PRACTICE ADVISORY

THE IMPACT OF DRUG TRAFFICKING ON UNACCOMPANIED MINOR IMMIGRATION CASES

Produced for the Vera Institute of Justice's Unaccompanied Children Program

By Angie Junck

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The Impact of Drug Trafficking on Unaccompanied Minor Immigration Cases

By Angie Junck[1]
for the Vera Institute of Justice
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I. Introduction

Beginning in late 2011 and early 2012, an unprecedented number of unaccompanied minors, also known as "unaccompanied alien children" (UAC), from Central America (Honduras, Guatemala, and El Salvador) began migrating to the U.S. Whereas previously approximately 8,000 unaccompanied minors arrived in the U.S. and came to the attention of authorities every year, the Department of Homeland Security (DHS) apprehended almost double the number of unaccompanied minors in 2012 as were apprehended in prior years.[2] The Office of Refugee Resettlement (ORR) also reported that it had a record number of youth in its care in April 2012 (specifically, 10,000).[3] By the end of Fiscal Year 2014, Border Patrol agents had apprehended 68,631 UAC crossing the Southern border, representing a 76 percent increase from the previous fiscal year.[4] 2014 marks the largest surge thus far in the migration of UAC, resulting in the federal government declaring a national emergency.

While various news reports have speculated about the possible reasons for this increased migration, the Women's Refugee Commission in 2012 found through interviews with almost 150 UAC that their migration arose out of longstanding, complex problems in their home countries – that is, the growing influence of youth gangs and drug cartels, the targeting of youth by gangs and police, gender-based violence, rising poverty, and continuing unemployment.[5]

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[1] To contact the author regarding any questions or comments on this advisory please email ajunck@ilrc.org. This practice advisory could not have been written without the extensive assistance of Rebekah Fletcher, Kids in Need of Defense (KIND) (Seattle, Washington). Rebekah contributed many arguments and analysis for this advisory and also edited it. The author would also like to thank many other individuals who shared their expertise, experience, and materials including: Cindy Liou, formerly of Asian Pacific Islander Legal Outreach (APILO); Golden McCarthy, Jena Gutierrez (formerly), and Gladis Molina, Florence Immigrant & Refugee Rights Project (FIRRP); Manuel Rios, Rios & Cruz; Rachel Prandini (formerly) and Lindsay Toczylowski, Esperanza Project of Catholic Charities (Esperanza); Katie Glynn, Rocky Mountain Immigrant Advocacy Network (RMIAN); Rocio Alcantar and Rebecca Cabezas, National Immigrant Justice Center (NIJC); Ashley Ham Pong (formerly) and Deborah Searfoss, Capital Area Immigrant's Rights (CAIR) Coalition; Sarah Plastino, Newark Pro Bono Coordinator, KIND; Rachel Valdes, Refugee and Immigrant Center for Education and Legal Services (RAICES); Hayley Upshaw and Andrea Del-Pan, Legal Services for Children (LSC); Kari Converse, New Mexico Federal Defender, and Tom Boerman, expert on gangs in general and Central American and Mexican gangs and organized criminal groups in particular. Apologies for any inadvertent omissions.

[2] Migration Policy Institute, "Top 10 of 2012 – Issue #10: As Migration of Unaccompanied Minors Endures, and in Some Cases Rises, Governments Seek to Respond," (Dec. 1, 2012) available at http://www.migrationpolicy.org/article/top-10-2012-issue-10-migration-unaccompanied-minors-endures-and-some-cases-rises-governments (last visited Dec. 15, 2014).

[3] *Id.*

[4] Department of Homeland Security, "CBP Border Security Report," 1 (Dec. 19, 2014).

[5] Women's Refugee Commission, "Forced from Home: the Lost Boys and Girls from Central America," (Oct. 2012), available at http://womensrefugeecommission.org/forced-from-home-press-kit (last visited Dec. 15, 2014).

At the same time, it is well documented that Mexico is and has been in a catastrophic situation with respect to violence caused by transnational criminal organizations, such as gangs and drug cartels. The Mexican government has been powerless to contain these organizations or to protect the public, particularly those who have been targeted or would be at risk of being targeted, including UAC. Drug cartels not only involve themselves in the illicit drug market, but have branched out into other trafficking activities, including migrant smuggling.[6] The Zetas cartel, for example, traffics arms, kidnaps, and collects payment for drug cartels on its drug routes. Finally, Mexican drug cartels have also claimed a growing influence over drug markets in Central American countries.[7]

Due to the influence of cartels in Mexico and at the border, the current migratory experience is very much connected with human and drug trafficking. According to Amnesty International, in 2012 there were many reports of drug cartels and other criminal gangs acting in collusion or with other public officials to kill and abduct thousands of people.[8] Tens of thousands of Central American migrants traveling to the U.S. were at risk of kidnapping, rape, forced recruitment, or being killed by criminal gangs.[9] It is no surprise, therefore, that UAC due to their age and unaccompanied status are prime targets for cartels and gangs on the border. The United Nations High Commissioner for Refugees (UNHCR) reported "that organized criminal groups coerce children into prostitution and to work as hit men, lookouts, and drug mules."[10] Because these youth often travel alone and are escaping violence and even death in their home countries, they are often faced with no choice but to carry drugs or work for drug cartels in order to cross the border.

Reports from practitioners serving or representing these youth across the country confirm this trend of an increased number of UAC arriving in the U.S. who have been or are involved in drug trafficking efforts. Unfortunately, coerced involvement in drug trafficking has not typically been characterized as human trafficking and the underlying conduct can result in severe penalties under immigration law, triggering ineligibility for most forms of immigration relief.

This practice advisory addresses this phenomenon by looking at overall drug trafficking patterns within UAC cases, identifying the substantive and procedural issues that may arise when UAC with drug trafficking histories pursue immigration relief, and drawing parallels to other bodies of law to provide practitioners with recommendations for use in the immigration context. Much of the information in the advisory is based upon feedback obtained from a national online survey of 44 individuals or agencies in 15 states and the District of Colombia who work with or represent immigrant youth, and from 11 phone interviews that followed with attorneys who have had significant experience representing immigrant

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[6] Colleen W. Cook, Congressional Research Service (CRS), "Mexico's Drug Cartels," CRS Report for Congress (Feb. 25, 2008), available at http://www.au.af.mil/au/awc/awcgate/crs/rl34215.pdf (last visited Dec. 15, 2014).

[7] This information was provided by Tom Boerman, an independent consultant on Central American and Mexican gangs and expert on gang asylum cases.

[8] Amnesty International, "Mexico Annual Report" (2012), available at http://www.amnesty.org/en/region/mexico/report-2012 (last visited December 15, 2014).

[9] *Id.*

[10] U.S. Department of State, "2012 Trafficking in Persons Report – Mexico" (June 19, 2012), available at http://www.refworld.org/docid/4fe30cac27.html (last visited Dec. 15, 2014).

youth in cases involving drug trafficking. The survey and interviews involved a series of questions about the characteristics of youth involved in drug trafficking and advocates' experiences seeking relief for them before DHS and the immigration courts.[11] The use of the word "trafficking" in the context of the survey and interviews was meant to encompass the sale, transportation, or assistance in any sale of drugs. Drug trafficking was further defined by geography and intent — international drug trafficking at the border, drug trafficking abroad in the home country, and internal drug trafficking (within the U.S.) whether conducted willfully or through force or coercion. While the survey and interviews asked about drug trafficking in all of these contexts, respondents overwhelmingly highlighted cases involving forced or coerced international drug trafficking at the border. As a result, this advisory mostly focuses on these types of drug trafficking cases.

Based largely upon the survey and interviews, this advisory discusses how children impacted by drug trafficking issues are able or unable to access legal relief and the challenges they face before DHS and immigration courts. The advisory aims to provide practitioners with strategies to most effectively overcome these challenges in defending youth who have been involved in drug trafficking against deportation and to obtain immigration legal relief on their behalf.

The advisory is broken down into the following four overarching topics:

- Legal Options Available for Youth Involved in Drug Trafficking;
- Grounds of Inadmissibility and Other Barriers to Immigration Relief Due to Drug Trafficking;
- Defenses Against Inadmissibility and Negative Discretionary Determinations; and
- Ethical and Strategic Considerations in Representing Youth with Drug Trafficking Issues

II. Legal Options Available for Youth Involved in Drug Trafficking

Although drug trafficking conduct has severe penalties under immigration laws, many practitioners have succeeded in obtaining legal relief for youth involved in drug trafficking due to mitigating facts and circumstances. This section will discuss legal relief that is available for youth who have been involved in drug trafficking, and some general considerations for practitioners when applying for these forms of relief.

A. Types of Relief Available in Drug Trafficking Cases

Practitioners report seeking various forms of relief for youth involved in drug trafficking. While Special Immigrant Juvenile Status (SIJS) was reported in the survey as the most frequently sought form of relief, it appears that there is a growing trend of T visa filings. The U visa and asylum were other forms of relief pursued for youth involved in drug trafficking. This section will discuss considerations when applying for each of these forms of relief and various guidelines and factors in determining which form of relief to

[11] *See* Appendix A for survey questions and a summary of responses.

pursue. A greater portion of this discussion is dedicated to the T visa rather than the other forms of relief because it is emerging as the form of relief most directly predicated upon a youth's involvement in forced or coerced drug trafficking at the border. The T visa also has broad waivers to forgive drug trafficking conduct, and in interviews conducted by the author, practitioners shared the most in-depth case-related information on T visas as opposed to other avenues of relief. This section will also briefly discuss the drug trafficking ground of inadmissibility because it can serve as a significant barrier to qualifying for various forms of relief.[12]

1. T Nonimmigrant Status[13] (T visa)

T nonimmigrant status (commonly referred to as the T visa) is a form of relief available to victims of human trafficking. Human trafficking is defined under federal law as sex or labor trafficking.[14] According to the U.S. Department of Health and Human Services (HHS), forced drug smuggling is a specific form of child labor trafficking.[15] Labor trafficking is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[16] As labor trafficking, forced drug smuggling usually falls within the involuntary servitude[17] or debt bondage[18] statutory categories. Debt bondage occurs in cases in which youth must traffic drugs in the U.S. in order to pay off a smuggling debt.

a. Successful Case Examples

Based on the survey and follow-up interviews, it appears that the T visa is the preferred form of relief for international drug trafficking cases along the border because coerced drug trafficking provides the very basis for eligibility and the drug trafficking conduct is waivable. Practitioners shared the specific facts of several successful T visa applications involving labor trafficking claims, the majority of which involved forced drug trafficking by armed cartels. Examples of successful T visa cases include:

- Children who were kidnapped by drug traffickers, threatened or physically harmed if they refused to engage in drug trafficking, and who actually transported drugs across the U.S. and Mexico border.

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[12] A greater discussion of the drug-related grounds of inadmissibility is provided in Section III of this advisory.

[13] A discussion of the T visa requirements and guidelines for formulating a claim of human trafficking based on forced drug trafficking is beyond the scope of this advisory. The Vera Institute of Justice has a practice advisory that discusses these issues in greater depth. *See* Volunteer Advocates for Immigrant Justice, "Practice Advisory: T Visa Claims for Youth Victims of Narco-Human Trafficking" (July 2011), available at http://my.hdle.it/21290018.

[14] 22 U.S.C. § 7102(9)(A)-(B).

[15] U.S. Department of Health and Human Services, "Labor Trafficking Fact Sheet," available at http://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_labor_trafficking_english.pdf (last visited Dec. 15, 2014).

[16] 22 U.S.C. § 7102(9)(B).

[17] Involuntary servitude is defined as, "any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint." 22 U.S.C. § 7102(6)(a).

[18] Debt bondage is defined as "the status or condition of a debtor arising from a pledge of the debtor of his or her personal services or of those of a person under his or her security as a debt…." 22 § U.S.C. 7102(5).

- Children who were convicted or adjudicated delinquent of drug trafficking within the U.S., but who also had facts involving kidnapping, coercion, and the transport of drugs to the U.S.
- Children who originally worked for cartels in Mexico voluntarily but for whom the situation became coerced when the child attempted to escape.
- In one case, a child who was forced to work for traffickers, but was never involved in drug trafficking directly, successfully argued that the situation constituted involuntary servitude.

b. Special Considerations in T visa Applications

Several advantages exist to filing a T visa over other applications for relief. In cases involving drug-related adjudications or convictions, the forced drug trafficking is itself the basis for T visa eligibility, and therefore the conduct is more readily excused. Congress has stated that victims of trafficking should not be penalized for conduct that occurred as a result of being trafficked. As a result, the T visa contains a broad waiver of drug trafficking-related inadmissibility grounds, including a waiver when there is a "reason to believe" that a person is or has been involved in drug trafficking (also known as the "reason to believe" ground of inadmissibility).[19] This waiver may be granted by the Attorney General in his or her discretion provided the particular inadmissibility ground to be waived was caused by or incident to the noncitizen's victimization. For criminal activities not incident to the trafficking, the waiver application will only be granted in "exceptional cases."[20] Therefore, an incentive to pursue T visas compared to other forms of relief is the ability to waive the drug trafficking ground of inadmissibility in the T visa context.

Additionally, annual caps are of less concern for T visas. Congress has designated annual caps for the number of individuals who may receive certain visas, such as the T visa and U visa. While the annual cap for the T visa is 5,000 individuals,[21] this maximum is not normally reached, unlike the cap for the U visa which has been met for the past six fiscal years.[22]

The T visa is also a preferred form of relief because, unlike the U visa, it does not require law enforcement certification.[23] In fact, a minor does not have to report the activity to a law enforcement official at all; it suffices to report it to ORR.

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[19] INA § 212(d)(13); *see also* Section III.C of this practice advisory for a discussion of the "reason to believe" ground of inadmissibility.
[20] 8 C.F.R. § 212.16(b)(2).
[21] 8 C.F.R. § 214.11(m).
[22] U.S. Citizenship and Immigration Services, "USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year" (Dec. 11, 2014), available at http://www.uscis.gov/alerts-topics/visas-t-and-u (last accessed Jan. 5, 2014).
[23] The U visa is described further in Section II.A.3.

c. Addressing Challenges with T visa Applications[24]

Despite the success of T visa applications reported in the survey and in subsequent interviews, one legal organization that specializes in immigrant trafficking cases reported that they had recently received their first Request for Evidence (RFE) from the DHS Vermont Service Center (VSC), the center that processes T visas, in a T visa drug trafficking case involving a UAC. The attorney noted that this may be the beginning of VSC's pushback against these claims. Using this case as an example, this section will discuss the possible challenges that may be posed by DHS in contesting a T visa application and provide suggested responses.

This case involved a youth who fled his home in Tijuana, Mexico because he feared for his life. On his journey to the U.S., he was approached by some men who told him that they could transport him to Tucson, Arizona if, in exchange, he would carry with him a backpack containing marijuana. They told him that once he arrived in the U.S. he could stay in the U.S. without doing anything more for the guides. However once they arrived in the U.S. the youth was told he had to work with the guide. The guide carried a gun so the youth was afraid of what would happen if he did not comply. The youth then went back to Mexico with the guide and was held with six other people in a house that was guarded by armed men. He was forced to carry drugs across the border twelve times. Each time he was in the U.S., he was kept in a locked house in Arizona. He felt he could not refuse because he saw other youth tied up, gagged, and thrown in cars never to be seen again.

In this case, the VSC issued an RFE on several issues. First, it questioned the youth's credibility and alleged that what occurred was alien smuggling and not human trafficking. The RFE specifically referred to the fact that the youth testified that he initially agreed to carry the backpack of marijuana in exchange for having a $3,000 smuggling fee waived. The RFE also stated that the youth had freedom of movement and could contact his friends and family if he wanted. Second, the VSC asked him to submit primary evidence of his victimization preferably using the T visa law enforcement certification form. Finally, the RFE pointed to a discrepancy between his statements to U.S. Customs and Border Protection (CBP) upon apprehension and his claim of extreme hardship of unusual and severe harm upon removal under the T visa standard. Specifically, the VSC alleged that he did not tell CBP that he feared persecution or torture if he was returned to Mexico.

i. Alien Smuggling and Human Trafficking

Many people voluntarily agree to be smuggled in order to enter the U.S., and they are not necessarily victims of trafficking. Even those individuals who may owe a debt to their smugglers are not necessarily victims of trafficking. This does not mean, however, that alien smuggling cannot evolve into human trafficking or that human trafficking does not have elements of alien smuggling as part of the process to recruit, harbor, transport, or obtain a person for labor or services.

[24] Thanks to Cindy Liou formerly at APILO in San Francisco, California for providing this case sample as well as the responsive arguments.

In the case discussed above, the VSC claimed that the youth was not a victim of trafficking because he voluntarily agreed to be smuggled in exchange for carrying marijuana and there were no other factors of force initially present. While it may be true that the case started solely as alien smuggling, the fact that the minor was lured into labor trafficking by transporting drugs and thereafter was not free to leave the guide once he arrived in the U.S. demonstrates that this case evolved into human trafficking. This trafficking case also involved elements of alien smuggling because the traffickers used the smuggling encounter to recruit the minor and then continued using the minor in the trafficking of drugs across the border twelve times.

Alien smuggling may also evolve into labor trafficking in other situations. For example, a youth may initially agree to pay a smuggler to enter the U.S., but then find him or herself in a situation of debt bondage in which he or she is forced or coerced into selling drugs in order to repay a debt. Practitioners in San Francisco report this happening to many Honduran youth. Although the debt itself is not enough to constitute trafficking, the exploitation surrounding the debt is what distinguishes trafficking from smuggling.[25] Examples of exploitative factors include direct or indirect threats from the smuggler if the youth does not pay; the smuggler's failure to keep any record of how much the youth paid or still owes; the smuggler maintaining control over all of the money; and the fact that the youth's only contact in the U.S. is the smuggler or people connected with the smuggler.

ii. Primary and Secondary Evidence of Trafficking

In the case described above, DHS requested primary evidence – e.g., law enforcement agency endorsement or evidence that DHS has granted continued presence – that the minor was a trafficking victim. Federal regulation provides:

> An application [for a T visa] must contain a statement by the applicant describing the facts of his or her victimization. In determining whether an applicant is a victim of a severe form of trafficking in persons, the [Immigration and Naturalization] Service will consider all credible and relevant evidence.[26]

But applicants who are minors at the time they are trafficked are not legally obligated under federal law to report their case to law enforcement, and therefore, obtaining primary evidence of such is not required.[27]

[25] Some of this discussion is taken from Volunteer Advocates for Immigrant Justice, *supra* note 13.
[26] 8 C.F.R. § 214.11(f).
[27] 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

Federal regulation discusses secondary evidence, which must include an original statement from the applicant, but may also be any other evidence that describes the force, fraud, or coercion against the victim.[28] Examples of secondary evidence include affidavits, police reports, and court documents.[29]

iii. Failure to Disclose Trafficking to CBP

Aside from the "evidence of trafficking" issue, DHS may use contrary statements or the failure to disclose certain information to law enforcement agencies such as CBP as a basis to deny a T visa. In the above case, DHS used the youth's failure to disclose his fear of return to his home country to CBP upon apprehension to undermine his ability to prove that he would face extreme hardship involving severe and unusual harm upon removal.

This allegation fails to take into account, however, the unique circumstances of minors. Minors are even less likely than adults to disclose sensitive information to a person of authority, whether it be law enforcement or an attorney.[30] This is particularly true of minors who come from countries like Mexico and those in Central America where there is a culture of fear and mistrust of the government. Minor trafficking victims of crime are less able than adult victims to self-identify and have difficulty articulating the circumstances of their trafficking. Minors also experience psychological traumatization at a deeper level and therefore may find it even harder than adults to disclose painful events. Even federal law recognizes the special needs of potential trafficking victims who are minors by providing them with interim benefits under certain circumstances.[31] This federal provision recognizes the difficulty of determining whether a minor is a trafficking victim and allows for the provision of interim supportive services using a lowered threshold of certainty.[32]

In addition, the circumstances under which CBP apprehends, interrogates, and otherwise treats minors are not conducive to obtaining disclosure of traumatic experiences by minors. When CBP arrests minors they often handcuff them, shackle their feet, and place them into a cold room. Some are even detained with their trafficker. Some youth have reported that CBP officers do not speak Spanish or speak poor Spanish. This environment does not allow or encourage minors to disclose sensitive information.

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[28] 8 C.F.R. § 214.11(f)(3).

[29] *Id.* But note that T visa eligibility letters for interim assistance are not included in the language of primary or secondary evidence. T visa applicants may have been issued an eligibility letter by HHS for interim assistance benefits after a determination that the person may have been a victim of trafficking. The role of the eligibility letter in the adjudication by the VSC of the T visa application is not dispositive – the VSC can approve the application with or without the letter. However the eligibility letter likely serves as one piece of evidence to demonstrate that the youth is a trafficking victim, in that a federal agency has made at least a preliminary assessment that the youth meets the definition of a victim of a severe form of trafficking.

[30] Eva Klain & Amanda Kloer, American Bar Association Commission on Domestic Violence, "Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children's Attorneys & Advocates," 15 (2009), available at http://www.abanet.org/domviol/pdfs/Child_Trafficking.pdf (last visited Dec. 16, 2014).

[31] 22 U.S.C. § 7105(b)(1). The statute further states, "Upon receiving credible information that a child…who is seeking assistance under this paragraph may have been subjected to a severe form of trafficking in persons, the Secretary of Health and Human Services shall promptly determine if the child is eligible for interim assistance under this paragraph.". § 7105(b)(1)(F)(1).

[32] A more complete discussion of these interim benefits is described in Appendix B.

Traffickers often tell minors that they have "insiders" working within CBP[33] and that if they disclose any information to CBP the traffickers will find out and harm or kill the minor. It is also relatively common that traffickers have information about family members in the home country and therefore may threaten the lives of the minor's family as well.[34] In federal guidance on working with minors in the analogous context of asylum where youth are fleeing from harm, U.S. Citizenship and Immigration Services (USCIS) recognizes that youth may be unduly pressured to not tell the truth:[35]

> Some children may have been coached by a human trafficker or an ill-informed adult to tell a particular story, which the child repeats at the interview in order not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry […] Quite often a child does not intend to deceive when making a fabrication or exaggeration; rather the statement may serve another purpose for the child such as to avoid anticipated punishment….[36]

Threats from traffickers, along with CBP's behavior and real or perceived collusion with cartels, often create significant fear in the youth.

Finally, because these youth often come from countries with high levels of government corruption, they may perceive that the U.S. government is corrupt as well. USCIS addresses this issue and states:

> The child may be arriving from a country where he or she has already had extensive interaction with or knowledge of a corrupt government. Such a child may assume that the fraud, abuse of authority, and mistreatment of the citizens he or she witnessed in the country of origin is just as pervasive in the United States.[37]

For this reason, a minor may not feel safe telling authorities the details of the trafficking.

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[33] Some survey respondents reported examples of CBP officers acting as drug cartel insiders. For example, in one case, a respondent reported that a CBP officer used the apprehension and detention of a UAC as a diversion to allow cartel members to continue to move drugs across the border.

[34] Sometimes a minor's first contact with someone tied to the trafficker is from the same village or town, or sometimes the minor is allowed to contact family members in the home country from the cell phone of a trafficker when en route or while being held in safe house, so that traffickers have contact information for family members. One practitioner reports cases in which even months after a youth is apprehended and in the U.S., traffickers track him or her down in the U.S. because they have contacted family members in the home country and somehow obtained the phone number of the minor in the U.S.

[35] U.S. Citizenship and Immigration Services, Asylum Division, "Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims" (Sep. 1, 2009), available at http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugeespercent20percent26percent20Asylum/Asylum/AOBTCpercent20Lessonpercent20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf (last visited Dec. 16, 2014).

[36] *Id.* at 33-34.

[37] *Id.* at 14.

2. Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile Status (SIJS) is a form of relief available to youth under the jurisdiction of a juvenile court who cannot be reunified with one or both parents as a result of abuse, neglect, or abandonment and for whom it would not be in their best interests to return to their home countries.[38] In many states, the child must be under 18 to qualify for state court jurisdiction, although some states allow jurisdiction to extend past age 18. As documented by survey responses and the Women's Refugee Commission report "Forced from Home," many of the youth who are migrating to the U.S., particularly from Central America, have faced some sort of abuse, neglect, or abandonment by their parents or other family members, and therefore many of these children qualify for SIJS relief.[39] In fact, most survey respondents stated that they sought SIJS relief in their drug trafficking-related UAC cases since a SIJS claim may be explicitly based on facts related to drug trafficking. For example, one respondent reported making a successful claim for SIJS based upon parental neglect for failing to stop their child from becoming involved in drug trafficking.

While many youth who have been involved in drug trafficking efforts can prove that they faced abuse, neglect, or abandonment from one or both parents, not all youth are able to establish juvenile court jurisdiction to obtain a SIJS predicate order, an order establishing the requisite findings in order to apply for SIJS before the federal government. Obtaining a predicate order usually depends upon the posture of the case. If a youth is involved in drug trafficking within the U.S. and is arrested and enters the juvenile justice system, he or she may be more likely to obtain a SIJS order because he or she comes under the jurisdiction of a delinquency court. Other youth who have never been apprehended and prosecuted by law enforcement for drug-related conduct in the U.S. and who are in ORR custody may have difficulties establishing juvenile court jurisdiction depending on where they happen to be detained, or where they are released. For example, the law in some jurisdictions does not allow for a private party (other than a child protection agency) to initiate the relevant proceedings to invoke the court's jurisdiction. In other jurisdictions, bias or hostility against SIJS may prevent obtaining proper court jurisdiction. For example, in Chicago the local juvenile court handling dependency cases is hostile to SIJS motions for youth who are in federal ORR custody because it sees SIJS as an abuse of the system. For practitioners in that area, therefore, pursuing SIJS is foreclosed. In Arizona, on the other hand, state law allows attorneys to make private motions in juvenile court and thus, SIJS predicate orders are more easily obtained.

Another issue for practitioners in pursuing SIJS in cases involving drug trafficking is the ground of inadmissibility based upon the existence of a "reason to believe" a person is or has engaged in drug trafficking.[40] Unlike the T visa, there is no waiver in the SIJS context for UAC to adjust their status if there

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[38] INA § 101(a)(27)(J).
[39] Women's Refugee Commission, *supra* note 5.
[40] *See* Section III.C for a discussion of the "reason to believe" ground of inadmissibility.

is underlying drug trafficking conduct. Therefore, if a minor falls within this inadmissibility ground, he or she may be found ineligible to adjust his or her status through SIJS.[41]

One survey respondent stated that their jurisdiction was hostile to any drug trafficking involvement and therefore, they have not attempted to pursue SIJS in any cases involving drug trafficking. In Phoenix, however, the Office of Chief Counsel (OCC) has agreed to allow minors to pursue SIJS even if they have been involved in drug trafficking, as long as there was duress or coercion that caused the minor to be involved in the conduct. As part of this policy, OCC has asked legal aid attorneys to always disclose any drug trafficking involvement. The UAC are then cross-examined in great detail regarding the presence of force or coercion and whether they had the ability to escape. Because force or coercion is present in many cases, drug trafficking conduct becomes less of a hurdle to overcome in this jurisdiction.

More commonly, practitioners in the survey stated that when pursuing SIJS they link abuse, neglect, and abandonment to the drug trafficking so as to mitigate that conduct. In particular, they argue that applicants should not be penalized for unlawful conduct that is connected to their eligibility for the benefit for which they are applying. While the link may not be as readily apparent as in the T visa context, practitioners note that some youth become involved in drug trafficking because of the lack of parental presence in the home and therefore they require protection from further harm.

3. U Nonimmigrant Status (U visa)

The third most often sought relief reported was U nonimmigrant status (U visa). The U visa is a form of relief for individuals who have suffered substantial abuse as a result of being victims of certain serious crimes occurring within the U.S. and who have cooperated with the investigation or prosecution of the criminal activity.[42] The U visa requires a certification from law enforcement (or other officials involved in prosecuting or investigating the criminal activity) that the individual has been, is being, or is likely to be of help to the investigation or prosecution of the criminal activity.[43] If the individual is under the age of 16, the parent or guardian may provide the assistance.[44] Because youth involved in drug trafficking, particularly at the border, are frequently victims of serious crimes such as trafficking, involuntary servitude, kidnapping, being held hostage, peonage, torture, sexual assault, etc. and have suffered severe mental and physical abuse, they may qualify for the U visa.

As is true for many U visa applications, the obstacle in these claims is obtaining certification from law enforcement that the youth (or parent or guardian) has been, is being, or is likely to be of help to the investigation or prosecution of the criminal activity. Unlike the T visa, law enforcement certification is a requirement for the U visa. Because of the international nature of many of these cases involving UAC

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[41] One respondent noted that they seek SIJS and the T visa simultaneously. They delay filing for adjustment of status after obtaining an approved I-360 (SIJS) petition because of the "reason to believe" ground of inadmissibility and wait for the outcome of the T visa.
[42] INA § 101(a)(15)(U).
[43] INA § 101(a)(15)(U)(i)(III).
[44] *Id.*

(e.g., the criminal activity may have occurred on the Mexican side of the border), law enforcement certification is frequently not available. Even if the criminal activities occurred in the U.S., they are less likely to certify in cases where the youth may be prosecuted for drug trafficking-related activity, which does seem to occur according to those interviewed and surveyed. A youth may also not be considered helpful to law enforcement unless he or she can recall details that would be instrumental in an investigation, such as precise identities and locations — details that many youth will not likely recall due to trauma resulting from kidnapping, seclusion, and other such experiences. Even if law enforcement is willing to certify based on the youth's assistance in the investigation of the trafficker, youth may be reluctant to report criminal activity due to fear of retaliation by the traffickers. Many practitioners reported that traffickers threatened the youth and their family's lives if they reported the crime to authorities.

Like the T visa, the U visa is one of the only forms of relief where there is a broad and generous waiver of inadmissibility for the "reason to believe" drug trafficking ground.[45] The U nonimmigrant status waiver allows the "reason to believe" ground to be waived "if the Secretary of Homeland Security considers it to be in the public or national interest to do so."[46] In applying for a waiver, practitioners note that it is important to connect the victimization to the underlying criminal activity (e.g., demonstrate that a youth was trafficking drugs under duress by the drug cartels), and to highlight other mitigating factors about the youth's life.

4. Asylum

Asylum is a form of relief for individuals who have suffered persecution or have a well-founded fear of persecution in their home country on account of race, religion, nationality, political opinion, or membership in a particular social group.[47] Through interviews, practitioners noted that they may pursue asylum simultaneously with other forms of relief, but it is generally a remedy of last resort in such cases because the standards for other forms of relief such as SIJS and the T visa are typically more straightforward and therefore more easily proven. One respondent stated that they only file asylum where there is a strong case or there is no other relief available. Another practitioner who only files T visa applications reported that she receives referrals from other agencies for potentially asylum-eligible youth who have trafficked drugs where the asylum claim is particularly weak.[48] Some practitioners file

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[45] INA § 212(d)(14); *see* Section III.C for a discussion of the "reason to believe" ground of inadmissibility.
[46] INA § 212(d)(14).
[47] INA §§ 101(a)(42(A), 208(b)(1)(B).
[48] It is difficult to establish persecution on account of membership in a particular social group when the social group is young people who live in communities with a pervasive and powerful gang presence and who resist recruitment into gangs. Although this constitutes a particular social group under the 1951 Refugee Convention and these youth are known to be socially visible in their home countries, there is much resistance to these claims by DHS and the courts presumably because there would be too many individuals eligible if this particular social group were to be fully recognized. U.N. High Commissioner for Refugees (UNHCR), "Guidance Note on Refugee Claims relating to victims of Organized Gangs" (Mar. 2010), available at http://www.refworld.org/pdfid/4bb21fa02.pdf (last visited on Dec. 16, 2014). In addition, two BIA decisions in 2014 narrowed the definition of "particular social group" for gang-related claims. As a result, it is increasingly challenging for practitioners to use asylum as relief for people with gang- or cartel-related claims. *See In re M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *In re W-G-R-,* 26 I.& N. Dec. 208 (BIA 2014). Other possible asylum claims that may be pursued are persecution on account of an imputed

asylum claims based on the UAC's fear of drug cartels. The basis for this type of claim is a fear of a cartel's revenge or punishment for the youth having lost or abandoned drugs where the youth has knowledge that the cartels have harmed individuals who have done so. Because there may be no "live," specific threat from the drug trafficker, proving fear of persecution is difficult in these cases as the government argues that these cases involve a generalized and not particularized fear of persecution. Other issues reported by practitioners include the difficulty of obtaining corroborating evidence of the applicant's story as required by the Real ID Act[49] and other particularly burdensome requirements such as providing an interpreter for one's own eligibility-related interviews.

There is no *per se* bar to drug trafficking conduct by the applicant in the asylum context. However, there are several bars to asylum that juveniles may trigger if they are involved in drug trafficking. Conviction of a "particularly serious crime" is a bar to asylum.[50] This ground will only apply to adult convictions, since juvenile delinquency does not result in a conviction for purposes of immigration law.[51] Where a youth has committed an offense resulting in a criminal conviction in adult court, an offense is deemed a "particularly serious crime" for purposes of asylum if it is considered an "aggravated felony," a criminal classification created by the immigration statute, or, if a review of all the facts and circumstances of the conviction reveal that it is "particularly serious."[52] Where there is an adult conviction and it was committed while under the age of 18 or near that age, advocates could challenge a "particularly serious crime" determination based on a youth's mental and emotional development and consequent, decreased culpability.

Even after meeting the basic eligibility requirements for asylum, an asylum applicant also must prove that he or she qualifies for a favorable exercise of discretion. For a child with drug trafficking conduct, this may be particularly difficult due to an Attorney General ruling stating that discretion will be unfavorable if the applicant is found to have been convicted of a "violent or dangerous" offense.[53] The ruling contains a limited exception based on exceptional and extremely unusual hardship, which is a very high standard to meet. Although the Immigration and Nationality Act (INA) requires a conviction and a juvenile delinquency adjudication does not constitute a conviction, the trafficking conduct may still be used by the judge to support a negative exercise of discretion.

Finally, a person may be denied asylum if there are reasons for believing that the person has committed a "serious nonpolitical crime" outside the United States prior to arrival.[54] A conviction is not required. This standard is broader than the "particularly serious crime" bar. The Board of Immigration Appeals

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political opinion (that is, refusal to join a gang where there is a *de facto* influence of gangs over the State or police) and persecution on the basis of membership of a family (where gangs attempt to recruit one family member who refuses to join, and consequently other family members are then pursued by the gang as retaliation).

[49] INA §208(b)(1)(B)(iii) requires immigration judges to request corroborating evidence from asylum applicants unless the judge believes that the applicant does not have and cannot reasonably obtain it.

[50] INA. § 208(b)(2)(A)(ii).

[51] *In re Devison*, 22 I. & N. Dec. 1362 (BIA 2000).

[52] INA § 208(b)(2)(B)(i).

[53] *In re Jean*, 23 I. & N. Dec. 373, 373 (AG 2002).

[54] INA § 208(b)(2)(A)(iii); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

(BIA) balances several factors when defining "serious nonpolitical crime."[55] Advocates may be able to challenge the finding of a serious nonpolitical crime when the crime was committed while the person was a minor by arguing that children are less culpable for their actions due to their developmental status. Immigration laws recognize this decreased culpability as evidenced by the fact that delinquency is treated differently and less seriously than adult convictions. Advocates should highlight if crimes were committed by the youth under duress and under the influence of others, such as family members, gangs, or the government.

B. General Considerations When Pursuing Relief from Removal

There are a number of factors that play a role in determining the relief that practitioners seek for youth involved in drug trafficking.[56] For example, a practitioner's lack of experience[57] with filing T visas may deter some from pursuing it for their clients. The age of the UAC may preclude the pursuit of some forms of relief, such as SIJS. For agencies that have agreements with *pro bono* attorneys and firms to represent UAC pursuing legal relief, the relative level of expertise and interest of the *pro bono* attorney may determine the form of relief that is sought. For practitioners serving UAC in ORR custody, another set of factors to consider is whether the youth is reunifying with family elsewhere, how long he or she will be in the vicinity of the legal services provider before the transfer, and whether legal services are available in the location where the youth is transferred. For example, if practitioners know that there will be minimal legal services in the area where the youth is to be transferred they may seek the form of relief that is easiest to pursue. Other agencies will not seek any relief at all because the children are in custody for such a short period before they are reunified to another part of the country.

As discussed previously, the relative difficulty or ease of obtaining SIJS predicate orders from the local juvenile court may also influence this decision. Some practitioners, like those in Arizona, still favor SIJS over the T visa because they are able to easily obtain SIJS predicate orders from the local juvenile court and DHS has tacitly agreed to waive drug trafficking conduct where it was under duress. Other practitioners find that the T visa is the only option because they are unable to obtain a SIJS predicate order or a certification of helpfulness for the U visa.

As discussed in greater depth in the next section, drug trafficking conduct triggers some of the most punitive consequences under immigration laws, even for juveniles. The risk of applying for immigration relief with drug trafficking conduct can be the denial of an application and deportation.[58] Therefore, a

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[55] These factors include a balancing of the nature of the offense committed against the degree of persecution feared (*In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 7 (BIA 1980)); balancing the seriousness of the criminal act against the political aspect of the conduct (*In re E-A-*, 26 I. & N. Dec. 1, 8 (BIA 2012)); and the applicant's description of the crime, the value of any property involved, the length of any sentence imposed and served, and the comparable punishment in the US for such acts (*In re Ballester-Garcia*, 17 I. & N. Dec. 592, 7-8 (BIA 1980)).

[56] *See* Appendix C for a chart comparing the different forms of relief in drug trafficking cases.

[57] Many practitioners surveyed noted that they have never filed a T visa or are just beginning to explore it as another avenue of relief.

[58] The risk is greater in affirmative applications than defensive applications. If a youth is already in deportation proceedings, there is generally no risk in raising as many defenses as possible against deportation.

primary factor when determining which form of relief to pursue is often the availability of a waiver to forgive the ground of inadmissibility based upon the "reason to believe" ground of inadmissibility.

III. Grounds of Inadmissibility and Other Barriers to Immigration Relief Due to Drug Trafficking

Under the INA, in order to be granted a visa, apply for adjustment of status, or seek other immigration benefits, an applicant must show that he or she does not trigger one of the 10 grounds of inadmissibility.[59] While juvenile delinquency is not treated as conviction for immigration purposes, certain delinquent conduct can still trigger inadmissibility. Consequences for drug-related conduct are harshest because in many applications for relief drug trafficking is not waivable. This section provides an overview of the drug-related grounds of inadmissibility and other barriers to relief from removal for drug-related conduct.

A. Current Drug Abuse or Addiction

Current drug abuse or addiction is a ground of inadmissibility.[60] This ground is listed in the health-related grounds of inadmissibility of the INA, rather than the criminal and related grounds. However, this ground of inadmissibility often arises as a result of delinquent conduct, and therefore may be triggered in cases involving drug trafficking.

The inadmissibility statute delegates authority to HHS to define drug addict or abuser.[61] According to HHS, for inadmissibility purposes the definition of drug addiction and abuse (referred to by HHS as substance dependence and repetitive substance abuse, respectively) is based on the criteria of the Diagnostic and Statistical Manual of Mental Disorders (DSM).[62] A finding of drug addiction or drug abuse will only be made if the noncitizen meets current DSM diagnostic criteria for substance dependence or abuse with any of the specific substances listed in Schedules I through V of § 202 of the Controlled Substances Act. The current HHS standards are vastly different from the past, when it considered any drug use that went beyond mere experimentation to be drug abuse.

Additionally, the drug abuse or addiction must be current, as the language of the statute punishes a person who is determined "to be" an abuser or addict (note the present tense). It is important to note,

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[59] INA § 212(a) lists these grounds, which include inadmissibility based on national security concerns, public health, public charge, commission of crimes, and past immigration violations.

[60] INA § 212(a)(1)(A)(iv). Drug abuse and addiction is also a ground of deportability, but for purposes of this discussion and its applicability to UAC the focus is on inadmissibility. *See* INA § 237(a)(2)(B)(ii) (deportation ground).

[61] INA § 212(a)(1)(A)(iv).

[62] U.S. Department of Health and Human Services, "CDC Immigration Requirements: Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders," 5 (Dec. 18, 2013), located at http://www.cdc.gov/immigrantrefugeehealth/pdf/mental-health-cs-ti.pdf (last visited Jan. 7, 2015); The DSM is published by the American Psychiatric Association, which provides a common language and standard criteria for the classification of mental disorders. The latest version, DSM V, was published May 18, 2013.

however, that current drug abuse or addiction will include any use in the past year. Ideally, a doctor should first decide if a person is a drug abuser or addict as defined above.

The standard for full "remission" for drug abusers under the DSM is a one-year period of no substance use or associated harmful behavior; this was updated on June 1, 2010 from a three-year required remission period. In practice, sometimes the panel physician will make a finding of "drug abuse" even if the applicant admits to only abusing drugs on a few occasions. The panel physician still retains discretion to determine a longer period, and may suggest or require that the applicant undergo random drug testing or take drug abuse prevention classes, in order to meet the criteria for "remission." When the remission period is over, the applicant must undergo a new medical exam before an immigrant visa can be issued, as illustrated by the following hypothetical case:

- Rebeca admitted to the panel physician that she smoked marijuana two or three times, with the last occasion being nine months prior. As a result, she is found inadmissible as a "drug abuser" under the drug abuse and addiction ground of inadmissibility. However, she can reapply for admission in three months because that will be the point at which she has been in "remission" for 12 months. She should arrange for random drug testing and take prevention classes in her country while she awaits the expiration of the remission period, and then have the test results sent directly from the testing facility to the panel physician.

The issue of drug abuse and addiction generally arises during the medical examination of the youth required for applications for lawful status, during the interview with an immigration officer, or possibly in testimony before the immigration court. This issue is not raised directly in immigration applications as there is no question asking whether the person has used or is addicted to drugs. In practice, advocates report that this ground is not typically charged for youth already in the United States. However, the ground has been very problematic for youth who are involved in consular processing abroad. Even if this ground of inadmissibility becomes an issue, there are waivers available.[63]

PRACTICE TIP > People whose blood tests reveal traces of marijuana or other drugs (which can remain in the blood for up to several months) may be found inadmissible. Attorneys should advise clients of this before they see a civil surgeon or attend a visa appointment. If the client is young, the attorney may want to speak to the client separately from his or her parents. Children who have been living within the United States and are sent back to their home country for consular processing must be thoroughly screened for this issue and prepared for the medical examination prior to departure. Should this issue arise, the child may end up separated from his or her parents until he or she can show remission.

[63] *See* INA § 212(a) (waivers for health-related grounds of inadmissibility).

B. Admission or Conviction of a Controlled Substances-Related Offense

Under the INA, a noncitizen who is convicted of a controlled substance crime or a crime involving moral turpitude (CIMT) can be found inadmissible.[64] Furthermore, the inadmissibility ground is triggered if the noncitizen admits to the essential elements of either of these types of crimes, even without a conviction. An admission occurs when: (1) the conduct in question satisfies all of the essential elements of a crime, [65] (2) the government provides a definition of the crime in understandable terms prior to the admission, [66] and (3) the admission is free and voluntary. [67]

While it is clear under federal law that juvenile delinquency is not a conviction for immigration purposes[68] and therefore, youth only adjudicated delinquent do not fall within the conviction portion of this ground of inadmissibility, many practitioners who have contacted the author over the last five years believe that a juvenile can still make an admission to a controlled substance offense. However, an admission by an adult or minor of conduct committed while a minor is generally not a formal "admission" for purposes of this inadmissibility ground. The BIA held that an admission made by a minor or adult about conduct that was treated or would have been treated in delinquency proceedings does not trigger inadmissibility under these grounds, because the admission is of committing juvenile delinquency, not a controlled substance or moral turpitude "crime."[69] This is consistent with BIA holdings stating "that acts of juvenile delinquency are not crimes … for immigration purposes."[70]

Advocates will have to determine whether the conduct at issue was or would have been treated in delinquency proceedings or adult criminal proceedings. Different states and the federal government have different standards to determine when a minor can be charged and convicted as an adult. As a general rule, most drug trafficking is treated by the federal government as a delinquency under the Juvenile Justice and Delinquency Prevention Act (JJDPA).[71] Many states will treat drug-related conduct as juvenile delinquency as well. Nonetheless, practitioners should examine the rules for when a youth can be charged as an adult in a particular jurisdiction to determine whether the client's statements could be

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[64] INA § 212(a)(2)(A)(i).

[65] *In re R-*, 1 I. & N. Dec. 118 (BIA 1941) (fraud in itself not a crime); *In re M-*, 1 I. & N. Dec. 229 (BIA 1942) (remarriage not punishable as bigamy); *In re De S-*, 1 I. & N. Dec. 553 (BIA 1943) (attempt to smuggle not a crime).

[66] *In re K-*, 9 I. & N. Dec. 715 (BIA 1962); *United States ex rel. De La Fuente v. Swing*, 239 F. 2d 759 (5th Cir. 1956); *In re G-M-*, 7 I. & N. Dec. 40, 42 (AG 1956); But see *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (a statement of marijuana use to a doctor during a routine examination was considered an admission even though the doctor did not provide a definition and the elements of the offense prior to the admission, noting that the purpose of the examination was not to obtain an admission).

[67] *In re G-*, 6 I. & N. Dec. 9 (BIA 1953); *In re G-*, 1 I. & N. Dec. 225 (BIA 1942); *In re M-C-*, 3 I. & N. Dec. 76 (BIA 1947).

[68] *In re Devison*, 22 I. & N. Dec. 1362 (BIA 2000)(*en banc*).

[69] *In re MU*, 2 I. & N. Dec. 92 (BIA 1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility).

[70] *In re Devison*, 22 I&N Dec. 1362 (BIA 2000) (*en banc*) (citing *In re C-M-,* 5 I. & N. Dec. 327 (BIA 1953)); *In re Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981).

[71] 42 U.S.C. § 5603(14).

treated as an admission of a crime. Practitioners can also consult a practice advisory written by this author on the legal and ethical considerations in disclosing juvenile conduct.[72]

C. Reason to Believe the Person Engaged in or Assisted in Drug Trafficking

Of all the drug-related inadmissibility grounds, the most dangerous to youth is if the government has "reason to believe" that they are or have been, or have assisted, a drug trafficker in trafficking activities (the "reason to believe" ground of inadmissibility).[73] Becoming inadmissible by way of the "reason to believe" ground can be a permanent bar to obtaining lawful status despite significant equities and mitigating factors since there are no waivers available for this conduct-based ground of inadmissibility in many different forms of immigration relief. There are, however, a number of defenses that practitioners can assert to argue that the ground is inapplicable even where a waiver does not exist.[74]

1. "Reason to Believe" Standard

Under the "reason to believe" ground of inadmissibility, a person is inadmissible if the consular officer of the Attorney General knows or has reason to believe the person:

> […] is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (212 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so.

The INA contains a similar "family ground" of inadmissibility that applies to the spouse, son, or daughter of a drug trafficker if they received any "financial or other benefit" from the drug trafficking within the previous 5 years.[75] The "family ground" should not apply to minors, however, because the plain language of the statute does not use the word "child."[76]

The scope of this inadmissibility ground is broad. The plain language of the statute provides that the ground not only includes individuals who actually sell drugs, but also individuals who facilitate or assist in the drug trade. However, under U.S. Supreme Court precedent there are limits to what constitutes drug trafficking. In *Lopez v. Gonzales*, the Supreme Court held that "ordinarily [illicit] 'trafficking' means

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[72] Angie Junck, "Practice Advisory: Legal and Ethical Considerations in Disclosure of Delinquent Conduct," Immigrant Legal Resource Center for Vera Institute of Justice (March 2010), available at http://my.hdle.it/21289963 (*hereinafter* Junck, "Delinquent Conduct").
[73] INA § 212(a)(2)(C).
[74] Defenses to the "reason to believe" inadmissibility ground are discussed in Section IV.A.
[75] INA § 212(a)(2)(C)(ii).
[76] The definition of a child is a person under the age of 21, whereas a son or daughter in immigration law is someone over the age of 21. *See* INA § 101(b)(1). Therefore, the "reason to believe" family ground should only apply to persons who received the benefit after reaching the age of 21 and not unduly punish children and youth who may have received some "benefit" from drug trafficking while still a child.

some sort of commercial dealing."[77] The BIA similarly found that trafficking includes, at its essence, a "business or merchant nature, the trading or dealing in goods."[78]

A person can be found inadmissible for a "reason to believe" ground even without a conviction.[79] The standard of what constitutes a "reason to believe" is also lower than that required for an admission to an offense. For instance, individuals against whom DHS has evidence that they engaged in trafficking or assisted in trafficking drugs in the past, even without a conviction, could be found inadmissible.[80] DHS, however, must have more than a mere suspicion – they must have "reasonable, substantial, and probative evidence" that the persons engaged in drug trafficking.[81]

This means that an arrest or charge of drug trafficking by itself should not suffice as substantial evidence to prove inadmissibility under the "reason to believe" ground.[82] The government must support the charge with other evidence such as a police report or other documentation of the drug trafficking, testimony from police, detectives, or other officers, or admissions from the person.[83] The Department of

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[77] *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).

[78] *In re Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992). Practitioners should be aware, however, that guidance issued by the U.S. Department of State goes even farther than *Lopez* and *In re Davis* and provides that the "reason to believe" inadmissibility ground applies to someone who purchases drugs with the intent to sell even though he or she never does resell them, and to individuals who receive no profit gain or profit from the transaction if they act "knowingly or consciously as a conduit between supplier and customer." U.S. Department of State, 9 *Foreign Affairs Manual* 40.23, Notes n.1 (*hereinafter Foreign Affairs Manual*). The Department of State does not provide a citation for this assertion within the manual. Advocates, therefore, should argue that the U.S. Supreme Court and BIA definitions control.

[79] *In re Favela,* 16 I. & N. Dec. 753, 754-56 (BIA 1979).

[80] *Id.* (individual excluded based on his admission that he attempted to smuggle marijuana, even though he was not convicted of a controlled substance offense); *In re R-H-,* 7 I. & N. Dec. 675, 678 (BIA 1958) (individual excluded based on his admission that he helped dealer deliver marijuana, even though he was never convicted of it).

[81] *In re Rico*, 16 I. & N. Dec. 181, 185-6 (BIA 1977); *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *see also Favela,* 16 I. & N. Dec. 753; *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence"); *Foreign Affairs Manual*, *supra* note 78, at note n. 2(b).

[82] *In re Arreguin de Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995). In considering whether a person warranted INA § 212(c) ("reason to believe" ground) as a matter of discretion, the Court dismissed the former INS's reliance on a police report to find that the applicant engaged in alien smuggling. The court said, "[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein. Here, the applicant conceded that the arrest took place but admitted to no wrongdoing. Considering that prosecution was declined and that there is no corroboration, from the applicant or otherwise, we give the apprehension report little weight."

[83] Decisions from the BIA and Circuit Courts that uphold the "reason to believe" determination were also based on more than a mere suspicion — in those cases, the individual either admitted he had trafficked drugs or was caught with a significant quantity of them. *See Castano,* 956 F.2d at 238 & n. 6 (INS "in effect 'retried' " the criminal case, introducing "lengthy evidence, both documentary and testimonial," and alien did not contest facts); *In re Favela,* 16 I. & N. at 756 (alien "admitted his conscious participation" in attempt to smuggle marijuana); *In re Rico,* 16 I. & N. at 182-83 (BIA did not rest on evidence of arrest for drug trafficking, but testimony of the Border Patrol Agent and the Customs Inspector that he frequently drove the car in which 162 pounds of marijuana was found as well as testimony of special agents of the Drug Enforcement Administration in the investigation of the incident); *In re R-H-,* 7 I. & N. Dec. 675, 678 (alien admitted he helped dealer deliver marijuana cigarettes to customers). *See also Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007) (unpublished) (holding that the drug sale charges for which the petitioner was acquitted were alone insufficient to constitute "reason to believe," and that a "reason to believe" charge triggering inadmissibility must be based on facts underlying an arrest and those facts must be cited in support of the charge); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (finding sufficient reason to believe the alien had committed illegal acts underlying previous drug trafficking arrest because the government submitted documents describing the police surveillance of the person and the person's subsequent attempt to escape with 147 pounds of marijuana); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (in addition to a previous arrest for drug trafficking, two undercover detectives testified that they had personally arranged drug deals with the petitioner).

State provides a list of examples where a "reason to believe" ground might be established, including a "conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports."[84] Notably, the Department of State maintains that conclusions from other officers or evaluators about someone's involvement in drug trafficking, no matter how trustworthy, should not form the basis for inadmissibility.[85] With regards to youth, the government may seek out the out-of-court statements or statements to Border Patrol, other law enforcement agencies, clinicians, or others.

The government must also present evidence that shows the applicant was knowingly and consciously connected to the drug trafficking in some way (e.g., as aider, abettor, or beneficiary) in order to trigger this ground of inadmissibility.[86] The government must prove the essential element of intent, which is the specific intent to traffic drugs.[87]

The government may argue that an arrest, admission, adjudication in delinquency proceedings, or criminal conviction for sale, possession for sale, possession with intent to deliver, or similar offenses alone will trigger this ground. Advocates should be aware that both the BIA and the Eleventh Circuit Court of Appeals have held that the facts underlying drug trafficking convictions, even if the offenses themselves no longer trigger conviction-based immigration consequences, can be used to exclude a person under the "reason to believe" inadmissibility ground.[88] However, more recently the Eleventh Circuit found that the government's evidence did not trigger the "reason to believe" ground where the individual's conviction for drug trafficking was vacated, the individual never admitted to the commission of the acts in criminal court, and the government did not corroborate hearsay statements in police reports which contained information that conflicted with the individual's testimony of what happened.[89]

2. Penalties

The "reason to believe" ground is a very serious ground that DHS may also apply to youth and cannot be waived in most applications for lawful status. If the youth is undocumented, becoming inadmissible for the "reason to believe" ground can be a permanent bar to obtaining lawful status despite significant equities, such as a U.S. citizen family member and dependency determinations of abuse, abandonment

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[84] *Foreign Affairs Manual*, *supra* note 78, at note n. 2(b).
[85] *Id.* at n. 2(c).
[86] INA § 212(a)(2)(C)(i).
[87] *See, e.g., In re Rico*, 16 I. & N. at 186 (finding that the petitioner was a "knowing and conscious participant" in an attempt to smuggle drugs into the United States which "brings him within the provisions of § 212(a)(23) of the Act relating to 'illicit trafficker'"); *In re Favela,* 16 I. & N. at 755 (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under INA § 212(a)(23)). *See also* Section IV.B for a discussion on duress arguments to challenge the existence of the requisite intent.
[88] *See In re Favela,* 16 I. & N. at 755 (juvenile convicted under the Federal Youth Corrections Act of a drug trafficking offense which after expungement rendered the conviction itself of no immigration consequence, could still be excluded under the "reason to believe" ground based on facts underlying the expunged conviction); *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992) (facts underlying a drug trafficking conviction which had been expunged under the former Federal Youth Corrections Act could still be used to exclude the person under the "reason to believe" ground).
[89] *Garces v. Attorney General,* 611 F.3d 1337 (11th Cir. 2010).

or neglect. It can also serve as a bar to adjustment of status after a grant of asylum despite a strong claim of persecution.[90] Virtually the only relief available to such a person would be an application for the U visa for victims of certain serious crimes who assist law enforcement or a T visa for victims of trafficking.

Notably, practitioners report that DHS does not generally or routinely charge youth involved in drug trafficking with the "reason to believe" ground of inadmissibility.[91] For those situations where this ground is alleged against a youth, a number of innovative arguments that negate the applicability of this ground of inadmissibility to minors are emerging.[92] However, it is common for DHS to use drug trafficking conduct as a basis for arguing that the youth is not deserving of relief as a matter of discretion.

D. Discretion

DHS will often focus on contesting underlying drug trafficking conduct in the discretionary phase of an application for relief. Indeed, the BIA found that an individual "who commits a serious drug crime faces a difficult task in establishing that she merits discretionary relief."[93] Drug trafficking, has been highlighted as a DHS enforcement priority meriting greater resource allocation.[94] Despite these obstacles, it is possible that drug trafficking issues can be overcome with significant equities and mitigating factors.[95] As discussed previously, a number of practitioners who responded to the survey were able to obtain immigration relief for youth engaged in drug trafficking. The discussion below provides tips on how to present mitigating factors to USCIS and the immigration court that may help overcome this conduct's treatment as a significant negative discretionary factor.

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[90] Asylees and refugees, like other noncitizens, must be admissible to adjust their status to lawful permanent residency. While there is a generous waiver for asylees and refugees under INA § 209(c), which waives almost all grounds of inadmissibility, it does not waive the "reason to believe" ground or sections of the terrorism and security grounds.

[91] However, one attorney recently did receive a charge in the Notice to Appear (NTA) based on a drug sale juvenile adjudication. While DHS subsequently dropped the charge, it continues to vigorously oppose a grant of relief based on the trafficking. The case was still pending at the time of the survey.

[92] *See* Section IV.A for a more complete discussion of these arguments.

[93] *In re Arreguin de Rodriguez,* 21 I. & N. Dec. 38, 42 (BIA 1995).

[94] U.S. Department of Homeland Security, Memorandum by Jeh Johnson, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants" (Nov. 20, 2014).

[95] *In re Arreguin de Rodriguez,* 21 I. & N. Dec. at 42 (Applicant met her burden of establishing eligibility for INA § 212(c) relief as a matter of discretion where this was her only conviction, the sentencing court acknowledged acceptance of responsibility and her minor role in the offense, there was substantial evidence of rehabilitation, and the applicant presented unusual or outstanding equities including 20 years of lawful residence and two minor dependent U.S. citizen children.)

IV. Defenses Against Inadmissibility and Negative Discretionary Determinations[96]

A. Specific Defenses to the "Reason to Believe" Inadmissibility Ground

Becoming subject to the "reason to believe" ground of inadmissibility can be a permanent bar to obtaining lawful status despite significant equities and mitigating factors. As previously discussed, this ground of inadmissibility cannot be waived in most applications for lawful status except for the T and U visas. Because of the lack of waivers and because drug trafficking is considered by DHS as a serious adverse discretionary factor in any application for relief, advocates must be creative in their defense strategies representing youth with potential drug trafficking issues. This section provides a variety of arguments that may be used to support the assertion that the "reason to believe" ground is inapplicable to all youth or to certain youth based on the facts of their case and that drug trafficking in cases of minors should not be weighed heavily as a matter of discretion. These arguments may be used in applications for all forms of relief, but may be especially helpful when there is no waiver available for the "reason to believe" ground of inadmissibility. It is important to hold the government to its burden in establishing that a youth is engaged in drug trafficking activity.

1. There is No Precedent Authority Holding that the "Reason To Believe" Ground of Inadmissibility Applies to Juvenile Delinquent Acts[97]

Because the "reason to believe" ground of inadmissibility does not require a conviction, and there is no explicit language in the statutory provision that provides for different treatment of a noncitizen based upon age, it is routinely presumed that the "reason to believe" ground equally applies to adults and minors even when juvenile delinquent acts may be involved. However, the authority that the BIA and DHS routinely cite for this proposition is questionable. In particular, the seminal BIA cases on the "reason to believe" ground, *Matter of Rico* and *Matter of Favela*, do not squarely address the special circumstances and protections afforded to minors when they commit acts of juvenile delinquency.[98] Neither case arises in the context of a juvenile committing, or being adjudicated delinquent by a juvenile court of, a drug trafficking offense, but both emphasize the fact that the respondent knowingly and consciously participated in the drug smuggling—something that could potentially be effectively disproven in a situation involving a minor.

Notably, no immigration case has yet addressed whether conduct committed by a minor would be sufficient to meet the "reason to believe" standard based upon the facts before it. This is an important and open question, since juvenile delinquency is treated differently not only by federal and state criminal justice systems, but also by federal immigration authorities.[99] In fact, the BIA's own precedent holds that admission of acts of delinquency cannot form the basis for a crime involving moral turpitude

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[96] Thanks to Rebekah Fletcher, KIND Seattle for providing many of these arguments and for sharing her analysis on these issues.
[97] Thanks to Manuel Rios from Rios and Cruz in Seattle, Washington for providing this argument and analysis.
[98] *See In re Rico*, 16 I. & N. Dec. 181 (BIA 1977); *In re Favela,* 16 I. & N. Dec. 753 (BIA 1979).
[99] Juvenile delinquency is not a conviction for immigration purposes. *In re Devison*, 22 I&N Dec. 1362 (BIA 2000) (*en banc*).

and controlled substance-related criminal, conduct-based grounds of inadmissibility because acts of juvenile delinquency are not crimes.[100] There is no persuasive authority to the contrary.

2. Congress' Intent in Enacting the Reason to Believe Ground of Inadmissibility Was Not to Cover Minors Forced into Drug Trafficking[101]

Congress' intent in enacting the "reason to believe" ground of inadmissibility was to protect the United States from "undesirable" individuals whose admission would be "detrimental" to the nation's interests.[102] The BIA has stated that:

> […] the Congressional intent underlying [the "reason to believe" ground of inadmissibility] was to provide a means for excluding known dealers of narcotics who, by avoiding conviction, had not otherwise been rendered inadmissible under INA section 212(a)(23)(A) (requiring a conviction of a controlled substance violation).[103]

BIA and other Circuit Court precedent on the "reason to believe" inadmissibility ground addresses serious conduct where either the person was knowingly selling drugs or transporting a large amount of drugs as part of a trafficking scheme. The facts presented by survey respondents, especially regarding international drug trafficking cases occurring at the border, indicate that the youth they work with are generally not known drug dealers or key players in a drug trafficking scheme; they are merely vulnerable conduits for drug cartels to transport drugs across the border. Furthermore, these UAC are typically not "detrimental" to the nation's interests. Generally, evidence of rehabilitation or productive activities in the community will support this argument.

Again, the facts of the majority of cases conveyed through the survey show that these youth are not coming to the U.S. with the intent to sell drugs, but rather to escape persecution in their home countries, reunite with family members, and find better life opportunities through education or work. For these reasons, under the intent of the statute many UAC do not fall within the category of individuals that INA § 212(a)(2)(C) intended to exclude.

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[100] *In re M- U-* , 2 I. & N. Dec. 92 (BIA 1944).

[101] Thanks to Rebekah Fletcher, KIND Seattle for providing this argument and analysis.

[102] *In re P-*, 5 I. & N. Dec. 190, 193 (BIA 1953).

[103] *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992) (citing *In Re P-*, 5 I. & N. Dec. at 193). *See also Retano v. Ashcroft*, 112 Fed. Appx. 649, 651 (9th Cir. 2004) (unpublished) (finding that 6,000 pounds of marijuana with a $4.5 million street value entrusted to the immigrant by key players in a drug trafficking operation was significant in suggesting that the immigrant was "trusted" by drug traffickers and therefore, was a known drug trafficker); *Alarcon-Serrano v. INS*, 220 F.3d 1116 (9th Cir. 2004) (amount and economic value of the 86 pounds of marijuana respondent transported was central to determination that he was a trusted participant in drug trafficking).

3. The Youth Has Not Engaged in Any Unlawful or Illicit Activity

In order to trigger inadmissibility, the underlying conduct at issue must generally be unlawful.[104] Although the "reason to believe" inadmissibility ground reduces the evidentiary standard of wrongdoing from the criminal standard of "beyond a reasonable doubt" to "reasonable substantial and probative evidence," the purpose of the ground is to establish that a noncitizen is somehow guilty of wrongdoing and therefore "undesirable" for admission to the U.S. Under this reasoning, if youth can show that their actions would not render them guilty of wrongdoing, then arguably they should not be found inadmissible under the "reason to believe" ground.

If there is no adjudication or conviction at issue, practitioners can argue that the juvenile's acts were not unlawful (or illicit) based upon the circumstances. It could be argued that the facts of the case do not meet the elements of drug trafficking crime by comparing it to a federal drug trafficking offense or a state drug trafficking offense in the state in which it occurred, or that upon apprehension there was a failure to prosecute. It could also be argued that there was force or coercion and therefore, duress was a defense to the crime.[105]

4. The Conduct Does Not Meet the Definition of Drug Trafficking

Mere possession of a drug is not sufficient to meet the definition of trafficking. The U.S. Supreme Court in *Lopez v. Gonzales* held that "ordinarily [illicit] 'trafficking' means some sort of commercial dealing."[106] The BIA similarly defined trafficking as "the unlawful trading or dealing of any controlled substance."[107] The BIA has explained that the concept of "trafficking" includes, at its essence, a "business or merchant nature, the trading or dealing in goods."[108] Whether someone receives remuneration may constitute evidence that substantiates the commercial nature of the person's conduct.[109]

Based on the facts of the cases reported in the survey and interviews, there is an argument that the act of transporting drugs for traffickers does not constitute drug trafficking as defined by U.S. Supreme Court and BIA precedent because the youth is not receiving any remuneration and is forced to be a conduit in the drug trade. In one case reported in an interview, an attorney reported that she challenged DHS' "reason to believe" charge even where the youth had a conviction for possession with intent to deliver because the conviction itself did not contain any admission that he received remuneration for the drugs.[110]

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[104] *In re McNaughton*, 16 I. & N. Dec. 569, 572 (BIA 1978).
[105] *See* Section IV.B for a discussion of the duress defense.
[106] *Lopez v. Gonzales,* 549 U.S. 47, 53 (2006).
[107] *In re Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992).
[108] *Id.*
[109] *Steele v. Blackman*, 236 F.3d 130 (3rd Cir. 2001) (holding that acts of "trading or dealing" should have a "business or merchant nature" to fall under the category of "trafficking" or they will otherwise constitute "simple possession" or "transfer without consideration"); *Retano v. Ashcroft*, 112 Fed. Appx. 649, 651 (9th Cir. 2004) (unpublished).
[110] The outcome of the case was still pending at the time of survey.

Advocates should note that many state drug offenses that may appear serious and are found within statutes containing a variety of other drug trafficking offenses still do not meet the definition of drug trafficking. This is helpful in situations where an adjudication or conviction is being used as evidence for the "reason to believe" ground. In California, for example, a criminal statute not only makes it illegal to transport, import, sell, furnish, administer, or give away marijuana, but also to offer or attempt to do any of those things.[111] In a case involving a conviction under that statute, the respondent argued that the conviction did not meet the INA's definition of aggravated felony, which includes "illicit trafficking in controlled substance […] including a drug trafficking crime" (i.e., any felony punishable under the Controlled Substances Act).[112] The Ninth Circuit agreed, holding that the "offer" language in that statute criminalizes solicitation, which is an offense that is not covered in the INA's definition, and therefore a conviction under that California criminal statute is not considered a drug trafficking offense.[113] Although this case dealt with the definition of aggravated felony, similar arguments could be made in the context of the "reason to believe" ground of inadmissibility.

If a juvenile has an arrest for drug trafficking, but pleads to a lesser drug offense that does not meet the definition of drug trafficking, advocates should also argue that the judicial proceedings themselves determined that the client was not guilty of the activity. Other juvenile delinquency adjudications that clearly do not meet the definition of trafficking include: simple possession, under the influence, or possession of paraphernalia. These offenses do not necessarily give the government "reason to believe" the person has engaged in trafficking, unless it involved a suspiciously large amount.[114]

Finally, some drug transactions may be so small that they arguably might not fit into the definition of trafficking. For example, the Ninth Circuit in *Rojas-Garcia v. Ashcroft* stated *in dicta* that a college student selling an ounce of marijuana to a roommate might not trigger the "reason to believe" ground of inadmissibility.[115]

PRACTICE TIP > Where your client has a criminal conviction or juvenile adjudication, be sure to obtain a copy of the entire juvenile or criminal court record of proceedings, and consult with the defense attorney if possible, if it is unclear whether your client admitted to the facts as alleged. You may find that although the client pled guilty to an offense, there may be an argument that the client did not admit to facts that would meet the definition of drug trafficking or substantiate a "reason to believe" inadmissibility ground.

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[111] Cal. Health & Saf. Code §11360(a).

[112] *United States v. Rivera-Sanchez*, 247 F.3d 905, 907 (9th Cir. 2001) (citing INA § 101(a)(43)(B)).

[113] *Id* at 909.

[114] *See, e.g., In re P-*, 5 I. & N. Dec. 190 (BIA 1953) (court inferred that alien who attempted to smuggle 162 pounds of marijuana was not for personal use because it involved such a large quantity).

[115] *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003). *Retano v. Ashcroft*, 112 Fed. Appx. 649, 651 (9th Cir. 2004) (finding that a large quantity and high value of drugs is sufficient evidence of trafficking). *In re Rico*, 16 I. & N. Dec. 181 (BIA 1977) (a single attempt at smuggling by an applicant who was found to be a knowing and conscious participant in the attempt to smuggle marijuana into the United States is sufficient to render an applicant an illicit trafficker in drugs); *In re Favela*, 16 I. & N. Dec. 753, 755 (1979) (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under § 212(a)(23)).

5. The Youth Did Not Knowingly and Consciously Traffic Drugs

The BIA has held that it is reasonable to require that the respondent knowingly engaged in trafficking.[116] Therefore, where possible, counsel should use age and the underlying facts of the case to show that a youth did not "knowingly" and "consciously" possess drugs with the intent to transport, deliver, distribute, or sell them.

The argument that a UAC lacked knowledge and did not consciously traffic drugs could be made in a number of ways. One could argue that UAC can never possess criminal intent due to their age or other indicia of limited capacity. For example, the U.S. Supreme Court has found that juveniles between the ages of seven and 14 are presumed incapable of entertaining criminal intent under the common law presumption of innocence.[117] This presumption, however, is rebuttable.[118] At least one survey respondent stated that they make the argument that their youngest clients ages 12 to 13 cannot form the intent to traffic drugs. Unfortunately, the Supreme Court did not extend the presumption of lack of criminal intent to juveniles over 14. As many of the youth caught in drug trafficking are between the ages of 16 and 17, age alone may therefore not be sufficient to show the lack of criminal intent without the discussion of other factors prevalent in the UAC population such as lack of formal education, trauma as a result of family abuse, experiences in the home country and during the migration north, duress or coercion, and unaccompanied status. These factors could be compelling enough to show that youth should not be found culpable for their actions. To bolster this argument, practitioners should use research on duress and lack of capacity of minors in general, as discussed elsewhere in this practice advisory, to demonstrate that youth do not meet the requirements of knowledge, intent, and consciousness.

A youth's lack of knowledge and consciousness may also be present based on other factors. Specifically, several practitioners in the survey and interviews reported that at the time of the trafficking the youth did not have actual knowledge that what they transported were drugs. One respondent in an interview said that most youth never see any drugs, but are forced to carry heavy backpacks.[119] Although DHS or the immigration court could argue that based on the facts of a case a juvenile had reason to know drugs

[116] *In re Rico*, 16 I. & N. Dec. 181 (1977) (a single attempt at smuggling by an applicant who was found to be a knowing and conscious participant in the attempt to smuggle marijuana into the United States is sufficient to render an applicant an illicit trafficker in drugs); *In re Favela*, 16 I&N Dec. 753, 755 (1979) (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under INA § 212(a)(23)).

[117] *Allen v. United States*, 150 U.S. 551, 558 (1893) states that,"The rule of the common law was that one under the age of seven years could not be guilty of felony or punished for any capital offence, for within that age the infant was conclusively presumed to be incapable of committing the crime; and that while between the ages of seven and fourteen the same presumption obtained, it was only *prima facie* and rebuttable. The maxim— malice supplies the want of maturity of years— was then applied and, upon satisfactory evidence of capacity, the child within these ages might be punished; but no presumption existed in favor of the accused when above fourteen."

[118] *Id.*

[119] Youth may not be told by traffickers they are drugs, but make vague statements such as "this stuff is worth more than your life."

were involved, practitioners could again mitigate against a "reason to believe" finding with evidence regarding the presence of force or coercion, the age of the minor, and other indicia of limited capacity.

Practitioners will have the most persuasive argument for lack of knowledge and consciousness where a youth was drugged while transporting drugs. One practitioner in an interview reported that a client was drugged by traffickers to keep him compliant. Under these circumstances, there is strong evidence that the UAC did not consciously decide to transport drugs. Evidence of being drugged could also be used as primary evidence to establish a duress defense based on force or coercion.

6. DHS Fails to Meet Its Burden of Proving That It Has a Reason to Believe the Youth Was Involved in Drug Trafficking.[120]

To establish the "reason to believe" ground of inadmissibility, DHS must produce reasonable, substantial, and probative evidence that the individual was engaged in the business of selling or dealing in controlled substances.[121] Mere suspicion is not sufficient and police reports taken alone should not suffice without corroboration.[122]

Even the entry of a guilty plea to drug trafficking itself could arguably not constitute sufficient evidence to substantiate the "reason to believe" ground. In *Garces v. Attorney General,* the Tenth Circuit held that entry of a guilty plea is not probative evidence where a person does not make any factual admission of guilt.[123] In *Garces*, the underlying drug sale conviction was vacated, but the Court evaluated the facts leading to the conviction since it could still support a "reason to believe" ground.[124] Because the criminal record did not affirmatively prove that Garces admitted his guilt or do so under oath,[125] the Court concluded that DHS did not provide substantial evidence that Garces admitted anything when he pled guilty.[126] This means that even if there is a conviction or facts to constitute drug trafficking, practitioners should look closely at the criminal or juvenile record or consult with a defense attorney to see if an argument could be made that the individual never admitted to facts constituting drug trafficking.

In a case shared during an interview, the attorney challenged the existence of a conviction of possession with intent to deliver as insufficient to prove the "reason to believe" ground because there was no admission that the child received remuneration for the drugs. In that case, DHS also relied on a document in the criminal record called a "Certification for Determination of Probable Cause" to establish the "reason to believe" ground. However, the attorney argued that the youth's admission of facts in the certification did not equate to admission to the elements of the offense. The attorney

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[120] Thanks to Rebekah Fletcher, KIND Seattle for providing this argument and analysis.
[121] *In re Rico*, 16 I. & N. Dec. 181, 185-86 (BIA 1977).
[122] *See In re Arreguin de Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995); *see also* Section III.C for a discussion of the "reason to believe" inadmissibility ground.
[123] *Garces v. Attorney General,* 611 F.3d 1337, 1347 (10th Cir. 2010).
[124] *Id.* at 1347-48.
[125] Under Florida law a person can plead guilty while maintaining his or her innocence (called an Alford plea) and the person does not have to be under oath in admitting the voluntariness of the plea. *Garces,* 611 F.3d 1337, 1349 (10th Cir. 2010).
[126] *Id*.

emphasized that the certification in and of itself, without corroborating evidence, had little probative value, and provided contradicting evidence that undermined the veracity of the Certificate including a police report suggesting that the target of the drug buy and bust was another individual and confirmation of the minor role in the offense by the youth because he was released the same night of the arrest. In this case, the youth offered a consistent, plausible explanation as to the facts establishing that he was credible and trustworthy, which was unlike other "reason to believe" published cases where the noncitizen either provided no explanation at all or gave an implausible explanation given the facts.[127] In fact, the attorney urged the immigration court to give less weight to alleged statements made by the youth in the course of an arrest due to his age and unaccompanied and *pro se* status.[128]

DHS may also fail to meet its burden of proof where it relies upon and uses illegally obtained information and records. In those instances, practitioners should consider filing motions to suppress or exclude evidence. An example of where a violation may arise is when DHS presents juvenile delinquency documents from a federal or state juvenile court to prove inadmissibility or as a negative discretionary factor. Depending upon the relevant state laws, this may constitute a violation of confidentiality.[129] For example, state law may prohibit the disclosure of documentation pertaining to a youth in juvenile court proceedings without a judicial order.[130] If DHS has not obtained the documents through permission of the juvenile court, there is a viable argument that juvenile court documents cannot be admitted into evidence in the immigration proceedings. In such a case, a practitioner should bring a motion to suppress the evidence.[131]

B. Even if the Juvenile Consciously Trafficked Drugs, the Conduct is Excused by Duress

In criminal law, duress can be a defense to a crime when an individual proves that he "committed a crime in order to avoid unlawful physical threats made by a third party."[132] Duress can occur through coercion by the other party, with coercion defined as "compulsion by physical force or threat of physical force."[133] Federal law under the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) defines coercion as "(A) threats of serious harm to or physical restraint against any person, (B) any

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[127] *See Lopez Molina v. Ashcroft*, 368 F.3d (9th Cir. 2004) (respondent offered no testimony or other evidence to rebut the evidence submitted by DHS, which included several documents submitted in support of the allegations of inadmissibility); *Cuevas v. Holder*, 737 F.3d 972 (5th Cir. 2013) (respondent claimed that he did not know his car, over which he was the legal owner and had exclusive control since he took ownership, contained 24 kilos of cocaine).

[128] The BIA has long-recognized that a Judge may not accept the admissions to a charge of deportability made by unaccompanied and unrepresented minors; and although a Judge can accept a minor's admission to factual allegations establishing deportability, a Judge must "exercise particular care" in doing so and the minor's age and pro se and unaccompanied status must be taken into consideration. *In re Amaya*, 21 I. & N. Dec. 583 (BIA 1996); *see also Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994) (Form I-213 not admissible where unaccompanied minor made admissions and was unrepresented).

[129] Vera Institute of Justice, "Confidentiality of Juvenile Records: A Guide for Sixteen States and Washington, DC.," (February 2015), available at http://my.hdle.it/38966624 (*hereinafter* Vera Institute, "Confidentiality of Juvenile Records").

[130] *See, e.g.,* Cal. Welf. & Inst. Code §§ 827, 828.

[131] *See* Immigrant Legal Resource Center and Ozment Law, *Motions to Suppress Protecting the Constitutional Rights of Immigrants in Removal Proceedings* (2nd ed. 2013).

[132] Monu Singh Bedi, "Criminal Law: Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role," 101 J. Crim. L. & Criminology 575 (2011).

[133] *Black's Law Dictionary* 294 (9th ed. 2009).

scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process."[134]

In the context of children in immigration proceedings, duress may be asserted as a defense to culpability for a youth's involvement in drug trafficking, including defending against the "reason to believe" inadmissibility ground[135] or a negative discretionary finding in an application for relief. Duress may be established based on the facts of the case or on the age of the minor. This section will discuss the legal parameters for coercion and the duress defense in the criminal context as an aid to helping practitioners strengthen their arguments before DHS and the immigration courts. The section will also discuss duress defenses that exist in various immigration legal contexts and provide arguments as to why they should equally apply in the drug trafficking arena. Finally, this section will provide specific recommendations for how practitioners may want to frame juvenile drug trafficking claims involving duress before immigration authorities.

1. Coercion and the Duress Defense in Criminal Proceedings

NOTE: This section provides a general overview of law that is complicated and in flux. The contours of the duress defense in criminal proceedings vary based on state statutes and federal and state case law.

When a person raises a duress defense, he or she admits doing an unlawful act (having the specific intent or *mens rea* to commit the act), but seeks to justify, excuse, or mitigate it.[136] This defense is often called an "affirmative defense" when raised in criminal proceedings. The Model Penal Code (MPC) allows a duress defense, which many states have adopted in some form.[137] The U.S. Supreme Court also has specifically recognized that a duress defense succeeds when a criminal statute has been violated if the individual had no "reasonable, legal alternative to violating the law."[138]

In federal drug prosecutions, the defense of duress generally is established if the following elements are present:

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[134] 22 U.S.C. § 7102(3).

[135] Some survey respondents acknowledged that they pursue this strategy. They mark "no" to the "reason to believe" question in Form I-485 Adjustment of Status as well as other immigration applications, relying on the legal argument that the acts do not constitute drug trafficking as a result of duress or coercion.

[136] *United States v. Bailey*, 444 U.S. 394 (1980).

[137] Model Penal Code (MPC) § 2.09(1) (1962): "It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." The Model Penal Code specifies further that the duress defense is unavailable "if the actor recklessly [or negligently] placed himself in a situation in which it was probable that he would be subjected to duress." MPC § 2.09(2) (1962).

[138] *United States v. Bailey*, 444 U.S. at 394. Note 8 in *Bailey* also states that "duress excuses criminal conduct . . .'because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise'" (citing Working papers of the National Commission on Reform of Federal Criminal Laws Relating to the Study Draft of the New Federal Criminal Code 123 (1970)).

- an immediate threat of death or serious bodily injury (immediacy);
- a well-grounded fear that the threat will be carried out (well-grounded fear); and
- no reasonable opportunity to escape the threatened harm (inescapability).[139]

Some jurisdictions also require that the defendant did not recklessly or negligently place him or herself in the situation, and that a direct causal relationship between the criminal action and avoidance of the threatened harm was reasonably anticipated.[140]

While the author was not able to find any case decisions involving juveniles and the forced threat of drug trafficking by cartels, there are analogous cases involving adults that illustrate how the elements of duress are applied in the criminal context. The following case background from the Ninth Circuit is intended to help practitioners effectively frame their duress arguments before immigration authorities and better anticipate potential counterarguments by the government against such defenses.

With regards to the duress defense, the element of immediacy in the Ninth Circuit is satisfied when threats of death or serious bodily injury are made to the defendant or his or her family. In *United States v. Contento-Pachon,* the Ninth Circuit reversed an exclusion of duress evidence where a drug trafficker threatened to kill the defendant and his family unless he smuggled cocaine into the U.S.[141] The defendant was asked to swallow cocaine-filled balloons and transport them to the U.S. When the defendant stated his refusal, the drug trafficker repeatedly threatened to kill his wife and three-year-old child if he did not cooperate. The defendant then swallowed 129 balloons of cocaine, was told that he would be watched at all times during the trip, and was threatened that if he failed to traffic the drugs he and his family would be killed. In finding that the defendant had a duress defense, the Ninth Circuit noted that the threat was immediate because the defendant continued to operate based on surveillance of his whereabouts.

Actual harm, rather than mere threats, can also satisfy the element of immediacy. In *United States v. Otis*, the Court found a duress claim viable due to actual harm to the defendant's father.[142] In that case, after the defendant lost $300,000 of the Cali cartel's money to the police, the cartel kidnapped the defendant's father in Colombia and only agreed to release him upon the defendant agreeing to work for the traffickers in the U.S. Because there was still an immediate threat to the defendant's life as the cartel could kidnap his father again, the Court found that the defendant was entitled to present his duress defense to the jury.[143]

[139] *United States v. Becerra*, 992 F.2d 960, 964 (9th Cir. 1993). This element has also been interpreted in some contexts as the obligation to turn oneself in to authorities on reaching a point of safety. *See United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984).
[140] "Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws," 1 A.L.R. 5th 938.
[141] *Contento-Pachon*, 723 F.2d at 693.
[142] *United States v. Otis*, 127 F.3d 829, 835 (9th Cir. 1997).
[143] *Id.*

Generally, vague threats of future possible or unspecified harm do not satisfy the immediacy element. In *United States v. Hernandez-Torres*, the Ninth Circuit found that the defendant was not entitled to a duress jury instruction because of vague threats by the drug trafficker to "not mess up."[144] In that case, after the defendant discussed his financial problems at a party, a drug trafficker offered him $1,500 in exchange for selling drugs, and the trafficker told the defendant not to "mess up."[145] These facts, according to the court, did not demonstrate that the defendant was subject to an immediate threat of death or serious bodily injury before he became involved in drug trafficking.[146] Similarly, in *United States v. Becerra*, the Ninth Circuit denied a duress jury instruction where the defendant feared a Mafia-connected prospective buyer based on a threat that the buyer would "take care of" the defendant's family if the deal did not go through.[147] Although the buyer was frequently surveilling the defendant, the Court found that a legitimate fear of future harm was not enough because it was not immediate.[148]

In addition, the element of well-grounded fear that the threat will be carried out requires an analysis of the subjective fear of the defendant and the objective ability of the threat to be carried out. In *Contento-Pachon,* the Court found that threats against the defendant were credible because they were specific and came from someone deeply involved in the drug trade.[149] In particular, the trafficker knew about the defendant's family and location and there were no vague threats of possible future harm.

Finally, the Ninth Circuit's approach to the inescapability element requires that the defendant did not have a reasonable opportunity to escape or report the crime, and that the defendant turn him or herself in to authorities when reaching a position of safety. In *Contento-Pachon,* the defendant did not notify law enforcement authorities in Colombia or Panama during his trip to the U.S. because he felt that they were corrupt and would place his family in further jeopardy. He was then apprehended at a U.S. airport. The element of inescapability was found to be met because the defendant had no reasonable opportunity to escape or report to authorities due to the argument that police in Colombia were corrupt and were paid informants for drug traffickers.[150]

The amount of time elapsed since the threat and the commencement of drug trafficking activities is also relevant in the Ninth Circuit's analysis of inescapability. In *United States v. Verduzco*, the Ninth Circuit held that there was no viable duress defense because five days had passed between the alleged threat by the Tijuana cartel and the smuggling attempt that the defendant conducted on the cartel's behalf.[151] The Court claimed that during those five days he could have approached law enforcement authorities in either the U.S. or Mexico.[152] The Court rejected the defendant's assertion that he feared reporting to Mexican police because of a previous encounter where police demanded money from him. In addition,

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[144] *United States v. Hernandez-Torres*, 18 Fed. Appx. 470, 470 (9th Cir. 2001).
[145] *Id.*
[146] *Id.*
[147] *United States v. Becerra*, 992 F.2d 960, 962, 964 (9th Cir. 1993).
[148] *Id.* at 964.
[149] *Contento-Pachon*, 723 F.2d*.* at 693-4 (9th Cir. 1984).
[150] *Id.* at 694.
[151] *United States v. Verduzco*, 373 F.3d 1022, 1030 (9th Cir. 2004).
[152] *Id.*

the Court declined to admit expert testimony that those socialized in Mexico are more reluctant to approach law enforcement, because such testimony would amount to "cultural stereotyping."[153] The court found that such a generalized assertion of corruption of police authorities in Mexico was insufficient and relied upon subjective rather than objective evidence.[154]

2. Proving Duress or Coercion in Immigration Cases

While criminal courts pose stringent burdens on the defendant to prove the elements of duress or coercion, this does not necessarily mean that immigration authorities should similarly hold immigrants, let alone immigrant youth, to the same standard. Just as immigration law provides lessened protections for immigrants because immigration proceedings involve civil, and not criminal, violations, immigration authorities similarly should not hold immigrants to the same burden as in criminal court. Nonetheless, practitioners should attempt to prove that the acts of youth involved in drug trafficking generally meet these elements of duress or coercion under criminal law in order to strengthen a claim for relief or a defense against inadmissibility. Using duress as an example, the suggestions below discuss the various criminal elements of duress in the context of immigrant juvenile drug trafficking cases:

- **An immediate threat of death or serious bodily injury (to the youth or his or her family).** Of the cases shared by practitioners in the field, this element is proven most easily in cases of youth who live on the border and are personally targeted by drug traffickers because of their age and their legal status or access to the U.S. (e.g., possessing a border crossing card). This element may also be more easily established for youth who live in the U.S. and about whom a gang has knowledge of their place of residence. In both situations, drug traffickers generally know where the minor lives and can be in contact with the youth and his or her family members so as to make more specific, rather than vague, threats. The requirement of immediate threats may be harder to establish in many of the cases reported in the survey and interviews—that is, where UAC are migrating through Mexico to get to the U.S. With regards to threats against the youth's family, most practitioners who responded to the survey did not report specific threats made by drug traffickers to family members or actions taken against family members that could meet the requirement of immediacy.[155] However, when the author raised the issue with one practitioner in a follow-up interview, she said that contact with and threats to family members are fairly common: traffickers may establish contact with the family in the home country after allowing youth to call their family by cell phone; in some cases the traffickers may be of the same nationality and possibly come from the same region as the youth, so it is relatively easy to make contact with the youth's family members.

[153] *Id.* at 1033.
[154] *Id.* at 1031.
[155] However, one practitioner did share a case where a youth was kidnapped with a group of migrants after crossing the border and taken to a "stash house" by a coyote. The cartel then ransomed the family, and his brother paid $800 to secure his release.

- **A well-grounded fear that the threat will be carried out.** Any evidence that the youth personally experienced harm or witnessed the cartels doing harm to others will provide the best basis to meet this element. For example, as reported by a respondent, one youth was slashed with a knife in the chest when he told his traffickers he could no longer work due to exhaustion. Another youth was stabbed in the hand as a threat to force him to traffic drugs across the border. If there was no actual harm to the youth, evidence should be documented where other individuals who refused to cooperate were severely hurt or killed.[156] For example, some practitioners reported that some youth saw other migrants killed and decapitated. Some youth may not have directly seen the harm imposed on others, but attorneys can include evidence that migrants who were forced to transport drugs disappeared and the youth were informed they were murdered. If evidence of the above situations cannot be provided, advocates should provide extensive general documentation on the violence of drug cartels or other gangs involved in drug trafficking. Notably, there is not much secondary evidence on the targeting of minors by the cartels, but some practitioners are beginning to gather more of this evidence.

- **Lack of a reasonable opportunity to escape.** Practitioners should extensively document the restraints placed on youth by traffickers to prevent their escape. For example, practitioners surveyed and interviewed reported youth being placed in a trunk, held in drug houses with manned guards, and being tied to other drug "mules" while making their way to the U.S. This duress element may also be met when youth are apprehended by border authorities if the youth discloses the activity to immigration authorities. However, there are many reasons why a minor would not choose to disclose this information immediately, and practitioners should consult arguments raised in Section II on T visas to counter this approach.

- **The defendant did not recklessly or negligently place him or herself in the situation.** This element, required in some jurisdictions, appears to be the most challenging element to prove because DHS could argue in many cases that the youth would not have been involved in drug trafficking but for his or her attempt to unlawfully enter the U.S. This also could be an obstacle in a case where the youth initially agrees to transport drugs in exchange for being smuggled across the border, but then later withdraws that consent. In all of these cases, it is important to highlight the general and specific push factors that caused the youth to migrate in the first place. For example, according to the Women's Refugee Commission report "Forced from Home," many youth from Central America report that they migrate to the U.S. because staying in their home country almost certainly means death due to extreme violence and poverty.[157] Even in those situations where a youth initially agrees to

[156] Several practitioners noted that many UAC cannot articulate specific threats to them by drug traffickers because the children do not vocalize the desire to leave. Most youth witness the consequences when others refuse to cooperate — that is, other individuals are severely harmed or killed. Where there are only implied threats, practitioners should be sure to describe all the attendant circumstances of the UAC's experience.
[157] Women's Refugee Commission, *supra* note 5.

transport drugs in exchange for crossing the border, if the youth later withdraws that consent the act may still constitute coercion resulting in a claim for a T visa.[158]

Practitioners who have asserted the duress defense in immigration court also reported the additional challenge of distinguishing between a youth who was smuggled or trafficked. More specifically, as one practitioner explained, practitioners must tease out whether the youth is trafficked in connection with money because he cannot pay smugglers or whether the youth was kidnapped and forced into the trafficking situation.[159] Depending upon the facts, both scenarios may constitute trafficking as involuntary servitude or debt peonage. Although a UAC may agree to sell or transport drugs in order to be smuggled or to pay a smuggling debt, this does not mean that there is a lack of force or coercion, or that an agreement of smuggling cannot evolve into human trafficking. In these types of cases, practitioners must provide facts that prove the UAC was forced or coerced. Evidence that practitioners may use to show coercion includes the following:[160]

- Threatening (directly or indirectly) or actually physically or non-physically harming the victim, which compels the victim to perform services to avoid harm.
- Using or threatening to use the law to exert pressure on another person to perform services.
- Demeaning or demoralizing the victim (e.g., through verbal abuse or humiliation).
- Disorienting and depriving the victim of alternatives (e.g., isolation, restricted communication, debts, monitoring).
- Diminishing resistance and debilitating the victim (e.g., by denial of food, water, or medical care, or by use of drugs or alcohol).
- Deceiving the victim about consequences (e.g., overstating risks of leaving or rewards of staying, feigning ties to authorities, hit men, or gangs).
- Dominating, intimidating, and controlling the victim (e.g., by abuse, an atmosphere of violence, display of weapons, rules, and punishments).

NOTE: Existence of Juvenile Adjudications or Criminal Convictions Despite Coercion or Duress

A number of courts and other authorities have found that adjudicators must engage in a particularized evaluation of an individual's culpability in determining whether he or she is inadmissible or barred from relief. Duress is one consideration of many in that determination. Some youth may have a juvenile adjudication or adult conviction for drug trafficking or

[158] *See* discussion of T visas in Section II.A.1.
[159] The VSC also expressed a similar concern in a T visa case where the UAC initially arranged to be guided across the border in exchange for carrying a backpack of marijuana, but later was held against his will and coerced into trafficking drugs across the border 12 times. In a "request for evidence" letter discussed in further detail at Section II.A.1.c on T visas, the VSC stated, "Federal law makes a distinction between alien smuggling and a severe form of trafficking in persons….Unlike alien smuggling, severe forms of trafficking in persons must involve both a particular means such as force, fraud, or coercion, and a particular end such as involuntary servitude or a commercial sex act."
[160] These factors can prove coercion due to human trafficking.

possession of a drug with a seemingly legitimate duress defense. For example, one practitioner reported a case in which a child with a viable duress defense nonetheless pled guilty to criminal charges as a way to get out of custody as quickly as possible, upon the advice of his public defender. Some individuals may be advised by counsel to plead guilty because a public defender may encourage them to do so in order to get the benefit of a plea deal involving a minimal sentence instead of risking a larger penalty by going to trial. In some jurisdictions such as Arizona, drug trafficking cases are a political issue for the prosecution and as such, the prosecution wants to send a message by prosecuting even low-level drug offenders and minors who can present mitigating circumstances.[161] Finally, a court may not be able to provide services to a juvenile unless there is a juvenile adjudication.

DHS may argue that where duress did not excuse the criminal conduct in criminal proceedings, DHS should similarly not excuse the behavior in immigration proceedings. Because of the unique factors impacting a youth's decision to plead guilty, however, the existence of a juvenile adjudication or criminal conviction should not preclude an argument of duress in the context of immigration proceedings. Practitioners may choose to explain the reasons for the existence of an adjudication or conviction if it benefits the client (e.g., if the defense attorney advised the youth that the only way for him or her to avoid lengthy commitment or detention was to plead guilty). Some practitioners, however, may find it more beneficial to decline to testify as to the communications between an attorney and client in the delinquency or criminal matter by asserting the attorney-client privilege.

3. Duress Defenses Under Immigration Law[162]

There is no explicit duress defense to the "reason to believe" ground of inadmissibility provided in the INA, the accompanying case law, and policy memos. However, a duress-related exception is provided for in other parts of immigration law: the persecutor bar to asylum, the domestic violence ground of deportability, the terrorist-related inadmissibility ground of providing material support to a terrorist organization, and the totalitarian bar to asylum. Because of the similarities between these provisions and the "reason to believe" inadmissibility ground, practitioners may argue that an implied duress defense should apply in drug trafficking-related cases. This section provides background on these other duress defenses in immigration law and specific arguments that practitioners can use to advocate for a duress exception to drug trafficking conduct.

The following inadmissibility or deportability grounds contain duress-related exceptions:

[161] One individual noted in an interview, "Government attorneys don't care about facts or risks, they just want to raise their own batting average."
[162] Thanks to Rebekah Fletcher, KIND Seattle and Florence Immigrant and Refugee Rights Project (FIRRP) for sharing these arguments and analysis.

- The persecutor bar to asylum and withholding of removal does not have an explicit involuntariness exception in the immigration statute, but the U.S. Supreme Court has held that voluntariness may be relevant in determining whether to apply the bar.[163] The Ninth Circuit Court of Appeals has also held that courts should conduct an individualized determination as to whether the noncitizen is culpable enough to be found to assist or participate in persecution.[164] Even individuals who engage in persecution in self-defense may be exempt from the persecutor bar.[165]
- The "domestic violence" ground of deportability contains a waiver for victims of domestic violence where the underlying conviction or conduct at issue is connected to the abuse.[166] Under this waiver, someone who is convicted of a domestic violence or stalking offense may not be deportable if the noncitizen was battered and was not the primary perpetrator of violence in the relationship, and one of three factors exist: 1) the person was acting in self-defense, 2) the person violated a protection order intended to protect him or herself, or 3) the person committed, was arrested, or convicted of a crime that did not result in serious bodily injury and "there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty."[167]
- The terrorist-related ground of inadmissibility for those who provided material support to a terrorist organization may allow for the defense of duress. DHS applies a "totality of the circumstances" approach that takes duress into consideration when determining whether to apply this inadmissibility ground.[168] The totality of circumstances includes a number of factors such as whether the applicant reasonably could have avoided, or took steps to avoid providing, material support; the severity and type of harm inflicted or threatened; to whom the harm was directed; and, in cases of threats alone, the perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted.[169]
- The "totalitarian ground of inadmissibility" provides an exception in cases where membership in a totalitarian party was involuntary, or "solely when under 16 years of age"[170]

All of these inadmissibility provisions or bars were intended to exclude individuals based on crimes or bad acts committed against others. However, Congress, the courts and DHS recognize that individuals may be coerced into committing these crimes or bad acts and therefore, may be less culpable than the individuals who these provisions were primarily intended to target. In other words, finding a noncitizen inadmissible or barred from relief based on activities engaged in under duress would be inconsistent with the purpose of the provisions at issue.

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[163] *Negusie v. Holder*, 555 U.S. 511 (2009).
[164] *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (quoting *Hernandez v. Reno*, 258 F. 3d 806, 813 (8th Cir. 2001)).
[165] *Id.*
[166] INA § 237(a)(2)(7).
[167] *Id.*
[168] U.S. Department of Homeland Security, Michael Chertoff, Memo on Exercise of Authority under Sec. 212(d)(3)(B)(i) (Apr. 27, 2007).
[169] *Id*.
[170] INA § 212(a)(3)(D)(ii). *See Rowoldt v. Perfetto,* 355 U.S. 115 (1957); *In re Rusin,* 20 I. & N. Dec. 128 (BIA 1989).

4. Applicability of a Duress Defense to the "Reason to Believe" Inadmissibility Ground

The "reason to believe" ground of inadmissibility was meant to target known drug traffickers. The cases establishing a "reason to believe" finding against immigrants involve the admission of conscious participation in selling or smuggling drugs across the border. Many of the UAC drug trafficking cases reported by practitioners, on the other hand, involve coercion usually under threat of serious injury or death, and therefore, do not place the youth within the category that the "reason to believe" inadmissibility ground was intended to exclude. When combined with age and other UAC vulnerabilities (e.g., neglect, abuse, persecution, UAC status, etc.), there is a strong argument that a duress defense is warranted in these cases.

Practitioners should anticipate that the government may challenge a duress defense against the "reason to believe" inadmissibility ground based on the plain language of the statute. For example, in *Negusie v. Holder* the government argued that the plain statutory language of the persecutor bar to asylum provides no duress exception because Congress did not explicitly include one.[171] However, the U.S. Supreme Court disagreed, finding that silence was not conclusive. The issue instead, according to the Court, was more properly framed as whether the statute mandates that coerced actions constitute assistance in persecution. The Court found that the statute was not explicit on this point.[172]

Despite the fact that the plain language of the statute controls in determining congressional intent,[173] the Supreme Court has also held that when a plain language interpretation is irrational or counterintuitive an adjudicator should look beyond the statutory language to follow the purpose of the statute.[174] This is especially true where a plain-language interpretation of a statute gives rise to an absurd or irrational result. Although there is no explicit duress exception to the "reason to believe" ground of inadmissibility, an argument could be made in this context that it would be irrational to read the "reason to believe" statute as literally requiring punishment of children who unwillingly become victims of drug trafficking in their attempt to escape persecution abroad.

A number of compelling reasons exist for reading a duress exception into the "reason to believe" ground of inadmissibility. First, not including a duress exception is in tension with international law. Under the Refugee Convention, individuals may be excluded from asylee protection based on commission of a serious non-political crime.[175] UNHCR generally takes into account defenses to criminal responsibility when analyzing exclusion due to commission of a serious non-political crime and takes into account the

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[171] *Negusie v. Holder*, 555 U.S. 511, 512 (2009).
[172] *Id.* at 535.
[173] *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.").
[174] *See id.* ("When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words") (internal citation omitted).
[175] 1951 Convention Relating to the Status of Refugees, art. 1(F)(b).

particular circumstances and context in which the activity took place. For example, individual responsibility can be negated if the necessary *mens rea* is absent or if the circumstances give rise to a coercion or duress defense or self-defense.[176]

Similarly, in a report regarding Colombian asylum seekers, UNHCR noted:

> [T]he possibility that an applicant was forced to commit certain crimes in circumstances which give rise to a defense of duress is particularly relevant. This defense could apply to members of armed groups who committed certain acts in order to avert a threat of imminent death or of continuing or imminent serious bodily harm against themselves or another person. Where an applicant was forcibly recruited into these groups, especially if he or she was a child at the time, this would be a relevant factor in assessing whether or not he or she has a valid defense of duress.[177]

The absence of a duress exception is also in tension with well-established principles of criminal law, in which a person is only culpable for his or her act if he or she had the *mens rea* (intent and knowledge) to commit the act. This culpability can be negated through coercion or self-defense. Where the boundaries between criminal law and immigration are increasingly intertwined, there is an increased need for criminal law defenses in the immigration context.[178] The duress defense should be available where the potential consequences to a UAC—deportation where he or she faces persecution and likely death upon return to his or her home country—is at least equal to, but most likely greater than, the consequences to a criminal defendant of fines and imprisonment.

In addition, under the rule of lenity, ambiguities present in a criminal statute should be construed in favor of the accused.[179] Under this rule a duress exception should also apply. The U.S. Supreme Court has a long history of construing immigration statutes narrowly in favor of noncitizens. In *Fong Haw Tan v. Phelan*, the U.S. Supreme Court held that a statutory provision may be generously interpreted when the stakes are considerable for noncitizens.[180] The stakes could not be higher for minors who have faced persecution in their home countries and have been victimized en route to the U.S.

In establishing duress as a defense to the "reason to believe" ground of inadmissibility, practitioners are advised to show a connection between drug trafficking and the vulnerability of the youth due to age, abuse, neglect, or abandonment, unaccompanied status, or other victimization. DHS should be

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[176] UNHCR, "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," 6-7 (Sep. 4 2003).

[177] UNHCR, "International Protection Considerations Regarding Colombian Asylum Seekers and Refugees," 41 (2005).

[178] *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010) ("We have long recognized that deportation is a particularly severe 'penalty,' but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context").

[179] *Whitman v. United States,* 135 S. Ct. 352, 353 (US 2014).

[180] *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948).

considering the totality of the circumstances and therefore, should know the context for why the youth came to the U.S. and how he or she became involved in drug trafficking. Since courts and DHS have not enforced immigration consequences where duress has negated a noncitizen adult's individual culpability, the severe consequence of inadmissibility should likewise not be enforced against youth, because of their age, unaccompanied status, and their vulnerability to outside influences.

Finally, in instances where UAC have prior adjudications or convictions, practitioners should raise a defense of duress in the immigration context. This is because evidence of duress leading up to the UAC's actions resulting in an adjudication or conviction is relevant to a "reason to believe" determination, regardless of whether the child raised this defense (or was even provided a meaningful opportunity to raise this defense) in the context of delinquency proceedings.

C. Lack of Capacity Due to Age[181]

One emerging argument being raised by practitioners is that minors, and particularly UAC, due to their age, lack of maturity, and diminished mental capacity, should categorically be excluded from inadmissibility and conduct bars to immigration relief. In the context of drug trafficking, UAC could argue that due to age and status as unaccompanied minors they lack the mental capacity to ever establish that they knowingly and consciously aided, abetted, or colluded in drug trafficking.[182]

The debate surrounding capacity and minors in immigration law has frequently centered around the "fraud and willful misrepresentation" and "false claim to U.S. citizenship" grounds of inadmissibility.[183] Many practitioners argue that because of their age, minors cannot act knowingly, intentionally, deliberately, or voluntarily in a way that meets the legal standards for a finding of inadmissibility for misrepresentation. As support for this argument, advocates claim that categorically excluding UAC from being found inadmissible for this reason is consistent with the treatment of minors found elsewhere in the INA.[184] In fact, the Department of State and DHS have agreed to a certain extent with this argument by adopting a new policy in 2013 regarding minors who make false claims to citizenship.[185] This policy sets an affirmative defense to the false claim to U.S. citizenship ground of inadmissibility where an individual was under the age of 18 and the minor lacked the capacity to understand the nature and consequences of the false claim.[186]

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[181] Thanks to Rebekah Fletcher, KIND Seattle for providing some of this analysis.
[182] If there are mental health issues with a minor, there is an even more convincing argument that the minor does not have the capacity to commit a crime.
[183] Dree K. Collopy, *No Minor Issue: The Diminished Capacity of Minors in Our Immigration System*, 12-04 Immigr. Briefings 1, April 2012.
[184] Megan Kosse, "Banishing Children: The Legal (In)Capacity of Unaccompanied Alien Children to Falsely Claim U.S. Citizenship," 37 Wm. Mitchell L. Rev. 4 (2011).
[185] U.S. Department of Homeland Security, Letter to Honorable Harry Reid from Brian de Vallance, Acting Assistant Secretary for Legislative Affairs (Sep. 12, 2013); U.S. Department of State, Letter to Senator Reid from Thomas B. Gibbons, Acting Assistant Secretary, Legislative Affairs (Aug. 29, 2013).
[186] *Id.*

In arguing that minors lack the capacity to knowingly and consciously engage in drug trafficking, practitioners can cite to a whole host of provisions listed within immigration law that stand for the proposition that minors, and in particular unaccompanied minors, possess diminished capacity, are more vulnerable and less culpable than adults, and require special protections.[187]

> **PRACTICE TIP >** Attorneys should also submit evidence and research relating to the effect of age, stress, and trauma on a youth's decision-making and capacity. In particular, attorneys may want to highlight children's relative lack of cognitive development and their motivation for short-term rewards (including safety), as well as the effect of pressure, stress, being a victim or witness to violence, and substance abuse. This evidence can help excuse or mitigate the drug trafficking conduct triggering inadmissibility or denial of an immigration benefit as a matter of discretion.

V. Ethical and Strategic Considerations in Representing Youth with Drug Trafficking Issues

Attorneys have an ethical duty to be both candid to the court and zealous advocates for their clients.[188] In cases involving drug trafficking, youth must strike the delicate balance between being truthful and disclosing what is minimally necessary to address questions from the government so that the information is not used against them. This section provides background on ethical standards for attorneys, approaches for disclosure of drug trafficking conduct in immigration applications and before immigration authorities, and other strategic considerations that will ensure that drug trafficking cases are presented in the best light possible.

A. Ethical Guidelines

The ABA Model Rules of Professional Conduct (MRPC) set out two roles for lawyers: (1) to be zealous advocates in representing their client, and (2) to be candid in revealing both fact and law to the court. The preamble to the MRPC further elaborates on the meaning of a "zealous advocate," providing that as an advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system."[189]

Model Rule 3.3(a) defines the duty of candor, and states that:

(a) A lawyer shall not knowingly:

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[187] *See* Appendix D for a list of these legal provisions. An in-depth discussion of the application of a "lack of capacity" defense by minors to all inadmissibility grounds is beyond the scope of this practice advisory. There is an in-depth discussion dedicated to this issue in M. Aryah Somers, "Children in Immigration Proceedings: Child Capacities and Mental Competency in Immigration Law and Policy," (May 2015).

[188] American Bar Association, Model Rules of Professional Conduct, Preamble (2); *Id* at Rule 3.3 (Candor Toward the Tribunal).

[189] American Bar Association, Model Rules of Professional Conduct, Preamble (2).

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.[190]

Finally, the Executive Office for Immigration Review (EOIR) provides rules and procedures for the professional conduct of practitioners.[191] A person is subject to discipline if he or she,

> Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.[192]

The regulation provides that this should not undermine a practitioner's duty to represent a client within the bounds of the law.

B. Ethical Considerations When Applying for Relief and Disclosing Drug Trafficking Conduct

The amount of disclosure of drug trafficking involvement in immigration applications varies amongst attorneys. The survey indicated a wide spectrum of responses regarding how to respond to the drug-related questions on Form I-485 (the application for adjustment of status to lawful permanent resident). On one end of the spectrum is the position that drug-related behavior is always disclosed when answering the relevant questions and an attachment is included explaining the conduct. On the other end of the spectrum, there are some attorneys who always answer "no" to questions asking about drug trafficking involvement as long as there is a legal justification for doing so. Many respondents answer "yes" and disclose the activity if there is specific evidence in the record or the client admits the drug-related activity to them, while most respondents answer "no" if force or coercion was involved.

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[190] *Id* at Rule 3.3.
[191] Executive Office for Immigration Review, Subpart G. Professional Conduct for Practitioners—Rules and Procedures, Part 1003, effective: January 20, 2009; 8 CFR § 1003.102.
[192] *Id.*

The extent of disclosure also depends upon the type of relief sought and the basis for the claim. In the T visa context, because the heart of the claim is drug trafficking, attorneys shared that it is common practice to disclose the conduct along with an explanation that it was committed under duress. More specifically, affidavits from the youth are provided with detailed information about the youth's life in the home country, the migration to the U.S., and involvement in drug trafficking. In other cases, like SIJS, some practitioners shared that they strike a balance of minimally disclosing the involvement when required, but not admitting as a matter of law that this activity meets the definition of drug trafficking. For example, in response to the "reason to believe" drug trafficking question on Form I-485[193], which asks if the child has "ever illicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance," practitioners who regularly handle criminal-related juvenile cases felt comfortable answering "no" and providing an explanation for that answer. This approach is entirely consistent with being a zealous advocate since, as discussed elsewhere in this practice advisory, there are a number of credible legal arguments that a youth's conduct is excusable or may not meet the legal definition of trafficking.

Notably, the rules of professional conduct on candor do not require affirmative disclosure, but only require not making false statements of fact or law to the court. This means that practitioners and their clients do not need to disclose information that has not been requested. This is helpful in circumstances where the client does not want to fully disclose the details of the conduct or even an underlying conviction or adjudication. Special attention is required, however, when responding to questions from officers or judges. The best approach is to offer the minimal amount of information necessary to answer the question without lying. This involves keeping damaging information as general as possible (e.g., not fully disclosing the exact criminal charges if there was a criminal case) and then shifting the focus onto factors that mitigate the conduct including unaccompanied status, force or coercion, etc. In interviews or on cross-examination, if an officer or government attorney asks for details that are not relevant to an application, attorneys should advise the client to not answer anything further and assert the right to remain silent. With regards to requests for documentation, attorneys should rely on and abide by state confidentiality laws, where applicable, to protect certain information and documents from being disclosed to the government.[194] If confidentiality laws are applicable, the government bears the burden of acquiring the records.

There are other questions on Form I-485 that should be answered only after the attorney fully understands the scope of the law. In particular, question 1(a) in Part 3(C) asks: "Have you ever in or outside of the U.S. knowingly committed any crime involving moral turpitude or a drug-related offense for which you have not been arrested?" The concern expressed here by many practitioners is that even without an arrest, conviction, or juvenile adjudication, a youth must disclose that he or she was involved in drug trafficking. This question, however, is intended to the track the "crime involving moral turpitude" and "controlled substance" grounds of inadmissibility. Because a youth who merely commits a

[193] Located in Question 3(d) in Part 3(C) of the form.
[194] Vera Institute, "Confidentiality of Juvenile Records," *supra* note 129.

delinquent act cannot admit to committing a crime involving moral turpitude or a drug-related offense, practitioners may in many circumstances legitimately answer "no" to this section.[195] Advocates should also carefully evaluate their response to question 1(b) in Part 3(C) on Form I-485 that asks: "Have you ever in or outside of the U.S. been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance excluding traffic violations?" If the youth has ever been arrested, even as a minor and even if the case was dismissed, he or she must answer "yes" to this question. Otherwise, this could be seen as a false statement.

Practitioners must also weigh the strength of the argument in support of nondisclosure against the need to disclose all of the relevant evidence in the application because an immigration officer or government attorney possesses the information. For example, one survey respondent said that they had to disclose a youth's involvement in drug sales in an application for a U visa because it was documented in a probation report. In that case, they explained the circumstances of the offense in a declaration in order to mitigate the impact of the conduct. Finally, attorneys should find out as much as they can about local practices around drug trafficking issues in the relevant jurisdiction in case there are other concerns that they need to be aware of.

Advocates confronting these issues should be prepared to present the arguments supporting their chosen approach and also prepare their clients, because even if drug-related information is not disclosed, the issue may still come up at some later point in the immigration process. Finally, if a client makes a disclosure that clearly shows he or she is ineligible for the benefit sought, the attorney must inform the client of that and decline to go forward with the case.

PRACTICE TIP > Obtaining information from youth regarding force or coercion

According to the ABA, minors are less likely than adults to disclose information to persons of authority, whether it be a law enforcement agent or an attorney.[196] In the context of drug trafficking, it may be particularly difficult to elicit information from youth. Several respondents who work regularly with UAC involved in drug trafficking shared in interviews that youth are generally not forthcoming and do not want to talk about drug trafficking, or may not recognize that they were victims of coercion.[197] Some UAC are detained with other youth from their communities and are concerned that their traffickers will find out that they are "snitches." Other youth may be afraid to disclose their involvement due to a real or perceived threat to family members in their home country by traffickers or those connected to their traffickers. Attorneys reported that due to these factors it often takes longer to elicit information. Because of these obstacles attorneys should not assume that there is no force or coercion in drug trafficking cases even if a youth initially denies it when specifically asked. Attorneys, where

[195] There is an in-depth discussion dedicated to this issue in Junck, "Delinquent Conduct," *supra* note 72.
[196] Eva Klain & Amanda Kloer, *supra* note 30.
[197] In one example, a youth was forced by a cartel to carry drugs from the border at McAllen, Texas to Houston. He was locked in a shoe closet for eight hours where he heard others being tortured. He did not realize that he was being trafficked, but just thought this was part of the journey that children go through to get to migrate to the U.S.

possible, may need to take the extra time to develop a relationship with the youth and employ creative, child-friendly approaches to eliciting the information in order to obtain the full story of what happened. One survey respondent stated that they have had success when they explain to the youth that their case may become an opportunity to no longer be involved in drug trafficking and instead obtain a work permit.

C. Other Strategic Considerations

1. Preparing the Client

In order to most effectively mitigate drug trafficking conduct and present these cases in the best light possible, attorneys must also work closely with their clients to prepare them for interviews and court testimony. Attorneys who have experience with these types of cases shared that they work with their clients to ensure that they speak honestly, but do not volunteer information that is not being asked or offer more detail than is necessary. In the event that a youth does not know the answer to a question, they are encouraged to state that they do not know or cannot remember. If there is a juvenile adjudication or conviction, clients are instructed to focus on the final disposition. In terms of explaining the conduct at issue, clients are asked to explain their decisions and actions in the context of force or coercion if it existed and in the context of other circumstances such as age, poverty, abuse, or neglect. Some attorneys instruct their clients to end all statements with a positive equity.

The process of actually preparing a client, according to some practitioners, includes educating the youth client about the law, such as the meaning of "drug trafficking" and the legal consequences of admitting to engaging in drug trafficking. This discussion may include an explanation of inadmissibility and potential waivers and explaining the pertinent facts necessary to meet both. Practitioners may also discuss the distinction between sharing drugs and selling drugs for profit and asking the client how they would characterize his or her actions. This may be preceded or followed by obtaining DHS records and criminal or juvenile court records to best understand the youth's full story and how it may be characterized by immigration officials. Finally, some attorneys practice direct and cross-examinations with their clients to ensure that they are well prepared to testify; this practice includes role play and asking and answering questions in different ways.

In preparing clients to answer questions about how or why they answered the drug-related questions in an application, many practitioners explain to clients the legal reasons why they should answer that they were not engaged in drug trafficking, even though it may appear to the client that the actions do constitute drug trafficking. Attorneys emphasize to clients that they should be honest, yet cautious, when disclosing information. This is done by focusing on the circumstances of their actions and giving examples of why they felt under duress or compelled to engage in drug trafficking. Other strategies employed to prepare clients include only providing an explanation of drug trafficking in written form that shows the totality of the circumstances, and having the attorney interject and explain the drug trafficking to an officer if a question arises in cases where the client cannot be expected to understand

the legal basis for answering “no” to the drug-related questions on the I-485 application.

2. Other Strategies to Zealously Represent Youth Involved in Drug Trafficking

Survey and interview respondents, particularly those who frequently handle drug-related cases, shared a number of other strategies they pursue to ensure the most positive outcomes for their clients. Some attorneys file procedural motions to limit the government’s ability to proceed with the case or to put the client’s case in the most favorable procedural posture. For example, motions to terminate removal proceedings may be filed so that USCIS, rather than an immigration judge, can adjudicate the adjustment of status application. Under these circumstances, outside of the adversarial process of immigration court, DHS is less likely to allege inadmissibility due to a “reason to believe” the person engaged in drug trafficking. Attorneys may also file motions to suppress evidence by arguing that the information and records forming a basis for inadmissibility or negative discretionary determination were obtained in violation of state juvenile confidentiality laws or other laws. Finally, some attorneys may move to seal the juvenile record under relevant state laws to ensure that the government’s access to adverse information about the client is limited.

Some attorneys also reported extending their advocacy beyond the law and using social science. For example, attorneys may use social workers to demonstrate the lack of capacity of the youth and relying on cognitive development research (e.g., lack of ability to consent or knowingly consent based on mental development and age). This may also involve presenting psychological evaluations resulting from a youth’s treatment in federal facilities or elsewhere.

Finally, some attorneys have found that demonstrating community support is critical to positive outcomes in these types of cases. For example, attorneys can help ensure that as many adults as possible are in the courtroom during a merits hearing to demonstrate that the youth has community support.

VI. Conclusion

As little as five years ago, most practitioners were either hesitant or did not proceed at all to seek legal relief for youth involved in drug trafficking. With the rise of drug trafficking cases, the emergence of duress and coercion involved in such cases, and the further development of legal and social science arguments to defend or mitigate against the culpability of these youth, more practitioners are seeking relief and having success. By closely working with these youth to obtain the full picture of their history, carefully developing the factual record, and contextualizing the facts with legal and social science arguments, more practitioners will be able to effectively represent minors involved in drug trafficking.

Appendix A

Results of Nationally Administered
Survey on Immigrant Youth Drug Trafficking Cases

This appendix provides a summary of responses from a national survey administered on drug trafficking involvement of immigrant youth.

I. Overview

In January 2014, the author conducted a national online survey followed by 11 phone interviews with immigrant youth advocates in various jurisdictions around the country about their experiences working with immigrant youth involved in drug trafficking and seeking legal relief for them. The use of the word "trafficking" was meant to encompass the sale, transportation, or assistance in any sale of drugs. Drug trafficking was further defined by geography and intent—international drug trafficking at the border, drug trafficking abroad in the home country, and internal drug trafficking (within the U.S.) whether conducted willfully or through force or coercion. Forty-five individuals or agencies responded to the survey (hereafter "respondents"). These respondents come from legal organizations (including one federal defender office), social service organizations, and shelters or facilities serving these youth while in federal custody at an Office of Refugee Resettlement (ORR) facility. The survey received responses from the District of Columbia and 15 states: Arizona, California, Florida, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Texas, Virginia, and Washington.

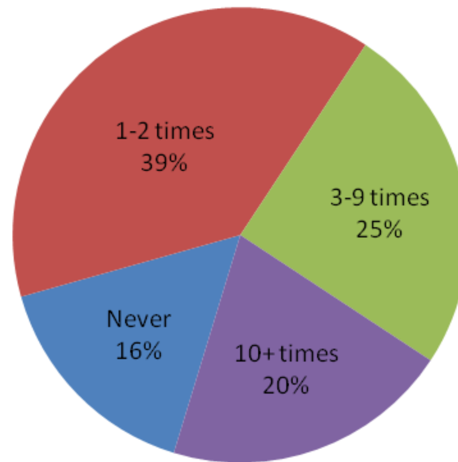
Overall, there were a handful of respondents who have dealt with these types of cases regularly. There were more limited experiences from others for a variety of reasons. Some of the attorneys do not work in proximity to ORR facilities that house unaccompanied children (UAC) with a history of crime and therefore, may see limited drug trafficking-type cases. Some organizations have newer staff who have not been present long enough to see these cases or to assess patterns. Other organizations only work with families and do not have direct contact with UAC. Some respondents are non-legal organizations who work with UAC in other capacities and may not capture or possess the relevant information asked here. The following discussion provides a description of the characteristics and patterns of these cases. It should be noted that where the response of "other" is included in the survey results, this was overwhelmingly chosen because the question was not applicable, meaning that it was not within the respondent's knowledge.

II. Prevalence and Types of UAC Drug Trafficking Cases Generally

Frequency of encountering youth who admit involvement in drug trafficking: As seen in Figure 1 on the next page, the plurality of respondents indicated that they do not encounter drug trafficking cases very often. Thirty-nine percent (N=17) responded that they saw drug trafficking cases 1-2 times per year and an additional 16 percent (N=7) said that they have never encountered youth who admit involvement in

drug trafficking. On the other end of the spectrum, 20 percent of respondents (N=9) saw drug trafficking cases 10 or more times per year, while 25 percent (N=11) of respondents saw these cases between three to nine times per year. One additional respondent provided an ambiguous response that could not be included in the analysis.

Figure 1. How many times per year do you encounter youth who admit that they have been involved in drug trafficking?



Increase in drug trafficking cases: As seen in Figure 2 below, 71 percent of respondents (N=32) said that they have not seen a recent increase in the number of youth involved in drug trafficking. As seen in Figure 3 on the next page, of the 29 percent (N=13) who have seen an increase, most respondents reported that the increase began in 2013 (46 percent or N=6) or late 2011 (38 percent or N=5), with only 15 percent (N=2) stating that the increase began in 2012.

Figure 2. Have you seen an increase in the number of youth engaged in drug trafficking?

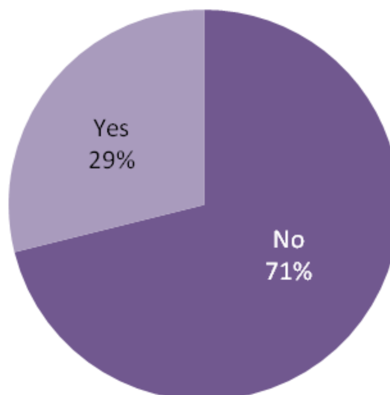
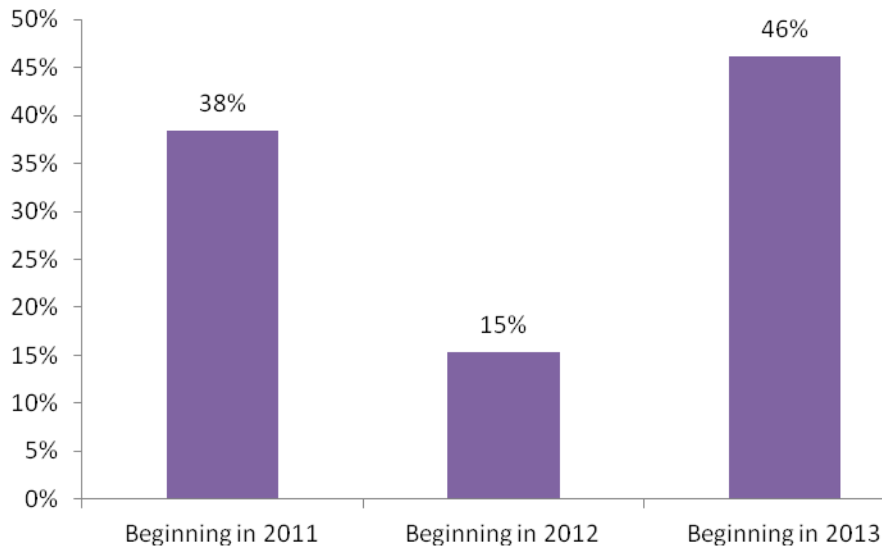
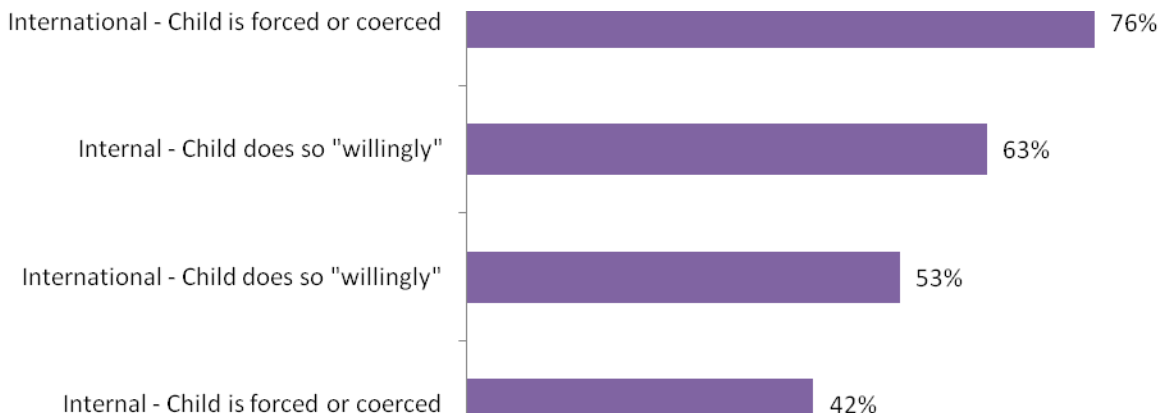


Figure 3. If yes, when did you notice this increase?



Types of drug trafficking cases: In addition to identifying trends in the frequency of cases involving drug trafficking, respondents were asked which specific types of fact scenarios they typically see, and then asked to choose from multiple options. Thirty-eight respondents provided valid responses. As seen below in Figure 4, for cases involving international drug trafficking, 76 percent of respondents (N=29) saw cases where the child was forced or coerced into trafficking drugs, whereas 53 percent of respondents (N=20) found that the youth involved him or herself willingly in international drug trafficking. In the internal drug trafficking cases, 63 percent of respondents (N=24) noted that UAC were involved willingly, compared to 42 percent of respondents (N=16) who found that the children were forced or coerced. An additional seven respondents said that the question was not applicable or they did not know how to respond.

Figure 4. What types of fact scenarios do you typically see relating to drug trafficking?



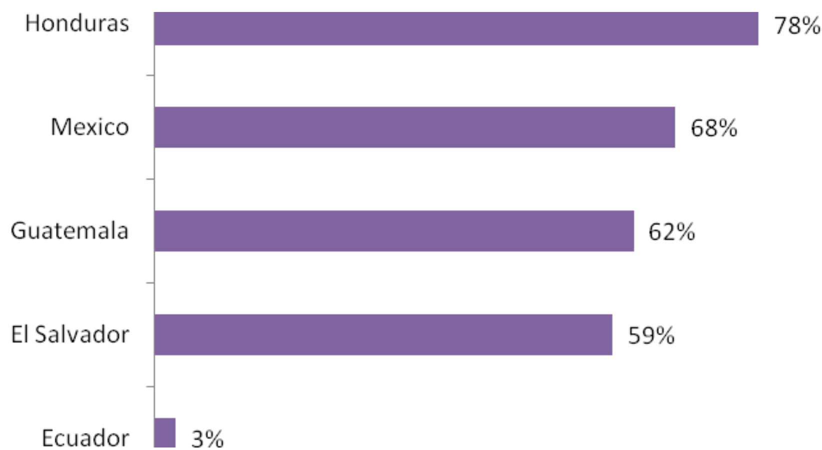
III. Characteristics of International Drug Trafficking Cases

The majority of respondents interpreted international drug trafficking cases to involve drug trafficking at the border between Mexico and the U.S. A couple of respondents interpreted this to include drug trafficking in the home country, particularly Central America.

A. Demographics

Age and origin of UAC involved in international drug trafficking: Overwhelmingly, international drug trafficking cases involve boys ages 15 to 17. There are very few females, but some respondents did provide one or two examples of girls. As seen in figure 5 below, of respondents who provided a valid response, the majority (78 percent) indicated having worked with youth from Honduras, followed by Mexico (68 percent), Guatemala (62 percent), and El Salvador (59 percent). One respondent worked with youth from Ecuador. An additional eight respondents said the question was not applicable or did not know the youth's countries of origin. These percentages exceed 100 percent because the same respondent can work with youth from multiple countries.

Figure 5. What countries of origin are the youth involved in international drug trafficking typically from?

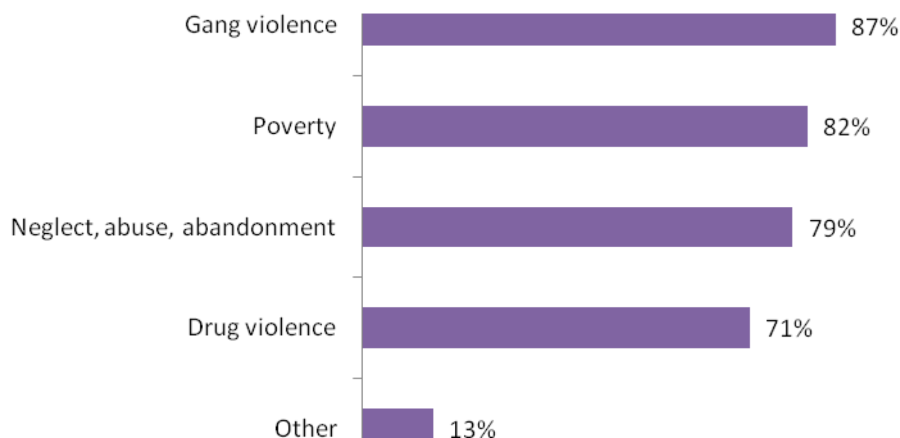


B. How Children Experience Drug Trafficking

Motivations for coming to the U.S.: As seen in figure 6 on the next page, of the respondents who provided a valid response, the vast majority found that youth come to the U.S. based on a combination of four factors: gang violence (87 percent), poverty (82 percent), neglect, abuse, or abandonment (79 percent), and drug violence (71 percent). Thirteen percent of respondents indicated that youth also come for additional reasons, such as to reunify with family or find work. An additional seven

respondents said the question was not applicable or did not know the youth's motivations for immigrating. These percentages exceed 100 percent because respondents could select multiple answers.

Figure 6. What are the primary reasons that UAC migrate to the U.S.?



The three most common threads provided by respondents among these cases was gang persecution, broken family structures, and poverty. Many respondents found that these cases involved youth who faced gang recruitment and threats in their home country. These youth also suffered abuse within their families or abandonment by one or both parents and have little to no parental presence, which leads to having few protective factors when they face poverty and violence. These youth often work starting at a young age and may live on their own from a very young age. Many respondents also found that these youth migrate to the U.S out of economic necessity. Among the younger minors, one person noted that they migrate to reunify with parents in the United States after many years of separation.

While many respondents noted that these youth are victims of gang violence and neglect, abuse, and abandonment, there were a few responses that found that youth involved in drug trafficking tend to have a high gang affiliation. One respondent noted that these young men tend to be pressured to enter into gang life and sell drugs in their neighborhoods. Another respondent found that these youth are already gang affiliated, but are then being compelled to do harder crimes. One person noted that some youth travel to the U.S. only to sell and plan to return immediately to the country of origin. These youth are selling drugs to provide for themselves and their family and drug trafficking is seen as the easiest, most sure way to do so.

Several respondents found that victims of drug trafficking tend to be young boys who follow the same route north to the U.S. It is common that such youth were travelling alone or without a *coyote* (smuggler) to cross into the U.S. and were encountered by drug traffickers while alone. Respondents

also found that victims of drug trafficking were frequently youth who were residents of border towns, including those with visas.

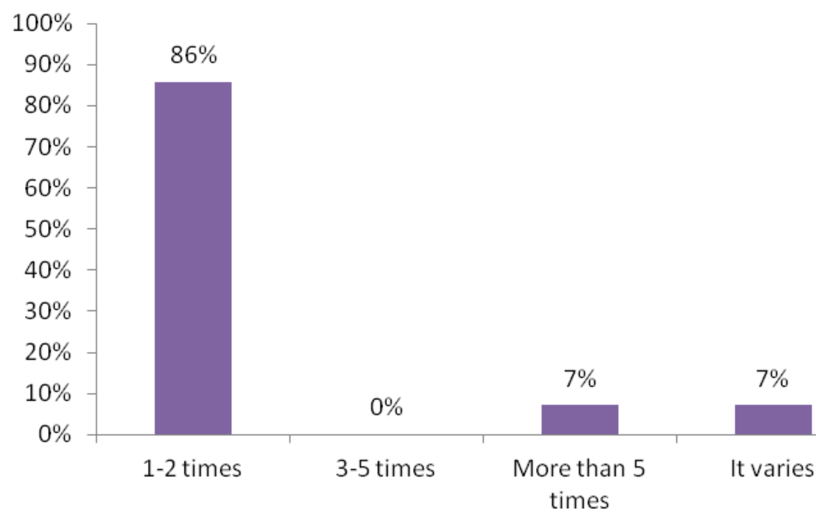
Where the drug trafficking began and ended: These cases mostly began south of the border in Mexico and ended in a U.S. border state like Arizona or Texas. In the U.S. it may end at a stash house or through apprehension by Border Patrol. Even where there is no apprehension, some respondents found that the trafficking generally ends very close to the U.S./Mexico border after the youth enters the U.S.

For some children, the drug trafficking only occurred in the country of origin. For example, one respondent provided a story of a 17-year-old girl who was approached in El Salvador by the MS-13 gang to be a drug carrier, and because she felt she had no choice but to comply with MS-13, she carried drugs to school. Teachers only searched boys, and therefore boys would ask girls to be carriers.

Other cases involve drug trafficking over multiple countries. For example, one child was kidnapped in Guatemala to traffic drugs but handed the drugs over immediately before crossing the U.S./Mexico border, meaning that the trafficking ended immediately before arriving in the U.S. In other instances drug trafficking committed at the border crossing continued once within the U.S as a result of continued pressure by cartels on the child. Finally, there were instances reported where a child was induced in the home country to travel to the U.S. for work, but upon arrival the child was forced to sell drugs.

The frequency with which children transported drugs across international borders tended to be low. As seen below in figure 7, 86 percent of all respondents (N=24) found that UAC typically moved drugs across the border just one or two times. Seventeen additional respondents said the question was not applicable (i.e., the respondent has never seen an international drug trafficking case or the case did not involve drugs crossing borders) or were unaware of the frequency with which drugs were moved across the border in a typical case.

Figure 7. In a typical case, how many times did the youth move drugs across the border?



How youth get involved in drug trafficking at the border: Three primary narratives relating to international drug trafficking emerged from the survey responses:

1. Force or coercion from traffickers or cartel members;
2. Manipulation, force, or coercion from guides or *coyotes*; and
3. Recruitment from friends, family, or other community members.

In the force or coercion by drug traffickers scenario, youth who are migrating to the U.S. are often forced at gunpoint, kidnapped, held in captivity at stash houses near the border, threatened with violence or death, or physically abused by the trafficker to carry drugs. Most youth are scared to refuse to comply. Traffickers may pose as smugglers and trick youth into carrying drugs across the border. One respondent stated that about 30 percent of the cases they saw involved youth who had no intention to cross the border, but were forced at gunpoint into vehicles off the street or whose "friends" turned them over to gang members, and were then taken to houses to be loaded with drugs.

Several respondents described guides or *coyotes* luring migrant youth into carrying drugs or directly recruiting them for the cartels. Youth, many of whom have no way to pay for assistance to cross the border, may be offered help crossing into the United States in exchange for carrying drugs. Once they arrive in the U.S., they may be turned over to the drug cartels to be forced to continue to smuggle drugs. A youth may seek and obtain the help of a smuggler to cross, but at the crossing the *coyote* may threaten to leave the youth behind if he or she does not carry drugs across the border. The smuggler may also turn the youth over to drug traffickers before crossing. The drug traffickers then use coercion to force the youth to cross with drugs.

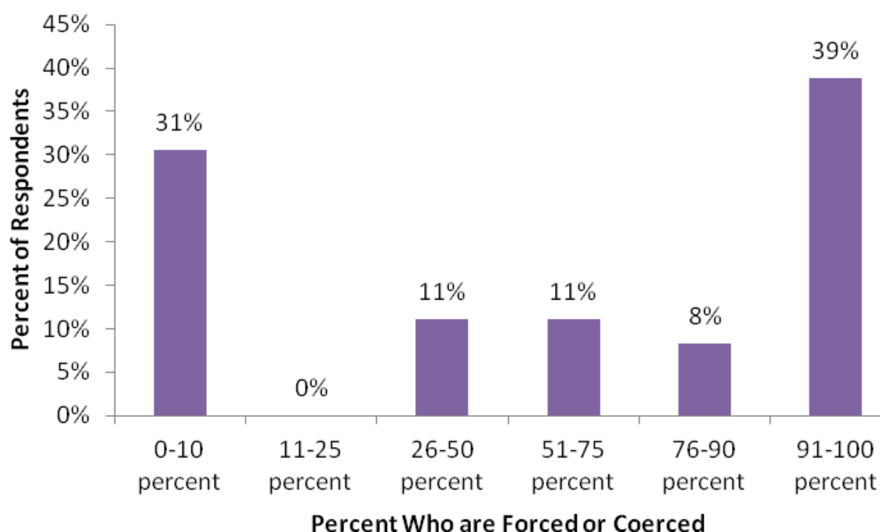
Finally, some children are recruited in the streets, at school, or in town squares by other youth or adults who are already related to, or working within, drug trafficking networks. One respondent characterized this as being recruited in a friendly way and offered money by individuals, including immediate relatives, in their communities who were already working in drug trafficking networks. Some youth found that it was unavoidable to engage in drug trafficking due to the extremely high prevalence of drug trafficking and other criminal activities in their communities. Others noted that youth signed on willingly in order to support themselves and to help their families because this was seen as the only way to make money. Some youth may already be members of a gang from a young age and therefore, are directed into criminal activities, including drug trafficking across the border. They may do so under threats or promises of payment. These youth join the gangs either under force, coercion, or by financial pressures.

C. Use of Force or Coercion

Prevalence of force or coercion: The frequency with which force or coercion was seen in international drug trafficking cases varied substantially between respondents. As seen on the next page in figure 8, of respondents who provided a valid response, 58 percent (N=21) found force or coercion in over half of their international drug trafficking cases, whereas 42 percent (N=15) found force or coercion in less than

half of the cases. Nine additional respondents said the question was not applicable or did not know how to respond.

Figure 8. Of international drug trafficking cases, what approximate percent are forced or coerced?



In the vast majority of cases, respondents found that youth were forced or coerced into trafficking drugs by drug traffickers or gang members. Many youth reported threats against themselves or their families if they refused to carry the drugs across the border, and sometimes traffickers used guns or knives to elevate these threats. Others reported kidnapping or physical violence as a form of coercion, including being held at gunpoint for days, being drugged to remain compliant, or having a family member held hostage until the drugs were trafficked.

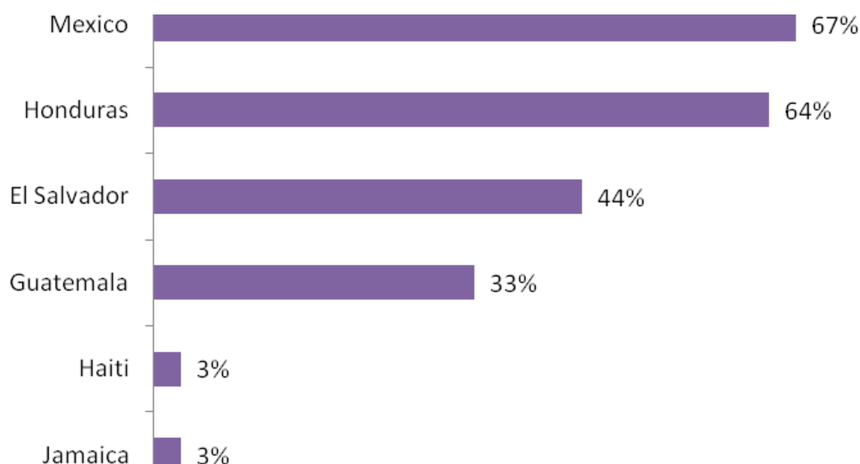
A few examples were provided where UAC refused to traffic drugs or at least escaped their drug trafficking situations. These involved youth dropping the drugs en route, or escaping the traffickers and attempting to cross the border on their own.

IV. Characteristics of Internal Drug Trafficking Cases

Respondents generally interpreted “internal drug trafficking” cases to involve drug trafficking within the U.S., although some included internal drug trafficking cases that occurred in the country of origin. International drug trafficking cases were also mentioned in this section of the survey where youth were recruited or induced to come to the U.S. to work and later became involved in drug trafficking within the U.S. Generally, boys aged 15 to 17 were predominantly reported as being involved in internal drug trafficking, while girls were reported in a few cases.

As seen in figure 9 below, of those who provided a valid response, 67 percent (N=24) said that their internal drug trafficking cases involved youth from Mexico, followed closely by youth from Honduras (64 percent). Many respondents also worked with youth involved in internal drug trafficking from El Salvador (44 percent) and Guatemala (33 percent). One respondent reported working with youth from Haiti and Jamaica. An additional nine respondents indicated that the question was not applicable.

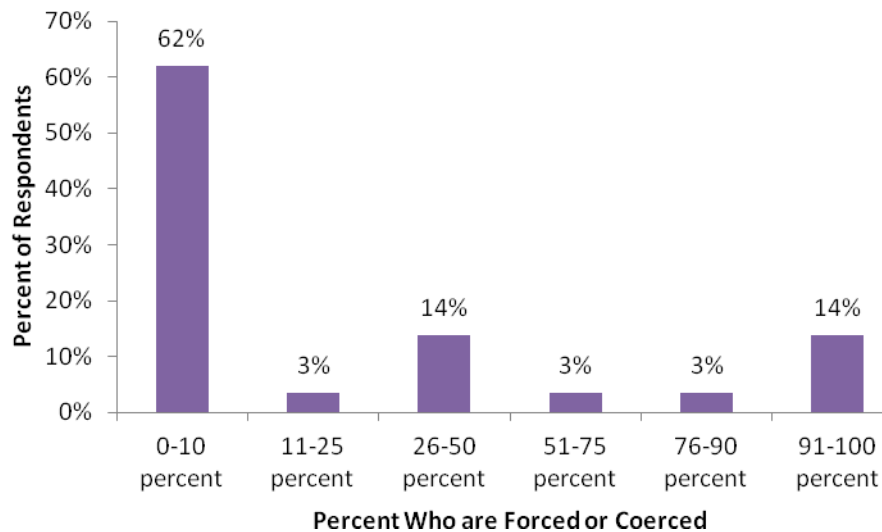
Figure 9. What countries of origin are the youth typically from?



As with international drug trafficking, respondents reported that youth may become involved in internal drug trafficking due to poverty or coercion. Practitioners who regularly work with these youth indicate that many are brought to the U.S. by their families as children, and grow up in poor, gang-ridden neighborhoods. Many youth get involved in drug sales because they see no other choices for financial stability in the U.S. Some of these youth may sell during periods of separation from parents or other caretakers, or simply when there are no caretakers. A friend or cousin involved with gangs or who knows someone who sells drugs may invite the youth to sell, and the youth may feel compelled to sell drugs in order to support themselves.

As shown on the next page in Figure 10, respondents found that force or coercion was not as prevalent in internal drug trafficking cases as in international drug trafficking cases. Of respondents who provided a valid response, 79 percent (N=23) found force or coercion in less than half of the cases they see, compared to only 21 percent (N=6) who found force or coercion in more than half of their internal drug trafficking cases. Sixteen respondents said that the question was not applicable or did not know how to respond.

Figure 10. Of internal drug trafficking cases, what approximate percent are forced or coerced?

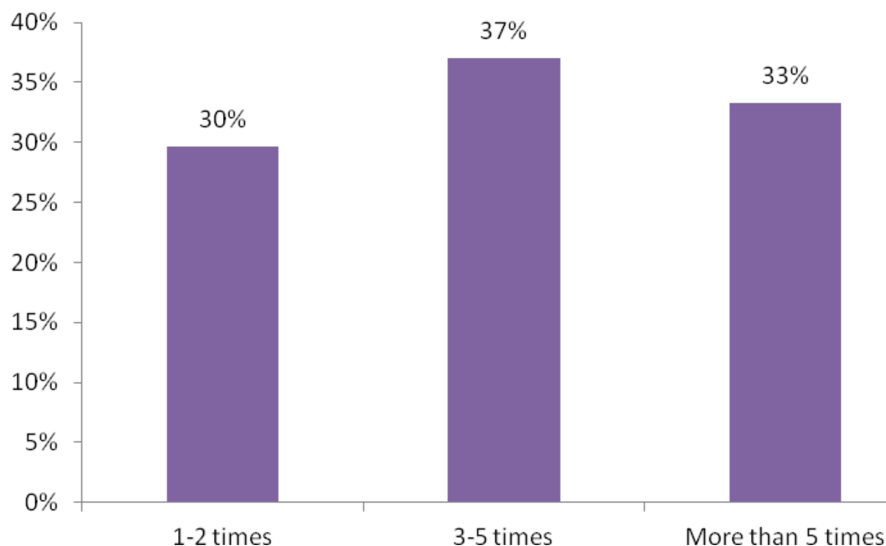


In those situations involving force or coercion in internal trafficking cases, most respondents reported that the coercion came from a contact from the youth's country of origin. For those youth who trafficked drugs only within their country of origin, respondents report that youth are approached by gangs in their neighborhood and they or their families are threatened with death or bodily harm if the youth does not participate. For those youth involved in drug trafficking within the U.S., respondents reported that some youth are lured to the U.S. under false pretenses, such as a promise of real work and the opportunity to attend school—with the youth often unaware that the "job" will require them to sell drugs. Some youth who pay to be smuggled into the U.S. are later forced to traffic drugs in order to pay off their smuggling debts to smugglers associated with traffickers in the U.S. Finally, some entered the U.S. with no connection to drug traffickers, but came into contact with traffickers through contacts from the home country already involved in trafficking in the U.S.

While the rates of force and coercion are lower for children apprehended internally rather than at the border, there was significant discussion by the respondents of the various circumstances of these children and the commonalities between them, including a lack of financial and emotional support, lack of a stable living situation, and threats of harm. Several respondents who regularly represent such youth found that many of these youth do not want to leave the traffickers because they have no other way of making a living in the U.S. and have no supportive adult in the U.S. Without an alternative way to survive on their own, youth may continue to rely on this source of income and network of support. Other youth feel pressure and face coercion to continue to be involved by gangs. Such youth may face threats to themselves or to their family members and fear death. Because of the community in which they live, it may be difficult for them to distance themselves from gang members in their neighborhoods and schools. Again, without the capacity or means to find a safe place to relocate, these youth may feel that they have no choice but to continue their involvement.

It also appears that drug trafficking acts occur more often for those engaged in trafficking internally than internationally (at the border). As shown in Figure 11 below, of respondents who provided a valid response, 37 percent of respondents (N=10) indicated that youth involved in internal drug trafficking sold drugs three to five times, followed by 33 percent (N=9) who sold drugs more than five times, and 30 percent (N=8) who did it only one to two times. Eighteen additional respondents said the question was not applicable or did not know how to respond.

Figure 11. In a typical case, how many times did the youth sell drugs?



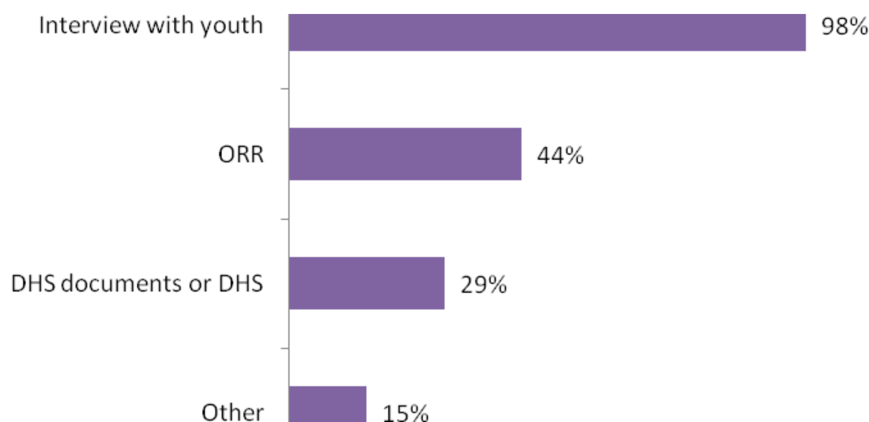
V. Legal Issues in Drug Trafficking Cases

Many respondents had filed no, or very few, cases for immigration relief involving drug trafficking. Respondents who filed for legal relief mostly reported obtaining T nonimmigrant status and Special Immigrant Juvenile Status (SIJS).

A. Screening for Drug Trafficking Issues

Method of discovering drug trafficking activities: As shown in figure 12 on the next page, of those who provided a valid response, the overwhelming majority of respondents (98 percent or N=40) learned that a youth was involved in drug trafficking through interviews with the youth themselves. Forty-four percent of respondents (N=18) said that they found out through ORR, 29 percent (N=12) found out from the Department of Homeland Security (DHS), and 15 percent (N=6) found out from other sources. The percentages exceed 100 percent since the same respondent could provide multiple answers. Four additional respondents said the question was not applicable.

Figure 12. How do you discover that youth are involved in drug trafficking?



Interestingly, although most respondents reported learning about trafficking conduct through their screenings, only 51 percent (N=23) had asked an explicit question on drug trafficking. Some of the 49 percent (N=22) of respondents who did not ask the question directly provided the following explanations for not including such a question:

- The issue arises when discussing criminal and delinquency history or asking other background questions, including the journey to the U.S., if they have any fear, and harm they face. It also arises when reviewing police reports or other relevant documents.
- Those kinds of questions are reserved for later meetings once the youth's trust has been gained.
- During screenings, questions are only asked relating to the youth's prima facie eligibility for relief, and therefore not for specific grounds of inadmissibility such as drug trafficking.

Some respondents noted that this survey provided an impetus for them to add a specific drug trafficking question to their intake form.

Framing of drug trafficking screening question: Of the 51 percent of respondents who stated that they do ask about drug trafficking during screening, there was no consensus about how to frame the question, and a number of respondents explained that they use indirect inquiries. Methods for obtaining information include:

- Asking directly, "Have you ever used drugs?", "Have you ever sold illegal drugs?" or "Have you ever transported or carried drugs from one place to another?"
- Asking generally whether they have any arrests in the U.S. or home country or contact with law enforcement agencies.

- Asking about drug trafficking only after the youth discloses gang or cartel affiliation or criminal activity.
- Asking the child about the journey to the U.S., which may include questions on whether the child trafficked drugs or was forced to do or bring something against his or her will. Some specific questions include, "When you entered the U.S., did anyone give you anything to bring into the U.S. with you? Did you see any drugs? If so, were you forced to come into contact with drugs? Did anyone tell you that you had to carry, package, or sell drugs? Did you feel like you could say no? What do you think would happen if you tried to say no?"
- Asking general questions about harm and fear, such as, "Has anyone ever hurt you? Are you afraid of anything? Is there anything else you would like to tell me? Would you be afraid or would there be any dangers in your life if you returned to your country?"
- Asking general questions about past experience with people involved in the drug trade, such as, "Have you been asked in the past about selling or buying drugs? When or with whom did you discuss that? What did you say?"

B. Pursuing Immigration Relief for Youth Involved in Drug Trafficking

Reasons for not seeking relief: Sixty percent of respondents (N=27) sought immigration relief for youth involved in drug trafficking. Of the 40 percent (N=18) that did not seek immigration relief, the following reasons were cited for not seeking relief:

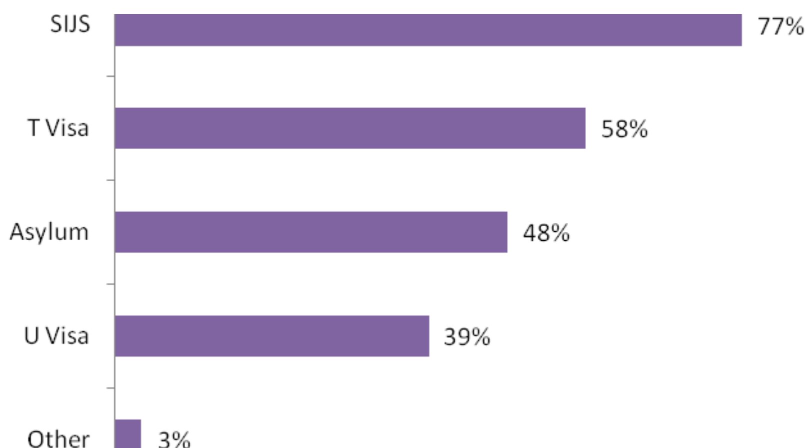
- The youth is ineligible for any form of relief, or for the relief that the attorney's office is able to provide.
- The jurisdiction is not friendly to drug trafficking cases.
- Detention fatigue from youth, where youth request return to their home country and do not wish to pursue relief.
- The youth are still involved in a forced trafficking situation and are not ready to report to law enforcement, or fear law enforcement because of previous negative experiences, or fear repercussions by the traffickers against themselves or their families.
- The youth did not remain in the area long enough to pursue immigration relief (e.g., a child in ORR custody who was transferred to another facility or reunified with family members in another region).

Several respondents reported that this question was not applicable because the issue has not presented itself in the youth population screened by the respondent, or the respondent does not provide legal representation to minors.

Types of relief sought: As seen in figure 13 on the next page, of respondents who pursued immigration relief, 77 percent sought Special Immigrant Juvenile Status (SIJS) in drug trafficking cases (N=24), followed by 58 percent who sought T visas (N=18), 48 percent who sought asylum (N=15), and 39 percent who sought U visas (N=12). An additional three percent (N=1) stated "other," explaining that

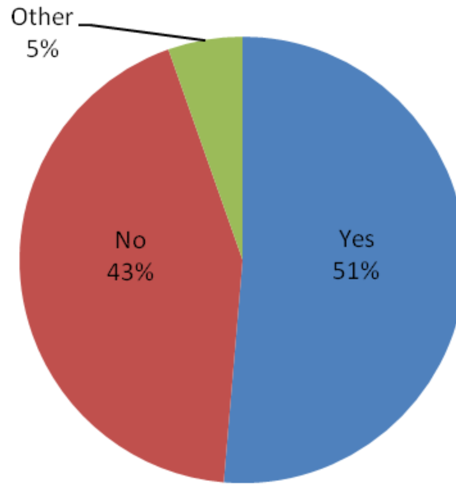
they sought relief for clients under the Convention against Torture (CAT). These percentages exceed 100 percent because the same respondent can seek multiple forms of relief for different clients. Fourteen additional respondents said the question was not applicable.

Figure 13. What forms of relief have you pursued?



Influence of force or coercion versus willfulness in the decision to pursue relief: As seen in Figure 14 on the next page, of all valid responses, it appears that the facts underlying the drug trafficking (e.g., whether there was force or coercion versus willful participation) had an impact on 51 percent of respondents (N=19) in pursuing relief for UAC, compared to 43 percent (N=16) who felt that it had no impact whatsoever. Five percent of respondents (N=2) said “other,” stating that it depends on the case or that their organization’s stance is to argue that minors do not have the cognitive capacity to willfully participate in drug trafficking. An additional eight respondents said the question was not applicable.

Figure 14. Did the facts of the particular case (e.g., force or coercion versus willfulness) affect your decision as to whether or not to pursue relief?



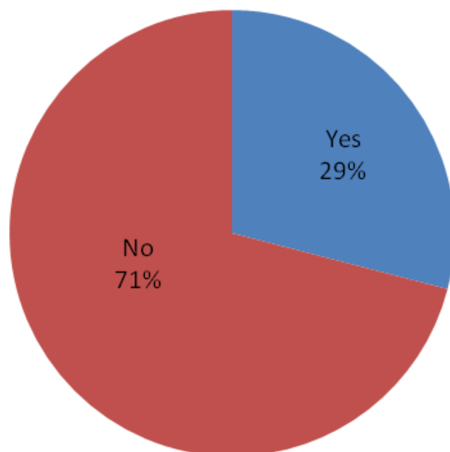
Filing of I-360 (Special Immigrant Juvenile Status) and I-485 (Adjustment of Status) applications involving drug trafficking: As shown below in Figure 15, of respondents who filed I-360 applications involving drug trafficking, most (71 percent or N=12) did so in cases involving drug trafficking where there were no arrests or charges. The second biggest category in which cases were filed involved drug possession with both admissions and adjudications (41 percent or N=7). Twenty-nine percent of respondents (N=5) filed I-360 applications in cases where there were either dropped charges or adjudications of a drug sale, and 24 percent (N=4) filed in cases with drug sale charges that were pled down to a lesser offense. These percentages exceed 100 percent because the same respondent can file I-360 applications on behalf of multiple clients. An additional 28 respondents indicated that the question was not applicable.

Figure 15. Have you filed I-360 applications for clients who…

Response	**Percent of Valid Responses (N=17)**
Have drug sale adjudication(s)	29 percent
Have drug sale charges, but pleaded to lesser offense such as possession	24 percent
Have drug sale arrest or charges, but case dropped or dismissed	29 percent
Admitted drug trafficking (sale or transportation) (no arrests or charges)	71 percent
Admitted drug possession or adjudicated of drug possession charges (no drug sale charges)	41 percent

As shown in Figure 16 below, of all valid responses, 29 percent of respondents (N=9) filed an I-485 application. Seventy-one percent of respondents (N=22) stated that they did not file the I-485 application. No explanation was provided for this failure to file. An additional 14 respondents stated that the question was not applicable.

Figure 16. Have you filed an I-485 application for clients with drug-related delinquency arrests, charges, or adjudications?



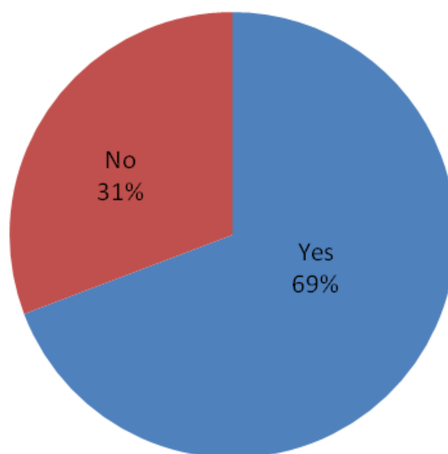
Answers related to drug trafficking crimes committed if I-485 is filed: For those that filed I-485 applications for individuals involved in drug trafficking, the drug-related questions on the application were answered in a variety of ways, including:

- Attaching a statement reading, "I used drugs in the past as a minor but not anymore," in instances where a “yes” was answered to a drug-related question.
- Answering “yes” to the drug-related question only if force or duress was not present.
- If force or duress was present or the youth has a viable legal argument for answering “no,” the attorney advises answering “no,” or leaving the answer blank, and including an addendum explaining the force or duress that occurred with the activity.
- Answering “no” to the drug-related questions if there was a drug sale adjudication, with the inclusion of an argument that this does not constitute drug trafficking.
- Answering “no” to the drug -related questions if there was a juvenile adjudication. (One respondent also discloses, with juvenile court permission, any juvenile arrests and adjudications, including drug-related ones.)

Disclosure of drug trafficking information does not always depend on whether the attorney is aware that DHS has knowledge of drug trafficking activity. Figure 17 on the next page shows that even in situations where the respondents were unaware as to whether DHS had knowledge of the client’s drug trafficking-related information, 69 percent (N=9) of them still chose to disclose the information and 31

percent (N=4) of them chose not to disclose it. Thirty-two respondents said that the question was "not applicable."

Figure 17. Did you disclose drug trafficking-related information (e.g., no charges or arrest) in the application if you were unaware as to whether DHS had knowledge of such activity?



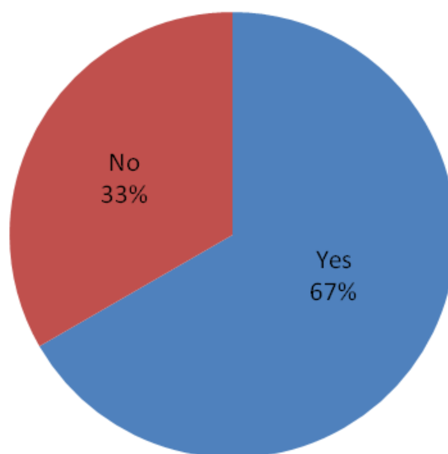
How respondents disclosed drug trafficking activity in applications: Respondents reported the following practices when responding to drug-related questions in applications for relief where the applicant had a history of drug trafficking:

- Answering all questions honestly, but without volunteering information that is not specifically requested; keeping the information as general as possible.
- Stating the facts of the drug trafficking in simple terms and then making legal arguments as to why the conduct does not constitute drug trafficking based on age, circumstances of the youth, and force or coercion.
- Disclosing information of drug trafficking via a declaration by the child explaining the circumstances surrounding the trafficking. If there is an in-court adjustment, the attorney will be the first to ask the child about the incidents on direct examination.
- In U and T visa applications based on the youth being trafficked to sell drugs, explaining that the youth trafficked drugs under force or duress. In the T visa context a waiver may be filed.
- Not disclosing any information if there is a viable legal argument for nondisclosure (e.g., in response to the question asking if the youth knowingly committed any drug-related offense, nondisclosure may be appropriate because the question asks for crimes, and juvenile delinquency is not considered a crime under immigration law).
- Only disclosing involvement in drug trafficking at the interview and not in the application.

As shown in Figure 18 on the next page, for respondents who applied for relief before USCIS or an immigration court, 67 percent (N=12) responded that the issue of drug trafficking came up with USCIS,

DHS, or the immigration judge, and 33 percent (N=6) responded that it did not. Twenty-seven respondents indicated that the question was not applicable.

Figure 18. In response to any applications, did the issue of drug trafficking come up with USCIS, DHS, or the immigration judge?



Several respondents found that the issue of drug trafficking was mostly raised in court hearings. Evidence of drug trafficking also came up in FOIA results, Form I-213 (Record of Arrest or Apprehension), probation documents, and through disclosure by the DHS trial attorney.

Respondents reported that the government used information regarding drug trafficking in the following ways: USCIS questioned the youth in a Request for Evidence (RFE) as to whether drugs were forcefully or willingly brought to the U.S.; DHS ICE counsel argued that an immigration judge should deny a case as a matter of discretion; and immigration judges have denied voluntary departure as a matter of discretion. In other cases, drug trafficking was not an issue with immigration judges even as a matter of discretion.

There were only three situations reported by respondents where DHS charged the youth with the ground of inadmissibility requiring a “reason to believe” the person is engaged in drug trafficking. In one case, DHS initially charged in the Notice to Appear that the youth was inadmissible under the “reason to believe” inadmissibility ground. Although the charge was subsequently withdrawn, DHS continued to allege that the youth could not overcome this inadmissibility ground. In another case, DHS raised the “reason to believe” ground as a reason to deny a request for a continuance (i.e., that client was a "high-priority" case for them, and they thus wanted it adjudicated more quickly), but the continuance was ultimately granted. In the third case, a respondent reported that only one application by USCIS based on the “reason to believe” inadmissibility ground had been denied in the past six years.

When drug trafficking -related questions arise in interviews or in immigration court, respondents report taking the following actions and precautions:

- Instructing the client to only answer relevant questions. If an officer or DHS trial attorney asks for details that are not relevant to the application, the attorney advises the client to not answer anything further and to assert the right to remain silent.
- Providing the minimum documentation and information that is ethically necessary to explain the circumstances while protecting the client's best interests (e.g., by giving enough information to allay concerns without fully disclosing the exact criminal charge).
- Relying on state confidentiality laws to protect the disclosure of documents when submitting documentation (e.g., some states require a court order to release juvenile records, or the records may not be released at all if sealed).
- Highlighting mitigating evidence to paint the youth in the best light possible, which can be done by including favorable evidence, or by disclosing negative conduct alongside an explanation of it in the context of coercion or force, age, family abuse, and other factors that may negate culpability.
- Stating facts in as simple and general of a way as possible.

C. Outcomes of Applications for Relief

Not a single respondent reported a denial of an application due to drug trafficking involvement. In fact, six respondents reported receiving T visa approvals based on an underlying forced drug trafficking claims. Of those six respondents, five noted that they had several approvals ranging from two to three to an unknown number.[198] Another respondent mentioned that they had not filed T visas yet, but had received the ORR eligibility letter for two clients.

Another respondent reported a U visa approval because the inadmissibility ground based on the drug charges was waived. Approvals of SIJS cases were also reported. One respondent shared that the adjustment of status application was approved based on the argument that drug trafficking was conducted under duress. Another case was approved although the youth had a juvenile adjudication for accessory after the fact for drug trafficking and three drug-related arrests. ICE had photocopies of the probation and police reports and photos of a "buy in bust," although the record was sealed. The child was asked about his involvement during the merits hearing and he admitted selling drugs on the stand. Although it was treated as a negative discretionary issue, he was ultimately granted adjustment of status. The mitigating factors that outweighed the drug trafficking were the extensive abuse he suffered in the home country and as the target of gangs, his church attendance, his current stability, and his extensive work history (he had dropped out of school). A former teacher also wrote a letter on his behalf and offered to provide testimony. Another respondent echoed that by supplementing the record with evidence of mitigating circumstances, they have been able to get USCIS to grant adjustment of status in many of their clients' cases where some drug trafficking involvement has been alleged.

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[198]One respondent who only files T visas noted that despite the approvals, it appears that USCIS may be becoming more skeptical of these types of human trafficking claims.

Finally, several cases were abandoned or were closed before a grant or denial was issued. Other clients ran away, left the jurisdiction, decided to not pursue the case, or accepted deportation.

Appendix B

T Visa Interim Assistance and Its Potential Effect on T Visa Eligibility for Children

T visa interim assistance allows potential victims of trafficking to be eligible for federal and state funded benefits and services to the same extent as those provided to refugees.[199] Initial interim assistance may be available for up to 120 days, and can then be granted for a longer term.[200] The Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) requires that the Secretary of Health and Human Services (HHS) make an immediate determination as to eligibility for T visa interim assistance if it receives credible information that a child who is seeking assistance may have been subject to a severe form of trafficking.[201] This information regarding the child's situation can be submitted to HHS by anyone in the form of an eligibility request.[202]

The Office of Refugee Resettlement (ORR), which forms part of HHS, contracts facilities to temporarily house unaccompanied children (UAC), many of whom may have experienced some form of trafficking. ORR-contracted facilities generally file an initial interim assistance eligibility request with ORR after screening a youth who appears to have been a victim of trafficking. ORR's Anti-Trafficking in Persons Division (ATIP) then reviews the initial request to see whether the facts of the UAC's case meet the definition of a "trafficking victim," and may then grant interim assistance by issuing an interim assistance eligibility letter, valid for 90 days. It should be noted that the content of the eligibility letters are often not shared with attorneys, and attorneys are not involved in this process.

The role of this eligibility letter in T visa adjudications is not dispositive – the Vermont Service Center (VSC), which is tasked with T visa determinations, can approve the application with or without the letter. Federal regulations state that certain documents are required as primary evidence of eligibility for a T visa, and others may be provided as secondary evidence;[203] they do not mention the interim assistance eligibility letter in either of these categories. However, some practitioners have reported that the letter appears to serve at least some role as secondary evidence to demonstrate that a youth is a trafficking victim, since it shows that a federal agency has made a preliminary assessment that the youth may have been subject to a severe form of trafficking.

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[199] 22 U.S.C. § 7105(b)(1)(A).

[200] 22 U.S.C. § 7105(b)(1)(F)(iii)-(iv).

[201] 22 U.S.C. § 7105(b)(1)(F).

[202] Office of Refugee Resettlement, Department of Health and Human Services, *Child Victims of Trafficking* (Mar. 2013), http://www.acf.hhs.gov/programs/orr/resource/child-trafficking (last visited on December 16, 2014).

[203] 8 C.F.R.§ 214.11(f)(2)-(3).

Appendix C

Comparison of Forms of Relief in Drug Trafficking Related Cases

Form of Relief	Waiver of Drug Trafficking-Related Inadmissibility Ground Available?	Pros	Cons
T visa	Yes	• Forced or coerced drug trafficking conduct can serve as the basis for eligibility. • Broad drug trafficking waiver available. • No law enforcement certification required. • Annual cap for T visa issuance set at 5,000, but this number has never been met.	• Lack of expertise or resources to pursue. • Once granted, must wait three years before applying for lawful permanent residence.
Special Immigrant Juvenile Status (SIJS)	No	• Less resource intensive than the T visa. • Most UAC can prove abuse, neglect, or abandonment. • Drug trafficking may be contextualized within abuse, neglect, etc. • Once granted, immediately eligible to apply for lawful permanent residence.	• May be difficult to establish juvenile court jurisdiction to obtain a predicate order. • No waiver of drug trafficking conduct. • Issuance of Visas for Special Immigrants, which encompasses SIJS and other categories, is capped at 9,800 per year.
U visa	Yes	• Drug trafficking conduct may be explicitly tied to the basis for the visa. • Broad drug trafficking waiver available.	• Obtaining law enforcement certification may be difficult. • Must wait three years before applying for lawful permanent residence. • Annual cap for U visa issuance is set at 10,000 and is often met.
Asylum	Not applicable at initial application	• Drug trafficking ground of inadmissibility is not applicable.	• Difficulty establishing persecution on account of membership in a particular social group for gang-based claims.

Appendix D

Legal Provisions to Support Arguments
Regarding the Diminished Capacity of Immigrant Minors

United States Code

- 8 USC § 1182(a)(9)(B)(iii)(I): Provides that aliens under the age of 18 do not accrue unlawful presence in the United States.
- 8 USC § 1445(b): Restricts the right to apply for naturalization to individuals over the age of eighteen.
- 8 USC § 1183a(f)(1)(B): Requires that a sponsor providing an affidavit of support on behalf of an alien be at least eighteen years of age.
- 8 USC § 1158(a)(2)(D): Excuses non-compliance with the one-year limitations period for applying for asylum.
- 8 USC § 1182(a)(2)(A)(ii)(I): Creates an exception to inadmissibility for committing a crime of moral turpitude where the crime was committed while under age 18 and more than 5 years prior to the date of application for entry.
- 8 USC § 1158(b)(3)(C): Gives the Asylum Office initial jurisdiction for unaccompanied alien children in removal proceedings.
- 8 USC § 1158(a)(2)(E): States that unaccompanied minors are not subject to the asylum bar for having a safe third country to which to return.
- 8 USC § 1232: Creates special procedures for handling unaccompanied minor children at the ports of entry, including the procedure for permitting them to withdraw their applications for admission and avoid removal proceedings.

Code of Federal Regulations

- 8 CFR § 208.4(a)(5)(ii): Treats an applicant's status as a minor as an "extraordinary circumstance."
- 8 CFR § 1240.10(c): Prohibits an immigration judge from "accept[ing] an admission of removability from an unrepresented respondent who is . . . under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend."
- 8 CFR §§ 208.4(a)(5)(ii), 1208.4(a)(5)(ii): State that unaccompanied minors are not subject to the one-year filing deadline for asylum.

Case Law

- *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000): Concludes that Congress, in defining the term "conviction" for immigration purposes, intended to maintain consistency with federal and state governments in providing a separate system of treatment for juveniles; See also *Matter of De La Nues*, 18 I &N Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); and *In the Matter of C-M-,* 5 I&N Dec. 327 (BIA 1953).
- *Hernandez-Ortiz v. Gonzalez*, 496. F.3d 1042 (9th Cir. 2007): States that testimony of a minor in asylum proceedings is to be given liberal benefit of the doubt.