented by an attorney, and the respondent's obligation to inform the court of a change of address.

A typical notice to appear for undocumented immigrants will contain four allegations: 1) the respondent is not a U.S. citizen; 2) the respondent is a citizen of another country, such as Mexico; 3) the respondent entered the U.S. at an unknown time and location; and 4) the respondent entered the U.S. without being admitted, paroled, or inspected, such as entering on a visa. Based on these allegations, the notice to appear will assert removability under 8 U.S.C. § 1182(a)(6)(A)(i) for being present in the U.S. without having been admitted, paroled, or inspected.

The DHS bears the burden of establishing removability.[2] However, in most cases the DHS will be able to easily meet its burden. For example, the DHS will have records in its database that a respondent who entered on a nonimmigrant visa, like a visitor visa, violated the terms of admission by remaining in the U.S. beyond the authorized time.

For undocumented respondents, the DHS often confirms that the individual entered the U.S. without having been admitted or inspected at a port of entry through interviewing the undocumented respondent at the time of arrest, as well as entering the individual's information into its databases.

The DHS produces a document called Record of Inadmissibility/Deportability on form I-213 that contains a narrative of the interview regarding the respondent's unlawful entry into the U.S. and alienage.

Respondents who want to challenge the introduction of form I-213 into evidence are at long odds for several reasons.

First, the general rule is that I-213s are presumed "inherently reliable" absent clear evidence to the contrary.[3] Because of this presumption of reliability, I-213s are "admissible even without the testimony of the officer who prepared it."[4] While I-213s can be challenged, a respondent must provide some evidence that the information contained in the document is unreliable or false.

Second, removal proceedings are civil in nature.[5] Thus, the protections guaranteed under

the Fourth and Fifth Amendments for criminal arrestees and defendants do not apply in the same manner for respondents placed into removal proceedings. The U.S. Supreme Court found that evidence in removal proceedings cannot be suppressed absent an "egregious violation" of the Fourth Amendment.[6] An example of an egregious violation may include a traffic stop based purely on race.[7] On the other hand, a warrantless entry into a house will likely not rise to the level of an egregious Fourth Amendment violation.[8]

Third, if an undocumented respondent denies the allegations contained in the notice to appear, then the DHS need only produce evidence of alienage, which could be simply filing the I-213 record. Once the DHS establishes alienage, the burden shifts to the undocumented respondent to provide evidence of a lawful entry into the U.S.[9]

Relief from Removal

A respondent found removable may not necessarily be physically removed if the individual applies for relief granted by the immigration judge. The respondent bears the burden of demonstrating both statutory eligibility for relief and that a favorable exercise of discretion is merited.[10] Below are the most common forms of relief pursued in removal proceedings.

Relief via asylum. Asylum may be considered "affirmative" or "defensive." An affirmative asylum application is initially filed with the asylum office of the U.S. Citizenship and Immigration Services (USCIS). If an asylum officer concludes that the applicant has not met the burden of demonstrating asylum, then the affirmative application is referred to the immigration court, where respondents may have their application heard and decided by an immigration judge.

Affirmative asylum applications are supposed to be heard within 45 days after the application is filed and decided within 180 days.[11] These statutory deadlines are missed in every affirmative asylum application. The average length of time for an affirmative asylum interview is more than six years,[12] which is obviously way past the 45-day statutory requirement.

Consequently, a person who filed for asylum while in lawful nonimmigrant visa status, such as entering on a visitor visa, will effectively violate the terms of the visa while the asylum application is pending. While waiting for an interview, the asylum applicant will not be placed into removal proceedings absent extraordinary circumstances, such as being arrested and convicted of a serious offense. Rather, such an individual is allowed to remain in the U.S. and obtain employment authorization while waiting for adjudication of the asylum application, which will likely take years.

Defensive asylum applications are filed directly with the immigration court versus first being filed with the USCIS. That is, a defensive asylum application is filed by an applicant who is first placed into removal proceedings. Whether filed affirmatively or defensively, an asylum application must be filed within one year of the applicant's last arrival into the U.S., absent extenuating circumstances.[13]

Asylum law is challenging. An applicant must demonstrate a well-founded fear of persecution on account of race, religion, political opinion, nationality, or membership in a particular social group.[14] If an applicant faces harm in their home country, but the feared persecution is not on account of one of these five grounds, then the asylum application will be denied.

It is not particularly relevant that an asylum applicant has a U.S. citizen child unless the existence of that child demonstrates the applicant has a well-founded fear of persecution. The U.S. Court of Appeals for the Seventh Circuit issued two decisions relating to an asylum applicant's fear that a child will be subjected to female genital mutilation (FGM). In *Kone v. Holder*,[15] the Seventh Circuit held that that FGM on a minor child could constitute "direct persecution" of the parent, including psychological harm that the parent may experience if a child is subjected to FGM.

In *Oforji v. Ashcroft*,[16] the Seventh Circuit held that the respondent could not base an asylum claim on the concerns about a U.S. citizen daughter experiencing FGM because as a U.S. citizen, the daughter could remain in the U.S. with her other parent who was not in removal proceedings. But in *Kone*, the Seventh Circuit distinguished that case from *Oforji* because in *Kone both parents* were in removal proceedings.[17]

Withholding of removal. Withholding of removal is similar to asylum, yet quite distinct. An applicant who missed the one-year deadline for asylum may want to file for withholding of removal. Like asylum, withholding of removal centers on potential harm in the home country on account of either race, religion, political opinion, nationality, or membership in a particular group. However, the evidentiary burden under withholding of removal is demonstrating a "clear probability" of harm under one of the five grounds.[18] The term "clear probability" is

WHITING

ODRCIC

Sarah C. Whiting, Marquette 2008, is with Wiemer Law Group LLC, in Milwaukee.

sarah@macgilliswiemer.com.

Davorin J. Odrcic, Notre Dame 2001, is with Odrcic Law Group LLC, Milwaukee.

davorin@djovisa.com.

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often defined as more than a 50% chance that the future harm will actually occur.[19] In contrast, asylum requires only proving a 10% chance that the feared persecution will happen.[20]

Deferral under the Convention Against Torture (CAT). Deferral of removal under the CAT may be pursued by respondents who are ineligible for both asylum and withholding of removal. For example, both asylum and withholding of removal contain criminal bars if the applicant was convicted of a "particularly serious offense."[21] In contrast, a CAT claim does not have any criminal bar, and thus even a noncitizen convicted of a heinous crime may not necessarily be physically removed if the applicant can demonstrate a "substantial probability" of being tortured in the home country.

Adjustment of status. Certain respondents may file for adjustment of status to lawful permanent residence based on a petition filed by a U.S. citizen immediate family member, such as a spouse, parent, or child who is at least 21 years old. For a child to adjust through a U.S. parent, the child must be unmarried and under the age of 21 at the time of filing the petition.

The "immediate U.S. citizen family member" designation is key for several reasons. First, a person who is a beneficiary of a petition filed by an immediate family member is not subject to the general prohibitions to adjustment of status such as lacking current lawful status or working in the U.S. without authorization.[22] Thus, a person who overstayed a visitor visa may adjust status through an immediate family member even if that person also worked in the U.S. without authorization. Second, there is no cap on the number of visas issued for immediate family members of U.S. citizens, and therefore there is no waiting line to pursue adjustment of status.

In contrast, the other family-based categories are annually capped under a quota system that results in long delays, because the demand for visas outstrips the supply. For example, a U.S. citizen may petition for a sibling from Mexico, but the U.S. government is only processing visa applications in that category for petitions that were filed on or before March 1, 2001.[23] That roughly translates into at least a 25-year or longer wait under that category.

Most applicants for adjustment of status based on a petition from an immediate family member do not file their applications in immigration court. Rather, they will usually file directly with the USCIS. However, certain individuals will pursue adjustment of status in removal proceedings. If a person is eligible for adjustment of status and is already in removal proceedings, then the immigration judge has exclusive jurisdiction to adjudicate the application.[24] In some cases, the USCIS will place a person into removal proceedings after denying an application for adjustment of status. In that scenario, the applicant can renew the adjustment application before the immigration judge.[25]

Cancellation of removal. Both lawful permanent residents and nonpermanent residents may apply for cancellation of removal, but the requirements for each differ completely.

For lawful permanent residents, an applicant must have been in lawful permanent resident status for five years, must have resided in the U.S. continuously for at least seven years prior to service of the notice to appear, and must not have been convicted of an aggravated felony.[26]

Undocumented immigrants may file for cancellation of removal under one of two categories. Special rule cancellation of removal is limited to undocumented immigrants who were either battered or subjected to extreme cruelty by a U.S. citizen or lawful permanent resident spouse, child, or parent.[27] Cancellation of removal for all other undocumented immigrants contains the following statutory requirements:

- continuous presence of at least 10 years prior to being served with a compliant notice to appear;
- no inadmissible or deportable criminal convictions;
- good moral character for 10 years preceding the adjudication of the application; and
- removal will result in "exceptional and extremely unusual hardship" to a qualifying family member, which is limited to a U.S. citizen or lawful permanent resident child under the age of 21,[28] spouse, or parent.[29]

Persons granted special rule or the general cancellation of removal for undocumented immigrants will become lawful permanent residents.

> The law in general – as well as American social mores – emphasize the well-being of children in our society. This is the central tension regarding U.S. citizen children who have at least one undocumented parent.

Devaluation of the Best Interests of the Child Under Immigration Law

Before delving into the details of cancellation of removal, it must be emphasized that the Immigration and Nationality Act (INA) is not a child-friendly body of law. In fact, the best interests of a child – including the interests of a U.S. citizen child – are often superseded by the value placed on removing a noncitizen parent regardless of the collateral damage to the child. On the one hand, that is logical. The INA is designed to remove noncitizens or bar them from admission into the U.S. when they have been found to have violated immigration law regardless of whether they have U.S. citizen children or not.

On the other hand, the law in general – as well as American social mores – emphasize the well-being of children in

our society. This is the central tension regarding U.S. citizen children who have at least one undocumented parent.

In the 2000s, the term "anchor baby" unfortunately entered the American lexicon, which describes a child born to a noncitizen parent with the expectation that having a U.S. citizen child will provide a pathway to lawful immigration status. The term "anchor baby" is both pejorative and legally wrong. The existence of a U.S. citizen child does not confer any automatic immigration benefit to the parent, which is illustrated by the three scenarios below.

Scenario 1: Parents with accrued unlawful presence who depart the U.S. Jose and Maria are citizens of Mexico who entered the U.S. without inspection in 2001 and have never departed since that original entry. In 2003, their son, Eduardo, was born in Wisconsin and is therefore a U.S. citizen by birth. Jose and Maria have three additional children, all born in Wisconsin, in 2006, 2010, and 2015. When Eduardo is in high school, he expresses a desire to petition his parents for lawful permanent residence, but he learns that he must wait until he is 21 years old.

Eduardo patiently waits until he reaches the age of 21 in 2024. After the petitions for his parents are approved, Jose and Maria submit their applications for permanent residence. Because neither Jose nor Maria entered lawfully on a visa in 2001, they must complete the process abroad at the U.S. Consulate in Mexico.[30]

After the visa interview, Jose and Maria are handed an unpleasant surprise. They are served with a notice from the consulate that they are inadmissible, and thus ineligible for a permanent resident visa. Specifically, because they both accrued more than a year of unlawful presence in the U.S., and then departed the U.S. for their visa appointment, both Jose and Maria are inadmissible for 10 years.[31] The 10-year ban may be waived, but the waiver standard is limited to demonstrating extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent, *not a child*.[32] Without an available waiver, Jose and Maria have no choice but to remain in Mexico for at least 10 years while their oldest son, Eduardo, must now assume the role of the sole caretaker of his three younger siblings.

Scenario 2: A parent who made an immigration misrepresentation. Amy is a citizen of Uganda. In 2000, she submits a visitor visa application that omitted the fact that she has an undocumented sister already living in the U.S. Her visa is approved, and she enters the U.S. lawfully on her visitor visa in 2001.

While Amy had every intention of returning to Uganda, she meets and falls in love with a U.S. citizen man who promises to marry her. They have a U.S. citizen child together out of wedlock, named Freddy, born with spina bifida. His parents are told that Freddy will likely need to be in a wheelchair for life. When learning this news, Freddy's U.S. citizen father abandons him and Amy, thereby leaving her a single mom of a special-needs child. Amy decides to remain in the U.S. due to her concerns of the poor medical and school resources in Uganda for children with spina bifida.

Amy does a fantastic job of raising Freddy despite the challenges of being a single mother with a child who is in a wheelchair. When Freddy reaches the age of 21, he proudly petitions his mother for lawful permanent residence.

Unlike Jose and Maria, Amy does not need to leave the U.S. to pursue permanent residence, because she is eligible to file for adjustment of status due to having been admitted to the U.S. on her visitor visa. Amy's application is denied because the USCIS determines she is inadmissible for having made a material misrepresentation on her visitor visa

application by omitting the fact that her sister was already living in the U.S. at the time she filed her visa application.[33]

While a waiver of inadmissibility is available for the misrepresentation, it is limited to demonstrating extreme hardship to either a U.S. citizen or lawful permanent resident spouse or parent, not a child.[34] Like Eduardo and his siblings, Freddy does not matter. Even worse, Amy is then placed into removal proceedings after denial of her adjustment application, but because Freddy is already 21 years old, she does not have a qualifying family member for cancellation of removal.[35] Amy is removed, leaving Freddy without a caretaker.

Scenario 3: A parent who falsely claimed to be a U.S. citizen. Lucy is a citizen of the Philippines who entered the U.S. in 1988 with her mom on visitor visas when Lucy was 2 years old. Her mom decides to overstay her visa, which in turn means that Lucy violated immigration law too as a toddler. Lucy learns that she is not a U.S. citizen when she is in high school.

In 2010, Lucy wants to start earning a living on her own. With her old school ID and a fake Social Security card, Lucy is able to work. On the I-9 Employment Eligibility Verification form she checks the U.S. citizen box.

In 2015, Lucy marries Henry, a U.S. citizen. They welcome twin daughters in 2019. In 2020, Lucy files for adjustment of status based on her marriage to Henry. During the interview, the USCIS discovers that Lucy falsely claimed to be a U.S. citizen on her I-9 form in 2010. Lucy's application is denied for being inadmissible,[36] and she is placed in removal proceedings.

While a denied adjustment application may be renewed in removal proceedings, in Lucy's case it would be pointless. There is not even a waiver of inadmissibility due to a false claim to U.S. citizenship. Without a waiver, Lucy is permanently ineligible for adjustment of status despite her husband's approved petition. Lucy's only option in removal proceedings will be filing for cancellation of removal.

Cancellation of Removal for Undocumented Parents of U.S. Citizen Children

Lucy is prima facie eligible for cancellation of removal because she has been physically present in the U.S. for at least 10 years prior to being served with a compliant notice to appear. She does not have any criminal record, and therefore does not have an inadmissible or deportable conviction. Lucy should be able to demonstrate good moral character during the past 10 years. The issue in her case will be whether the immigration judge determines that either her husband or one of her twin daughters will suffer "exceptional and extremely unusual" hardship if she is removed from the U.S.

Some noncitizens are not as fortunate even as Lucy, who is at least statutorily eligible for cancellation of removal. This can be illustrated by changing the facts in Amy's case. Instead of her son Freddy filing an application for her at age 21, suppose that Amy was served with a proper notice to appear in 2010. Immigration court does not commence until 2012. Although Freddy's condition of spina bifida would strongly support the "exceptional and extremely unusual" hardship component, Amy is simply not eligible for cancellation of removal because her physical presence stopped in 2010 prior to her 10-year anniversary in the U.S. when she entered in 2001.[37]

The criminal prohibition to cancellation of removal as well as the good moral character requirement can produce harsh results. Simple possession of marijuana, even a minute amount, is an admissible offense that would render a noncitizen ineligible for cancellation of removal.[38] Thus, a parent of a special-needs U.S. citizen may be stripped of

the only defense from removal due to a fairly minor misdemeanor conviction, regardless of when the offense occurred.

A noncitizen who has been convicted of at least two OWI convictions within the 10-year good moral character period will likely also be found ineligible for cancellation of removal.[39] While drunken driving is certainly not advisable, a noncitizen parent who has demonstrated rehabilitation and has otherwise shown to have good moral character will likely be ineligible for cancellation of removal regardless of the level of hardship that will ensue for the parent's U.S. citizen children.

The Contours of 'Exceptional and Extremely Unusual Hardship'

The term "exceptional and extremely unusual hardship" is not expressly defined within the INA. Rather, the term has been interpreted solely through case law from the Board of Immigration Appeals (BIA). The BIA has issued several decisions that provide an understanding of what may qualify as "exceptional and extremely unusual hardship."

Matter of Monreal.[40] Cancellation of removal was created as a form of relief for undocumented immigrants in 1996 when Congress passed the Illegal Immigration Reform and Immigration Responsibility Act. It replaced an application called "suspension of deportation," which required evidence that deportation would result in "extreme hardship." The BIA first interpreted the phrase "exceptional and extremely unusual hardship" in *Matter of Monreal*, observing that "the hardship standard for cancellation of removal is a higher one than under the suspension of deportation statute."

In *Monreal*, the respondent was a 34-year-old citizen of Mexico who had lived continuously in the U.S. for over 20 years – after entering as a teenager in 1980 – when the BIA issued its decision in 2001. The respondent's wife was also undocumented, but she voluntarily departed with their infant U.S. citizen child while he remained with their two older children, ages 8 and 12. The respondent's parents lawfully immigrated to the U.S.

The respondent satisfied the good moral character and physical presence requirements for cancellation of removal, but the immigration judge concluded that although it was a "sad case" and the respondent and his family were "really good people," the evidence did not demonstrate that the respondent's U.S. citizen children [would] endure exceptional and extremely unusual hardship.[41] The immigration judge thus ordered the respondent's removal.

The BIA first examined the legislative history, which stated [that] the hardship standard requires "evidence of harm to [the respondent's] spouse, parent, or child *substantially beyond that which ordinarily would be expected to result from the alien's deportation*."[42] The board thus found that Congress intended "that cancellation of removal should be available to nonpermanent residents only in compelling cases" and to be "limited to truly exceptional situations."[43]

The BIA provided examples of when the hardship may be satisfied, such as "an applicant who has elderly parents in this country who are solely dependent upon him for support" or "a qualifying child with very serious health issues, or compelling special needs in school." In contrast, the BIA found that a "lower standard of living or adverse country conditions in the country of return" are generally "insufficient in themselves to support a finding of exceptional and extremely unusual hardship."[44]

Without the BIA expressly saying it, the respondent lost because he and his U.S. citizen children were just average enough to ensure his removal from the U.S. The BIA seized on things that in any other context would be beneficial attributes, noting that the respondent and his children were in "good health" and that should the U.S. citizen children follow their dad to Mexico, then "the family will be reunited."[45]

Matter of Andazola. About a year after the board issued *Matter of Monreal*, it followed up with *Matter of Andazola*.[46] In contrast to *Monreal*, the respondent's cancellation of removal in *Andazola* was granted so it was legacy INS, which appealed the immigration judge's decision.

The respondent was a 30-year-old Mexican citizen who entered the U.S. in 1985 as a child. Like the respondent in *Monreal*, there was no dispute that she satisfied the 10-year physical presence and good moral character requirements. The respondent's U.S. citizen children were ages 6 and 11. The respondent was unmarried, but the father of her children lived with them. She testified that she did not have any relatives in Mexico that could help as her mother, siblings, and aunts and uncles all resided in the U.S. without legal status.

The respondent stated that her children's health was "fine" but expressed concern about the educational opportunities in Mexico as well as her diminished employment options in her home country. In granting her application, the immigration judge found that her children "would be uprooted from their current nurturing environment and from their support system" and "they would face discrimination in Mexico because they are children of a single mother." The immigration judge further found that the children would "face complete upheaval in their lives and hardship that could conceivably ruin their lives."[47]

The BIA stated it was "sympathetic to the respondent's case and to her situation" but not sympathetic enough to uphold the immigration judge's decision on cancellation of removal. The board determined that the respondent did not satisfy "the very high standard of the current law" because neither the poor economic conditions in Mexico nor the diminished educational opportunities in Mexico set the respondent's U.S. citizen children apart.[48]

Following *Monreal*, the BIA concluded that "the fact pattern presented here is, in fact, *a common one*, and the hardships

the respondent has outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country."[49]

Matter of Recinas. The respondent in *Matter of Recinas*[50] was a 39-year-old citizen of Mexico with four U.S. citizen children ages 5, 8, 11, and 12; and two additional children born in Mexico ages 15 and 16. Her parents were both lawful permanent residents and her five siblings were all U.S. citizens. The respondent was a single mother with no immediate family in Mexico.

The BIA found that her case "presents a close question," [and] the "hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." The board's favorable decision rested on the fact that "[u]nlike the children in *Monreal* or *Andazola*, the respondent's four United States children are entirely dependent on their single mother for support." The board also determined the lack of any family ties in Mexico "distinguish her case from many other cancellation of removal claims." Finally, the board noted that "the respondent's prospects for lawful immigration through her United States citizen siblings or lawful permanent resident parents are unrealistic due to the backlog of visa availability for Mexican nationals with preference classification."[51]

Family Separation Versus De Facto Deportation of U.S. Citizen Children

The cancellation of removal application is filed on Form EOIR-42B, which contains a question that asks if the respondent's spouse or children will accompany the respondent to the country of removal or remain in the U.S. The only available answers on the application form are "yes" or "no." If the answer is no, then the application requires an explanation.

It is an odd question, since for many parents the most honest answer is "I don't know" or "maybe." In the movie *Sophie's Choice*, Meryl Streep plays a young Polish mother who is forced to decide between which of her two young children can stay with her and which child must be sent to the gas chamber at Auschwitz. The term "Sophie's choice" entered our lexicon based on this powerful scene: It means an impossible decision for which there is no preferable outcome.

The choice between taking children to another country versus leaving them in the U.S. is a Sophie's choice for noncitizen parents who apply for cancellation of removal. Yet, there are significant consequences depending on the answer given during testimony. In *Matter of J-J-G,*[52] the respondent was from Guatemala with five U.S. citizen children ages 2 months and 5, 8, 11, and 12 years old. The respondent's 8-year-old daughter was diagnosed with hypothyroidism

at the time of her birth, which "requires regular medication to treat this condition." The respondent testified that the children would remain in the U.S., but his partner testified that "the children would relocate to Guatemala, and indicated that she would also accompany the respondent."[53]

The BIA stated that "to the extent that a claim is based on the health of a qualifying family relative, an applicant needs to establish that the relative has a serious medical condition and, *if he or she is accompanying the applicant to the country of removal, that adequate medical care for the claimed condition is not reasonably available in that country.*"[54]

The board determined that the respondent failed to prove that his daughter would not be able to obtain medical treatment in Guatemala for her hypothyroidism for several reasons: that there was no corroborating evidence to support the testimony of the purported high costs of treatment in Guatemala. In addition, the board seized on other testimony that there is "free medical care in Guatemala."[55]

The BIA's decision in *Matter of J-J-G-* is troubling, given that it was not the respondent who testified that his children would accompany him to Guatemala. Rather, it was his partner who testified that the children, including their daughter with hypothyroidism, would live in Guatemala if the respondent was removed.

The Seventh Circuit appropriately pushed back in *Martinez-Baez v. Wilkinson*.[56] In that case, the respondent submitted evidence that his daughter had a speech delay that required an Individualized Education Program and speech therapy. Among other errors, the Seventh Circuit determined that the immigration judge erred by finding that the respondent "needed to establish that similar treatment was unavailable in Mexico." The Seventh Circuit correctly observed that "question is relevant only if the qualifying relative would be accompanying the applicant upon removal," but if "the qualifying relative will be staying in the U.S., the applicant needs only to establish the seriousness of the condition."[57]

During testimony, when the respondent was asked "if you went back to Mexico, would your kids go with you?" he responded "Possibly." When pressed by the DHS attorney, the respondent acknowledged that he had not decided "one way or the other." The Seventh Circuit concluded that it is "entirely possible" that the respondent's U.S. citizen daughter who suffers from speech delay "will exercise her right as a U.S. citizen to stay in the country." The Seventh Circuit concluded that because "it is by no means clear" that the respondent's U.S. citizen daughter "would end up in Mexico," the respondent "did not need to delve into the quality of care that she hypothetically might receive there." It was "thus error for the IJ to demand that Martinez-Baez prove the unavailability of care in Mexico."

Family law practitioners may soon be asked more frequently to participate as expert witnesses in removal proceedings.

The Intersection of Family Law and Removal Proceedings: The Guardian ad Litem

As of 2018, 4.4 million U.S. citizen children resided with at least one undocumented parent. There is a growing discussion about the treatment of such children in removal proceedings, given the advanced research regarding the trauma and long-term impact associated with forced family separations. The impact of forced family separations on families and communities at large is significant. There is also a movement toward recognizing the "best interests of the child" standard in removal matters when a child is a "qualifying resident."[58]

At this time, it is unclear how to adopt a more child-centered approach to the "exceptional and extremely unusual hardship" standard outlined above. It is also clear that a child's outcome is often determined by the level of sympathy an immigration judge has to children or to the best interests of children.

A family with minor children facing a removal proceeding may hire a guardian ad litem as an expert witness to complete an investigation and provide expert analysis of the statutory factors related to the "best interests" standard under Wisconsin's Family Code.[59]

A guardian ad litem acting as an expert witness in an immigration proceeding should be an attorney who meets the minimum requirements to accept guardian ad litem appointments in Wisconsin family courts. A guardian ad litem hired as an expert witness in a removal proceeding meets both parents, meets the children, completes one or more home visits, and obtains collateral source feedback from the children's schools, the parents' employers, the children's medical providers, family and community members, and close family contacts. The guardian ad litem may also meet with children at school and speak with school officials about their experience with the family. In general, as in a family law matter, the guardian ad litem seeks to understand a child's experience in a family system while evaluating and applying the statutory factors in custody and placement determinations.

A guardian ad litem should also contact child protective services local to a family and inquire as to where the children will be placed temporarily if nonresident parents are removed and unavailable to provide care. A guardian ad litem should inquire as to how many placements the county in question would anticipate before a child achieves permanency, as well as the availability of adoptive resources. It is also important to inquire about whether siblings will be placed together or separately,

and the likelihood that siblings can achieve the same permanent placement.

Ultimately, as an expert witness in an immigration proceeding, the guardian ad litem drafts a report that first provides a very detailed outline of their investigation, including all contacts made and evidence reviewed. The guardian ad litem then applies the statutory factors in custody and placement determinations to the evidence gathered. Finally, the guardian ad litem makes a formal recommendation as they would in family court. This report is submitted to the assigned immigration court, and the guardian ad litem needs to be available to testify as an expert as needed.

Family law practitioners may soon be asked more frequently to participate as expert witnesses in removal proceedings. The investigation should occur independently, and the recommendations should result from an independent and objective analysis. The guardian ad litem's report is just one piece of evidence an immigration court can consider in determining a family's fate. However, it may become an increasingly important piece of evidence as the push to apply the "best interests of the child" standard to immigration law evolves.

Storytelling is essential in removal proceedings. The ability to paint scenes of home life during testimony may resonate with immigration judges. By observing a family in their home, a family law practitioner's testimony may capture a scene or two that illustrates why the removal of a parent from the home will cause considerable hardship to a U.S. citizen child.

Conclusion

This article provides context for a family law practitioner who may become involved in removal proceedings as an expert witness. The authors' intent is that guardians ad litem can use the information above as a reference, and to more confidently approach an immigration proceeding as an expert witness when asked. **WL**

ENDNOTES

[1]8 U.S.C. § 1229(a)(1).
[2]8 U.S.C. § 1229a(c)(3)(A).
[3]*Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1999).
[4]*Pouhava v. Holder*, 726 F.3d 1007, 1013 (7th Cir. 2013).
[5]*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.").
[6]*Id.* at 1050-51; *see also Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).
[7]*See, e.g., Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1164 (9th Cir. 2005) (stop based solely on "Hispanic appearance" may be grounds for suppression in removal proceedings).
[8]*See, e.g., Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010).
[9]8 C.F.R. § 1240.8(c).
[10]8 U.S.C. § 1229a(c)(4)(A).
[11] 8 U.S.C. § 1158(d)(5)(A)(ii), (iii).
[12]*See* "High-Stakes Asylum: How Long an Asylum Case Takes and How We Can Do Better," American Immigration Lawyers Association (aila.org), June 14, 2023.
[13]8 U.S.C. § 1158(a)(2)(B).
[14]8 U.S.C. § 1101(a)(42).
[15]*Kone v. Holder*, 620 F.3d 760, 765-66 (7th Cir. 2010).
[16]*Oforji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003).
[17]*Kone* , 620 F.3d at 764.
[18]8 U.S.C. § 1231(b)(3)(A).
[19]*See, e.g., Mapouya v. Gonzales*, 487 F.3d 396, 414 (6th Cir. 2007).
[20]*INS v. Cardoza-Fonseca,* 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").
[21]8 U.S.C. § 1231(b)(3)(B)(ii).
[22]8 U.S.C. § 1255(c).
[23]*See* the November 2024 Department of State Visa Bulletin, travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2025/visa-bulletin-for-november-2024.html.
[24]8 C.F.R. § 1245.2(a)(1)(i).
[25]8 C.F.R. § 1245.2(a)(5)(ii).
[26]8 U.S.C. § 1229b(a).
[27]8 U.S.C. § 1229b(b)(2).
[28]A stepchild meets the definition of a "child" as a qualifying family member for cancellation of removal. *See Matter of Portillo-Gutierrez*, 25 I&N Dec. 148 (BIA 2009).
[29]8 U.S.C. § 1229b(b)(1).
[30]*See* 8 U.S.C. § 1225(a) (outlining the general rule that only individuals who were "inspected and admitted or paroled into the United States" may apply for adjustment of status).
[31]8 U.S.C. § 1182(a)(9)(B)(i)(II).
[32]8 U.S.C. § 1182(a)(9)(B)(v).
[33]8 U.S.C. § 1182(a)(6)(C)(i).
[34]8 U.S.C. § 1182(i).
[35]*Matter of Isidro-Zamarano*, 25 I&N Dec. 829, 830 (BIA 2012) (a "child" for cancellation of removal purposes is "an unmarried person under twenty-one years of age").
[36]8 U.S.C. § 1182(a)(6)(C)(ii).
[37]*See* 8 U.S.C. § 1229b(d)(1)(i) (stating that "continuous physical presence in the U.S. shall be deemed to end … when the alien is served a notice to appear").
[38]8 U.S.C. § 1182(a)(2)(A)(i)(II) (a noncitizen convicted of an offense that relates to a controlled substance under the federal schedule is inadmissible). Because marijuana possession is unlawful under federal law, a person convicted of possessing even a small amount under state law is inadmissible.
[39]*Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (evidence of two or more convictions for driving under the influence raises a rebuttable presumption that an applicant for cancellation of removal is ineligible for lacking good moral character).
[40]*Matter of Monreal*, 23 I&N Dec. 56, 59 (BIA 2001).
[41]*Id.* at 58.
[42]*Id.* at 59 (emphasis original).
[43]*Id.* at 59, 62.
[44]*Id.* at 63-64.
[45]*Id.* at 64.
[46]*Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).
[47]*Id.* at 321.
[48]*Id.* at 322-23.
[49]*Id.* at 324 (emphasis added).
[50]*Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).
[51]*Id.* at 470-72.
[52]*Matter of J-J-G*, 27 I&N Dec. 808 (BIA 2020).
[53]*Id.* at 809.
[54]*Id.* at 811 (emphasis added).
[55]*Id.* at 812.
[56]*Martinez-Baez v. Wilkinson*, 986 F.3d 966 (7th Cir. 2021).
[57]*Id.* at 978.
[58]*See* Lory D. Rosenberg et al., *Time for a Child Welfare Approach to Cancellation of Removal*, AILA L.J. Oct. 2022, at 203.
[59]Wis. Stat. § 767.41(5). **WL**