

Kristen Jackson
Charanya Krishnaswami
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005
Phone: (213) 385-2977
Fax: (213) 385-9089
kjackson@publiccounsel.org
ckrishnaswami@publiccounsel.org

Michelle Mendez
CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
8757 Georgia Ave., Ste. 850
Silver Spring, MD 20910
Phone: (301) 565-4800
mmendez@cliniclegal.org

Counsel for *amici curiae*

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA**

RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2016 SEP -1 PM 4:08
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

In the Matter of

Amicus Invitation No. 16-06-09

REQUEST OF PUBLIC COUNSEL, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., KIDS IN NEED OF DEFENSE, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, CENTER FOR GENDER AND REFUGEE STUDIES, IMMIGRANT LEGAL RESOURCE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, BOSTON UNIVERSITY IMMIGRANTS' RIGHTS CLINIC, JUSTICE FOR OUR NEIGHBORS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEBREW IMMIGRANT AID SOCIETY OF PENNSYLVANIA, FIRST FOCUS, SAFE PASSAGE PROJECT, MASSACHUSETTS LAW REFORM INSTITUTE, AND IMMIGRATION LAW PROFESSORS TO APPEAR AS *AMICI CURIAE*

Under Board of Immigration Appeals Practice Manual Chapter 2.10, the following proposed *amici curiae* respectfully request leave to file the accompanying brief in response to Amicus Invitation No. 16-06-09. These individuals and organizations have subject-area expertise in the realm of children's immigration law. They submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation based on their extensive experience working with asylum-seeking children and youth.

Proposed *amicus curiae* **Public Counsel**, based in Los Angeles, California, is the largest pro bono law firm in the nation. Its Immigrants' Rights Project provides direct representation to individuals seeking asylum before the Los Angeles Asylum Office, the Los Angeles Immigration Court, the Board of Immigration Appeals (BIA), and the U.S. Court of Appeals for the Ninth Circuit. The Project's attorneys also co-teach the Asylum Clinic at UCLA School of Law, author practice advisories and conduct nationwide trainings on children's immigration issues including asylum, and engage in policy and legislative advocacy to advocate for protections for child asylum seekers.

Proposed *amicus curiae* **Catholic Legal Immigration Network, Inc. (CLINIC)**, based in Silver Spring, Maryland, protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC's network includes more than 260 diocesan and other affiliated immigration programs with 400 offices in 47 states, Puerto Rico, and the District of Columbia. The network employs roughly 1,200 BIA accredited representatives and attorneys who, in turn, serve hundreds of thousands of low-income immigrants each year, many who are minors. Through its affiliates, as well as through the BIA Pro Bono Project and the CARA Pro Bono Project, CLINIC advocates for the just and humane treatment of asylum seekers through direct

representation, pro bono referrals, and engagement with policy makers. Its staff authors practice advisories on issues affecting immigration minors, conducts nationwide trainings on asylum, and, from 2013 to 2016, co-taught the Immigration Litigation Clinic at the Catholic University of America Columbus School of Law, which represents indigent asylum seekers.

Proposed *amicus curiae* **Kids in Need of Defense (KIND)** is a national nonprofit organization that works to ensure that no child faces immigration court alone. Since opening its doors in 2009 and as of June 2016, KIND has received referrals for more than 10,400 unaccompanied children from 70 countries, trained over 11,000 pro bono attorneys, and provided pro bono representation to over 4,000 children. KIND has also advocated for changes in law, policy, and practices to improve the protection of unaccompanied children in the United States. KIND has extensive experience in assisting child victims of persecution as they navigate the U.S. legal system, and joins this amicus brief in the interest of improving legal protections for minor children seeking asylum.

Proposed *amicus curiae* **Immigrant Legal Resource Center (ILRC)** is a national resource center based in San Francisco, California, that provides training, technical assistance, and publications on immigration law. The mission of the ILRC is to work with immigrants and citizens to make critical legal assistance and social services accessible to all, regardless of income, and to build a society that values diversity and respects the dignity and rights of all people. The ILRC writes some of the only national resources on immigrant children's issues, including its publications *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth* (4th Edition 2015 ILRC) and *Immigration Benchbook for Juvenile and Family Court Judges* (2010 ILRC).

The ILRC also regularly provides training and technical assistance on immigration options, enforcement, and detention of youth to juvenile courts, social workers, immigration attorneys and pro bono attorneys, probation officers, dependency attorneys, and public defenders. The ILRC therefore has a significant interest in ensuring that the laws and policies relating to asylum for immigrant youth are properly developed to allow them to access the relief and services they deserve.

Proposed *amicus curiae* **Center for Gender and Refugee Studies (CGRS)** based at the University of California Hastings College of the Law, and its California-based affiliate, CGRS-California, has a particular interest in the issues under consideration, which directly implicate the application of asylum law to children. CGRS has played a central role in the development of law and policy on the asylum claims of children through its litigation, expert consultations, scholarship, and development of policy recommendations. CGRS has published numerous scholarly papers on asylum and refugee law, and has issued a comprehensive report, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges*, looking at violence against children in the Central America-Mexico-U.S. region. CGRS has filed briefs, both as amicus and as counsel of record, regarding asylum claims in nearly every Court of Appeals. Each year, CGRS conducts national trainings and advises attorneys around the country representing asylum seekers. In the past year alone, the Center has assisted attorneys representing asylum seekers in more than 1,500 asylum proceedings, including hundreds involving applicants who suffered persecution as children.

Proposed *amicus curiae* **Young Center for Immigrant Children's Rights at the University of Chicago Law School** advocates on behalf of the best interests – safety,

permanency and well-being – of unaccompanied immigrant children. Since 2003, the Young Center has worked to protect vulnerable, unaccompanied immigrant children placed in adversarial immigration proceedings and those pursuing immigration benefits from U.S. Citizenship and Immigration Services (USCIS). The Young Center has been appointed as the Child Advocate (best interests guardian *ad litem*) for more than 1,500 unaccompanied children and runs Child Advocate programs in eight locations around the United States pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). In that capacity, the Young Center is responsible for providing best interests recommendations based on the unique capacities and vulnerabilities of each child and adolescent. Young Center attorneys and social workers are appointed as Child Advocates for children while they are in federal custody or sometime after their release and continue advocating for them upon their placement with family members or other sponsors in the community. As a result, the Young Center is well aware of the challenges children face finding counsel and integrating into communities and schools when they do not speak English, have not yet developed an understanding of American culture, bring with them a deeply rooted fear of government officials from their experiences in their countries of origin, and have unaddressed histories of trauma – often the result of persecution, community violence, abandonment, abuse or neglect. The Young Center also engages in policy initiatives to develop and promote standards for protecting the best interests of children in the critical window as they mature from childhood into adolescence and young adulthood.

Proposed *amicus curiae* **Americans for Immigrant Justice (AI Justice)**, formerly Florida Immigrant Advocacy Center, is a nonprofit law firm dedicated to

promoting and protecting the basic rights of immigrants. Since 1996, AI Justice has served over 90,000 immigrants from all over the world. A substantial portion of its clients include children and unaccompanied children who have been irreparably traumatized and victimized by abuse and violence and are seeking refuge as asylum seekers. AI Justice is the only organization in South Florida that represents minors housed in local immigration shelters. Part of its mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, AI Justice champions the rights of immigrants, serves as a watchdog on immigration detention practices and policies, and speaks for immigrant groups who have particular and compelling claims to justice.

Proposed *amicus curiae* **Boston University Immigrants' Rights Clinic** represents unaccompanied children facing deportation, refugees fleeing human rights abuses, and other vulnerable immigrants in court and administrative proceedings. The Clinic has extensive experience directly representing child asylum seekers, many of whom have suffered extensive trauma.

Proposed *amicus curiae* **Justice for Our Neighbors (JFON)** was established by the United Methodist Committee on Relief in 1999 to serve its longstanding commitment and ministry to refugees and immigrants in the United States. The goal of JFON is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON operates a network of legal clinics throughout the country. It employs a small staff at its headquarters in Springfield, Virginia, which supports 15 JFON sites nationwide. Those 15 sites collectively employ more than 40 immigration attorneys, operate in 11 states and Washington, D.C., and include

approximately 40 clinics. Last year, JFON served low-income clients in more than 7,800 cases. JFON advocates for interpretations of federal immigration law that preserve and protect children's access to asylum.

Proposed *amicus curiae* **Hebrew Immigrant Aid Society of Pennsylvania** is a nonprofit organization that provides legal and supportive services to immigrants, refugees, and asylum seekers from all backgrounds in order to assure their fair treatment and full integration into American society. HIAS Pennsylvania's Immigrant Youth Advocacy Project provides know-your-rights trainings, legal screenings, direct representation, and pro bono referrals for immigrant children and youth, serving upwards of 500 children each year.

Proposed *amicus curiae* **Safe Passage Project**, a registered 501(c)(3) nonprofit corporation, addresses the unmet needs of immigrant children living in New York by providing legal representation to empower each child to pursue a safe, stable future. The Project recruits, trains, and mentors volunteer attorneys for unaccompanied minors in immigration court. Without the Project, many of these children would be unrepresented and unaware of paths to citizenship.

Proposed *amicus curiae* **First Focus** is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. One of First Focus's priority issues is to ensure that federal policies, including immigration policies, promote the health, safety, and education of children in immigrant families. First Focus also works to ensure that immigrant children in the child welfare system are connected to the supports and services they need to achieve the best developmentally appropriate outcomes for children and older youth, including long-term

stability and permanency. Along with its partner organization, the First Focus Campaign for Children, First Focus advocates for both legislative and administrative solutions to keep families together and to minimize the harm of immigration policies that negatively impact children.

Proposed *amicus curiae* **Florence Immigrant and Refugee Rights Project** is a Legal Orientation Program site of the Executive Office for Immigration Review. As such, it is one of a network of organizations across the country providing free legal information to detained men and women and unaccompanied minors in removal proceedings. In 2015, over 11,000 detained children, men, and women facing removal charges observed a Florence Project presentation on immigration law and procedure. That same year, Florence Project staff provided individualized orientations and direct legal assistance to over 6,000 unaccompanied immigrant and refugee children and nearly 2,500 detained adult immigrants and refugees. In any given year, the Florence Project sees hundreds, if not thousands, of minors and young adults who are seeking asylum in the United States. The Florence Project has also worked with a number of young adults ages 18 to 21 whose parents brought them to the United States when they were children and who have strong asylum claims but for their parent's failure to file an application for them within the one-year deadline. The Florence Project firmly believes that the immigration laws should recognize the particular vulnerability of minor asylum seekers and advocates for the implementation of rules that ensure such individuals receive a fair process.

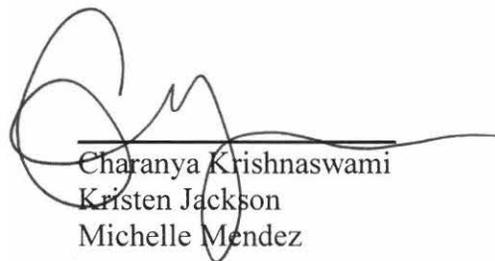
Proposed *amicus curiae* **Massachusetts Law Reform Institute** is a statewide poverty law and policy center. Its mission is to advance economic, racial and social justice for low-income people through legal action, administrative and legislative

advocacy, coalition building and provision of information about laws, policies and practices that impact low-income people, including children and asylum seekers. MLRI was co-counsel in two nationwide class actions involving asylees and asylum applicants and has litigated or submitted *amicus* briefs in numerous cases concerning the rights of asylum seekers or young immigrants before a variety of tribunals including the U.S. Supreme Court, the U.S. Court of Appeals for the First Circuit, the Massachusetts Supreme Judicial Court, and the BIA.

Proposed *amici curiae* **immigration law professors** are 40 professors who specialize in immigration law. They include clinical instructors engaged in representation of asylum seekers and immigrant children before federal and immigration courts and USCIS, as well as scholars who teach and publish on issues involving refugee law and children's rights. The names, titles, and institutional affiliations (for identification purposes only) of *amici* are appended to this request.

These individuals and organizations therefore respectfully request leave to appear collectively as *amici* and file the following brief. Additionally, given the impact of the Board's decision in this matter and the experience of *amici* in providing and improving legal services to thousands of immigrant minor asylum seekers, amici respectfully request that the Board permit them to present oral argument. *See* BIA Practice Manual, Chapter 8.7(e)(xiii) (Nov. 2, 2015).

Dated: September 1, 2016



Charanya Krishnaswami
Kristen Jackson
Michelle Mendez

Counsel for *amici curiae*

APPENDIX

List of *Amici Curiae* Immigration Law Professors*

Sioban Albiol
Clinical Instructor
DePaul College of Law

Deborah Anker
Clinical Professor of Law
Director, Harvard Immigration and Refugee Clinical Program
Harvard Law School

Sabrineh Ardalan
Lecturer on Law
Assistant Director, Harvard Immigration and Refugee Clinical Program
Harvard Law School

Lauren R. Aronson
Assistant Professor of Professional Practice
Director, Immigration Law Clinic
Louisiana State University Law Center

Jon Bauer
Clinical Professor of Law and Richard D. Tulisano '69 Scholar in Human Rights
University of Connecticut School of Law

Janet B. Beck
Clinical Assistant Professor
University of Houston Law Center

Lenni B. Benson
Professor of Law
New York Law School

Jacqueline Bhabha
Jeremiah Smith Jr. Lecturer
Harvard Law School

Kristina M. Campbell
Professor of Law
Jack and Lovell Olender Director, Immigration and Human Rights Clinic
University of the District of Columbia David A. Clarke School of Law

* Institutional affiliations for identification purposes only.

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas School of Law

Kate Evans
Associate Professor of Law
Director, Immigration Clinic
University of Idaho College of Law

Niels Frenzen
Clinical Professor of Law
Director, Immigration Clinic
University of Southern California Gould School of Law

Lauren Gilbert, Esq.
Professor of Law
St. Thomas University School of Law

Denise Gilman
Clinical Professor
Director, Immigration Clinic
University of Texas School of Law

Anju Gupta
Associate Professor of Law
Director, Immigrant Rights Clinic
Rutgers Law School

Lindsay M. Harris
Assistant Professor of Law
Immigration and Human Rights Clinic
University of the District of Columbia David A. Clarke School of Law

Susan V. Hazeldean
Assistant Professor of Law
Director, LGBT Clinic
Brooklyn Law School

Barbara Hines
Clinical Professor of Law (ret.)
Adjunct Professor
University of Texas School of Law

Regina Jefferies
Clinical Teaching Fellow
University of Minnesota Law School

Nancy Kelly
Lecturer on Law
Co-Managing Director, Harvard Immigration and Refugee Clinic
at Greater Boston Legal Services
Harvard Law School

Randi Mandelbaum
Clinical Professor of Law
Annamay Sheppard Scholar
Director, Child Advocacy Clinic
Rutgers Law School

Lynn Marcus
Co-Director, Immigration Law Clinic
James E. Rogers College of Law, University of Arizona

Elizabeth McCormick
Associate Clinical Professor of Law
Director, Immigrant Rights Project
University of Tulsa College of Law

Maggie Morgan
Albert M. Sacks Clinical Teaching and Advocacy Fellow
Harvard Law School

Miriam H. Marton
Assistant Clinical Professor of Law
Director, Tulsa Immigrant Resource Network
Boesche Legal Clinic
University of Tulsa College of Law

Karen Musalo
Bank of America Foundation Chair in International Law
Professor & Director, Center for Gender & Refugee Studies
U.C. Hastings College of the Law

Sarah H. Paoletti
Practice Professor of Law
Director, Transnational Legal Clinic
University of Pennsylvania Law School

Nina Rabin
Clinical Professor of Law
Director, Bacon Immigration Law and Policy Program
James E. Rogers College of Law, University of Arizona

Andrea Ramos
Clinical Professor of Law
Director, Immigration Law Clinic
Southwestern Law School

Heather Scavone
Assistant Professor of Law
Director, Humanitarian Immigration Law Clinic
Elon University School of Law

Erica B. Schommer
Clinical Assistant Professor of Law
St. Mary's University School of Law

Rachel Settlage
Assistant Professor
Wayne State Law School

Becky Sharpless
Clinical Professor
Roger Schindler Fellow
Director, Immigration Clinic
University of Miami School of Law

Elissa Steglich
Clinical Professor
Immigration Clinic
University of Texas School of Law

Claire R. Thomas
Adjunct Professor
New York Law School

Philip Torrey
Lecturer on Law
Harvard Law School

Julia I. Vázquez
Supervising Attorney & Lecturer in Law
Immigration Law Clinic
Southwestern Law School

David P. Weber
Associate Dean & Professor of Law
Creighton Law School

John Willshire-Carrera
Lecturer on Law
Co-Managing Director, Harvard Immigration and Refugee Clinic
at Greater Boston Legal Services
Harvard Law School

Lauris Wren
Clinical Professor
Director, Asylum Clinic
Maurice A. Deane School of Law at Hofstra University

PROOF OF SERVICE

I, Charanya Krishnaswami, certify that I mailed a copy of the foregoing

REQUEST OF PUBLIC COUNSEL, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., KIDS IN NEED OF DEFENSE, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, CENTER FOR GENDER AND REFUGEE STUDIES, IMMIGRANT LEGAL RESOURCE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, BOSTON UNIVERSITY IMMIGRANTS' RIGHTS CLINIC, JUSTICE FOR OUR NEIGHBORS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEBREW IMMIGRANT AID SOCIETY OF PENNSYLVANIA, FIRST FOCUS, SAFE PASSAGE PROJECT, MASSACHUSETTS LAW REFORM INSTITUTE, AND IMMIGRATION LAW PROFESSORS TO APPEAR AS *AMICI CURIAE*

to the Department of Homeland Security and counsel for respondent at the following addresses:

Office of the Chief Counsel
Immigration and Customs Enforcement
Department of Homeland Security
26 Federal Plaza, Room 1130
New York, NY 10278

David Rodkin, Esq.
401 Broadway, Ste. 705
New York, NY 10013

via first-class mail.

Date: September 1, 2016



Charanya Krishnaswami
PUBLIC COUNSEL

Kristen Jackson
Charanya Krishnaswami
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005
Phone: (213) 385-2977
Fax: (213) 385-9089
kjackson@publiccounsel.org
ckrishnaswami@publiccounsel.org

Michelle Mendez
CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
8757 Georgia Ave., Ste. 850
Silver Spring, MD 20910
Phone: (301) 565-4800
mmendez@cliniclegal.org

Counsel for *amici curiae*

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA**

| | |
|---|--|
| In the Matter of Amicus Invitation No. 16-06-09 | |
|---|--|

PROPOSED BRIEF OF *AMICI CURIAE* PUBLIC COUNSEL, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., KIDS IN NEED OF DEFENSE, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, CENTER FOR GENDER AND REFUGEE STUDIES, IMMIGRANT LEGAL RESOURCE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, BOSTON UNIVERSITY IMMIGRANTS' RIGHTS CLINIC, JUSTICE FOR OUR NEIGHBORS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEBREW IMMIGRANT AID SOCIETY OF PENNSYLVANIA, FIRST FOCUS, SAFE PASSAGE PROJECT, MASSACHUSETTS LAW REFORM INSTITUTE, AND IMMIGRATION LAW PROFESSORS

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

 I. Consistent with the text and legislative history of the INA, as well as consensus among psychological experts, the term “minor” should be defined to include youth under the age of 21, such that an asylum applicant who is under 21 has established extraordinary circumstances exempting her from the one-year filing deadline 3

 A. Consistent with the INA, which explicitly defines the term “child” as an individual under age 21, the Board should define the term “minor” to include youth under age 21 5

 B. Defining the term “minor” to include youth under the age of 21 is consistent with the legislative history of the “extraordinary circumstances” exception to the one-year deadline, which clarifies that the exception should be broadly applied where appropriate 8

 C. Psychological and social science research confirms that youth under the age of 21, particularly those who have survived trauma, are under a legal disability that should exempt them from the one-year filing deadline 10

 1. Youth between the ages of 18 and 21 have impaired decisionmaking ability directly bearing upon their ability to file for asylum 10

 2. Youth who have suffered trauma or witnessed pervasive violence suffer even greater psychological and developmental challenges that may affect their ability to file asylum applications 12

 II. If a youth files before she turns 21, she has per se filed within a “reasonable period,” and once she turns 21, the Board should conduct a holistic determination of her individualized circumstances to determine whether she has filed within a “reasonable period.” 14

 A. If a youth files her asylum application at any point before she turns 21, she has per se filed within a “reasonable period,” because she is still under a legal disability 15

B. Rather than setting a fixed period of time as “presumptively unreasonable” after the expiration of the legal disability, the Board should consider a broad set of factors and undertake a rigorous analysis of each applicant’s individualized circumstances to determine whether the applicant filed within a reasonable period.16

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States, 523 U.S. 224 (1998)5, 6

Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012)..... 11

Roper v. Simmons, 543 U.S. 551, 569 (2005)..... 11

Graham v. Florida, 560 U.S. 48, 68 (2010) 11

Husye v. Mukasey, 527 F.3d 1172, 1182 (9th Cir. 2008) 14, 16, 17

Schneider v. Chertoff, 450 F.3d 944, 953-54 (9th Cir. 2006)..... 15

Viridiana v. Holder, 646 F.3d 1230, 1238 (9th Cir. 2011) 16, 23

Wakkary v. Holder, 558 F.3d 1049, 1058-59 (9th Cir. 2009) 17

Matter of T-M-H- & S-W-C-, 25 I. & N. Dec. 193, 196 (BIA 2010) 16, 17

Matter of Y-C-, 23 I. & N. Dec. 286, 288 (BIA 2002) 24

Statutes

INA § 101(a)(27)(J) 7

INA § 101(b) 5

INA § 101(c) 5

INA § 207(c)(2)(B) 5

INA § 208(a)(2) 3, 4, 5

6 U.S.C. § 279(g) 7

8 U.S.C. § 1101(a)(6)..... 7

Child Status Protection Act, 107-208 § 2, 122 Stat. 3949 (2008) 6

Nationality Act of 1940, Pub. L. No. 76-853 §§ 313-14, 54 Stat. 1137 5

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163..... 5

| | |
|---|---|
| Fostering Connections to Success and Increasing Adoptions Pub. L. No. 110-351, 122 Stat. 3949 (2008)..... | 8 |
|---|---|

Regulations

| | |
|------------------------------|----------|
| 8 C.F.R. § 1208.4(a)(5)..... | 3, 5, 15 |
|------------------------------|----------|

Other Authorities

| | |
|---|---|
| 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996)..... | 9 |
|---|---|

| | |
|--------------------------------|---|
| H.R. Rep. 107-1742 (2002)..... | 6 |
|--------------------------------|---|

| | |
|---------------------------------|---|
| S. Rep. No. 81-1515 (1951)..... | 5 |
|---------------------------------|---|

| | |
|---------------------------------|---|
| S. Rep. No. 82-1137 (1952)..... | 5 |
|---------------------------------|---|

| | |
|-----------------------------|---|
| S. Rep. 104-249 (1995)..... | 9 |
|-----------------------------|---|

| | |
|--|----|
| B.J. Casey, Rebecca M. Jones, and Todd A. Hare, <i>The Adolescent Brain</i> , 1124 Annals N.Y. Acad. Sci. 111 (2008) | 11 |
|--|----|

| | |
|--|----|
| Bruce D. Perry et al., <i>Childhood Trauma, the Neurobiology of Adaptation, and “Use-dependent” Development of the Brain: How “States” Become “Traits,”</i> 6 Infant Mental Health J. 271 (1995) | 12 |
|--|----|

| | |
|---|----|
| <i>Brain Maturity Extends Beyond Teen Years</i> , NPR News, Oct. 10, 2011, http://www.npr.org/templates/story/story .php?storyId=141164708 | 12 |
|---|----|

| | |
|---|----|
| Child Welfare Info. Gateway, <i>Supporting Brain Development in Traumatized Children and Youth</i> , Childwelfare.gov, Aug. 2011, https://www.childwelfare.gov/pubPDFs/braindevtrauma.pdf | 19 |
|---|----|

| | |
|---|----|
| Comm. on Migration to the United States, Conf. of Catholic Bishops, Mission to Central America: The Flight of Unaccompanied Children to the United States 6 (2013), <i>available at</i> http://www.usccb.org/about/migration-policy/fact-finding-mission-reports/upload/Mission-To-Central-America-FINAL-2.pdf | 14 |
|---|----|

| | |
|--|---|
| Ctr. for Gender & Refugee Studies, <i>A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System</i> (2014), <i>available at</i> http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrrs_kind_report.pdf | 2 |
|--|---|

| | |
|---|---------------|
| Ctr. for Gender & Refugee Studies, <i>Childhood and Migration in Central and North America: Causes, Policies, Practices, and Challenges</i> (2015), <i>available at</i> http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_FullBook_English.pdf | 13 |
| Declaration of Professor Laurence Steinberg, Dkt. 212-1, Ex. 1, ¶ 23, Dec. 23, 2015, <i>J.E.F.M. v. Lynch</i> , No. 2:14-cv-01026 (W.D. Wash. 2014)..... | <i>passim</i> |
| Denisa R. Superville, <i>Unaccompanied Minors Face New Milestone: Graduation</i> , EdWeek, http://www.edweek.org/ew/articles/2016/06/08/unaccompanied-minors-face-new-milestone-graduation.html (June 7, 2016) | 21 |
| Emmy Werner, <i>Risk, Resilience, and Recovery: Perspectives from the Kauai Longitudinal Study</i> (1993) 5 <i>Dev. & Psychopathology</i> 503 | 20 |
| <i>In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)</i> , USCIS, https://www.uscis.gov/CAM | 7 |
| Kathleen J. Moroz, Vermont Agency of Human Services, Dep’t of Health, <i>The Effects of Psychological Trauma on Children and Adolescents</i> 4 (2005)..... | 12 |
| Karen Musalo & Marcelle Rice, <i>The Implementation of the One-Year Bar to Asylum</i> , 31 <i>Hastings Int’l & Comp. L. Rev.</i> 693 (2008) | 8 |
| M. Fazel & A. Stein, <i>The mental health of refugee children</i> , 87 <i>Archives of Disease in Childhood</i> 366, 367, 370 (2002) | 13 |
| Maureen E. Cummins, <i>Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary</i> , 29 <i>J. Contemp. L. & Pol.</i> 283, 312 n.184 (2013) | 18 |
| Meribah Knight, <i>Far from Family, Alone, Homeless and Still Just 18</i> , <i>N.Y. Times</i> (Feb. 25, 2012) | 20 |
| Nat’l Immig. Law Ctr., <i>Unaccompanied Children and Health Care</i> , Aug. 18, 2014, at 2, <i>available at</i> https://www.nilc.org/wp-content/uploads/2015/11/unaccompanied-children-health-care-2014-08-18.pdf | 22 |
| Office of Int’l Affairs, Immigration and Naturalization Serv., Dep’t of Justice, <i>Guidelines For Children’s Asylum Claims</i> (1998) | 2 |
| Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, <i>Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum</i> , 52 <i>Wm. & Mary L. Rev.</i> 651 (2010) | 8, 9 |

Rachel Roubein, *Here’s How Hard It Is for Unaccompanied Minors to Get Asylum*, The Atlantic, <http://www.theatlantic.com/politics/archive/2014/07/heres-how-hard-it-is-for-unaccompanied-minors-to-get-asylum/456267/> (July 17, 2014)...
.....22

R.A. Tyrer & M. Fazel, *School and community-based interventions for refugee and asylum seeking children: a systematic review*, PLOS ONE (2014)21

United Nations High Comm’r for Refugees, *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* (2009).....2

United Nations High Comm’r for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), available at <http://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> 12

U.S. Citizenship & Immig. Svcs., *Asylum Officer Basic Training Course, Guidelines for Children’s Asylum Claims* (2009), available at <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>, at 46 *passim*

I-589, *Application for Asylum and for Withholding of Removal*, USCIS, <https://www.uscis.gov/i-589>22

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae represent a nationwide spectrum of nonprofit organizations and scholars immersed in the study and practice of children's immigration and asylum law. Many regularly represent immigrant youth in asylum applications before the United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR), while others direct law school clinics focused on asylum law and author articles, practice advisories, and training materials on the subject. Still others engage in policy advocacy on behalf of immigrant children and study the systemic impact of asylum procedures on children and youth.

All, however, share a common interest in ensuring that children and youth asylum seekers can fairly access humanitarian protections for which they are eligible, and that the Board takes into account the particular challenges they face in navigating a dauntingly complex immigration system. They respectfully submit this brief to provide the Board perspective on the issues presented in the Amicus Invitation informed by their extensive experience working with asylum-seeking children and youth.

SUMMARY OF ARGUMENT

Children and youth are a particularly vulnerable subset of asylum seekers. Many have suffered unthinkable trauma and damaging harm at a tender age, which affects them indelibly, long after they escape their countries of origin. They must overcome multiple dramatic disruptions in their lives, as they transition not only from childhood to adulthood but from one culture to another. Thus, both U.S. and international asylum guidance counsel in favor of applying informed, child-specific standards when assessing

children’s asylum claims.¹ This established understanding that asylum law must account for the unique vulnerabilities and challenges children face should inform the Board’s analysis of the questions presented here, the answers to which will determine whether children and youth can even *access* this critical humanitarian protection.

First, in response to the first question posed in the Amicus Invitation, *amici* urge the Board to hold that youth under the age of 21 are “minors,” and therefore are under a legal disability excepting them from the one-year deadline for filing their asylum applications. Such a holding would be consistent with other provisions of the Immigration and Nationality Act (INA) and with overwhelming consensus among experts in child psychology that youth between the ages of 18 and 20 – especially those who have suffered childhood trauma – exhibit a “maturity gap,” meaning their capacity for decision-making, future-oriented thinking, and planning is similar to that of children under 18.

Second, in response to the third question posed in the Amicus Invitation, *amici* urge the Board to consider a broad, holistic, and flexible set of factors in determining whether the applicant has filed within a “reasonable period” after her legal disability is lifted. As an initial matter, of course, if an individual files *before* she turns 21, she has per se filed within a reasonable period of time because she is still under the legal disability

¹ *See, e.g.*, Ctr. for Gender & Refugee Studies, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* 8 (2014), *available at* http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf (citing Office of Int’l Affairs, Immigration and Naturalization Serv., Dep’t of Justice, *Guidelines for Children’s Asylum Claims* (1998) and United Nations High Comm’r for Refugees, *Guidelines on International Protection: Child Asylum Claims Under Articles 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* 3 (2009)).

constituting “extraordinary circumstances” that exempt her from the one-year deadline. If, however, an individual files *after* she turns 21, the Board should engage in a rigorous and complete examination of her individual circumstances to determine whether she filed her application within a “reasonable period” of the lifting of her legal disability. These factors may include, but are not limited to: the applicant’s history of trauma, abuse, abandonment, or neglect, either in her country of origin or the United States; her psychological and physical health; her socioeconomic and family circumstances; and whether she is represented, and when her representation was secured. *Amici* strongly urge the Board to refrain from adopting a bright-line rule in which a certain period of time is considered presumptively “unreasonable,” given the unique and myriad obstacles children and youth may encounter in preparing and filing their asylum applications.

ARGUMENT

- I. **Consistent with the text and legislative history of the INA, as well as consensus among psychological experts, the term “minor” should be defined to include youth under the age of 21, such that an asylum applicant who is under 21 has established extraordinary circumstances exempting her from the one-year filing deadline.**

Under the INA, asylum seekers must file their applications within one year of arriving in the United States, but it provides an exception if the applicant can demonstrate “extraordinary circumstances relating to the delay in filing an application.” INA § 208(a)(2)(B)-(D). “[E]xtraordinary circumstances” include “events or factors directly related to failure to meet the 1-year deadline,” including the enumerated circumstance of “legal disability.” 8 C.F.R. § 1208.4(a)(5). Although the regulations do not define the term “legal disability,” they offer as illustration the example of an applicant who “was an unaccompanied minor or suffered from a mental impairment.” *Id.* § 1208.4(a)(5)(iii).

Agency training manuals further expand on this point, explaining that *all* minors, whether unaccompanied or not, should be considered to be under a legal disability for the purpose of the one-year deadline.² U.S. Citizenship & Immig. Svcs., Asylum Officer Basic Training Course, Guidelines for Children’s Asylum Claims (2009), *available at* <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>, at 46 (“The same logic underlying the legal disability ground listed in the regulations also is relevant to accompanied minors: minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.”) (hereinafter “USCIS Guidelines for Children’s Asylum Claims”). The critical question, therefore, is how broadly the Board should define the term “minor.”

Amici urge the Board to hold that age 21 is the appropriate cutoff for determining whether a child is a minor whose legal disability exempts her from the filing deadline. This reading would be harmonious with the INA, which generally defines the term “child” as an individual under age 21. It is also consistent with the congressional intent of the “extraordinary circumstances” provision, which makes clear that the exception should be generously defined and should not serve as a bar to an otherwise bona fide asylum claim. Finally, holding that individuals under age 21 are under a legal disability is

² The Board should carefully and explicitly distinguish between the extraordinary circumstances exception at issue here and the statutory *exemption* from the one-year deadline for designated “unaccompanied alien children.” *See* INA § 208(a)(2)(E). Although the categorical exemption for unaccompanied children supports an expansive interpretation of the regulation at issue here, § 208(a)(2)(E) is both broader and narrower than the regulation here, which simply provides that legal disability is an extraordinary circumstance excusing an applicant from the filing deadline.

consistent with overwhelming consensus among child psychology experts that youth under 21 who have suffered from persecution, trauma, neglect, and abandonment are similar to their under-18 counterparts and warrant treatment accordingly.

A. Consistent with the INA, which explicitly defines the term “child” as an individual under age 21, the Board should define the term “minor” to include youth under age 21.

For over half a century, the INA has defined the term “child” as an “unmarried person under the age of 21.” *See* INA § 101(b)(1) (definition of “child” for visa petitions and related matters); § 101(c) (definition of “child” for citizenship and naturalization applications).³ Contemporaneous legislative materials describing this provision make clear it should apply broadly to “any . . . act or determination under the provisions of the [INA] relating to the status of a person.” S. Rep. No. 82-1137, at 5 (1952).⁴ Elsewhere, the legislative history of the 1952 Immigration and Nationality Act explicitly describes children under age 21 as “minors.” *See id.* at 49. The plain text and history of the INA thus make clear that the term “minor,” for the purpose of INA § 208(a)(2)(D) and 8 C.F.R § 1208.4, should be defined to include children under 21. *See Almendarez-Torres*

³ Unmarried children under the age of 21 are also eligible for accompanying or follow-to-join asylum benefits. *See* INA § 207(c)(2)(B).

⁴ Indeed, the definition of a “child” as an individual under age 21 arguably extends even further back than that: legislative history materials predating the passage of the Immigration and Nationality Act of 1952 explain that, even before the act’s passage, “[t]he law was well settled that a *child* of a person naturalized as a citizen of the United States, dwelling within the United States, *who was under 21 years of age* when the parent or parents were naturalized, is a citizen of the United States.” S. Rep. No. 81-1515, 706 (1951). The derivative citizenship provision was briefly changed to include only children under 18 in the Nationality Act of 1940, before it was changed back to 21 in the 1952 Act. *See* Nationality Act of 1940, Pub. L. No. 76-853 §§ 313-14, 54 Stat. 1137; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, §§ 101(b), (c).

v. United States, 523 U.S. 224, 288 (1998) (explaining the court can “look to the statute’s language, structure, subject matter, context, and history” to “illuminate its text”).

In a measure that postdates the 1996 inclusion of the one-year deadline in the INA, Congress reaffirmed its understanding that the term “child” should be read to include all individuals under age 21. In the Child Status Protection Act of 2002, Congress addressed the problem of children “aging out” of eligibility as derivative beneficiaries on permanent residency and citizenship applications during the pendency of agency adjudications by extending eligibility for children who were under 21 at the time they filed their application. *See* Pub. L. No. 107-208, 116 Stat. 927 § 2. Legislative history materials related to the Act repeatedly reflect Congress’s intent that “minors” are to be defined as children under 21. *See, e.g.*, H.R. Rep. 107-1742 (2002) at 12 (“[T]hese *children* . . . become over 21, and when they reach that age, they’re automatically put into a preference status, not the immediate relative status granted to *minor children*.” (emphasis added)); *id.* at 13 (“*Minor children* are becoming adults while they wait for the INS to act.” (emphasis added)). As this relatively recent piece of legislation makes clear, Congress’s intent that the term “minor” should be read to include children under 21 postdates its inclusion of the one-year deadline and its exceptions in statute and regulation.

Nor is reading the term “minor” to include individuals between the ages of 18 and 20 discordant with other statutory provisions or agency guidance. For instance, although the definition of “unaccompanied alien child” includes only children under the age of 18, rather than 21, this provision appears in a United States Code title separate from the one containing both the INA’s definition of “child” and the enumerated “extraordinary

circumstances” exception to the one-year deadline. *Compare* 6 U.S.C. § 279(g) (definition of “unaccompanied child” in Title Six) *with* 8 U.S.C. § 1101(a)(6) (defining “child” for purposes of INA in Title Eight). Other child-specific provisions in the INA, such as the definition of a Special Immigrant Juvenile, apply to individuals under 21. *See* INA § 101(a)(27)(J).

Similarly, although training materials guiding Asylum Officers on adjudication of children’s asylum claims generally describe a “minor applicant” as someone under the age of 18, this, too, is not dispositive of the issue. *See* USCIS Guidelines for Children’s Asylum Claims at 7. Even these guidelines recognize there are situations when youth between the ages of 18 and 20 should be treated in accordance with child-specific guidance. *Id.* at 15 (emphasis added) (explaining that even though the Guidelines “apply primarily to children under the age of eighteen who apply for asylum independently,” rather than as derivatives, “for the purpose of derivative determinations, the Guidelines apply to all individuals *under the age of twenty-one*” (emphasis added)).

Underscoring the fact that all youth under 21 should constitute “minors,” the government recently announced an expansion of the Central American Minors (CAM) Refugee/Parole Program, which provides in-country refugee and parole processing for individuals who reside in El Salvador, Guatemala or Honduras and who meet the definition of a “child” under the INA – that is, an unmarried youth under age 21. *See In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM)*, USCIS, <https://www.uscis.gov/CAM> (last visited Aug. 30, 2016).

Therefore, defining “minor” as an individual under age 21, rather than under age 18, would be consistent with the text and history of the INA, and would not conflict with other relevant statutory provisions or agency guidance.⁵

B. Defining the term “minor” to include youth under the age of 21 is consistent with the legislative history of the “extraordinary circumstances” exception to the one-year deadline, which clarifies that the exception should be broadly applied where appropriate.

Holding that individuals under age 21 can establish extraordinary circumstances exempting them from the one-year filing deadline would also be consistent with the legislative intent and history of that provision.

The one-year deadline was enacted in 1996 to combat perceived fraud in the asylum system. *See* Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int’l & Comp. L. Rev.* 693, 695 & n.4 (2008) (citing 141 *Cong. Rec.* E1635 (daily ed. Aug. 3, 1995)). Certain proponents of the deadline believed that the vast majority of asylum seekers would know immediately upon setting foot on United States soil that they would want to apply for asylum. *Id.* This presupposed legal savvy, familiarity with the U.S. immigration system, and access to financial and informational resources that most asylum seekers fleeing persecution – and certainly children and youth asylum seekers – lack. *See* Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security’s*

⁵ Congress has recognized in other legislation that 21, rather than 18, is an appropriate delineation between childhood and adulthood, particularly for children who have suffered trauma or instability as children. For example, in 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act, which allows states to define the term “child” for purposes of eligibility for foster care benefits to include children previously involved in the foster care system and who are now between the ages of 18 and 21. *See* Pub. L. No. 110-351, 122 Stat. 3949 (2008).

Administration of the One-Year Bar to Asylum, 52 Wm. & Mary L. Rev. 651, 669-70 & n.83 (2010).

But even the deadline's most ardent proponents emphasized the importance of including "adequate protections" for bona fide asylum seekers – in the form of the extraordinary and changed circumstances exceptions – and underscored their "commit[ment] to ensuring that those with legitimate claims for asylum are not returned to persecution, *particularly for technical deficiencies*." 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Orrin Hatch) (emphasis added). Other members of Congress, hesitant to impose a deadline on asylum applications whatsoever, registered the importance of "broadly defin[ing]" the exceptions to the filing deadline "to include *all reasonable circumstances* that could prevent a deserving asylum seeker from applying for asylum." S. Rep. 104-249, 43 (1995) (statement of Sens. Mike DeWine, Edward Kennedy, and Russell Feingold) (emphasis added).

The legislative history of the one-year deadline thus counsels in favor of broadly defining the "extraordinary circumstances" exception. Youth between the ages of 18 and 20, just like their under-18 counterparts, are likely to experience significant "technical deficiencies" that prevent them from filing their asylum applications in a timely manner, particularly when they are overcoming trauma and adjustment to a new country while simultaneously navigating the transition from childhood to adulthood. Therefore, consistent with the congressional intent of the provision, the Board should hold that all youth under age 21 are under a legal disability excusing them from the one-year deadline: by virtue of their age and the obstacles they have faced, they may validly fail to file within the deadline, and should not be subject to its stricture.

C. Psychological and social science research confirms that youth under the age of 21, particularly those who have survived trauma, are under a legal disability that should exempt them from the one-year filing deadline.

Finally, the conclusion that youth under 21 are under a legal disability constituting extraordinary circumstances finds ample support in scientific literature on the subject. Children continue to undergo significant maturation after they turn 18, particularly in their ability to make appropriate decisions about their futures and consider the long-term consequences of their actions. This is all the more true for youth who have suffered trauma, violence, or displacement, which can have a debilitating effect on cognition and psychological development.

1. Youth between the ages of 18 and 21 have impaired decisionmaking ability directly bearing upon their ability to file for asylum.

Although the age of 18 is the bright line drawn between childhood and adulthood in many contexts (although, as noted above, not in all immigration-related contexts), experts agree that youth between the ages of 18 and 20 continue to experience developmental challenges similar to those of their under-18 peers, which should counsel in favor of concluding that all youth under age 21 operate under a “legal disability” that should exempt them from the one-year deadline.

A leading expert on child psychology and development explains that although “[b]asic cognitive abilities mature by age 16 . . . emotional maturation is ongoing into the early 20s, a phenomenon that has been referred to as a ‘maturity gap.’” Expert Declaration of Professor Laurence Steinberg, Dkt. 212-1, Ex. 1, ¶ 23, Dec. 23, 2015, *J.E.F.M. v. Lynch*, No. 2:14-cv-01026 (W.D. Wash. 2014) [hereinafter “Steinberg Decl.”]. As a result, both children and youth in their late teens and early 20s lack a

developed ability to make reasoned and proactive decisions, neglect to consider the costs associated with certain decisions (or failure to make those decisions), and are “less able . . . to control their impulses and consider the future consequences of their actions.” See Steinberg Decl. ¶¶ 19-21. There is broad scientific consensus on these points. *Id.*⁶

The difficulty children and youth face in making reasoned decisions in their best interest is heightened in situations that “generate negative emotions like fear, threat, or anxiety,” *id.* ¶ 23, such as applying for asylum, a process that requires them to recount experiences of past trauma or confront potential future fears of persecution. In such instances, children “rely less on intellectual capabilities and more on feelings,” often failing to make sound decisions because the “emotional significance of the decision greatly influence[s] the adolescent.” B.J. Casey, Rebecca M. Jones, and Todd A. Hare, *The Adolescent Brain*, 1124 *Annals N.Y. Acad. Sci.* 111, 126 (2008). Therefore, a 20-year-old youth is likely to behave similarly to a teenager when confronted with the U.S. asylum system, which is both dauntingly complex and requires children to confront negative emotions such as fear, threat, and anxiety.

Because the “guiding principle” in determining whether to use child-sensitive asylum adjudication techniques is not a strict age cut-off, but rather “whether an individual demonstrates an immaturity and vulnerability that may require more sensitive treatment,” the Board should hold that youth under age 21 are under a legal disability excepting them from the one-year deadline. United Nations High Comm’r for Refugees,

⁶ The U.S. Supreme Court has relied on this type of scientific research to recognize that “children [are] constitutionally different than adults.” *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)); see also *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).

Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997), *available at* <http://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html>, at ¶ 5.11.

2. Youth who have suffered trauma or witnessed pervasive violence suffer even greater psychological and developmental challenges that may affect their ability to file asylum applications.

While all children and youth, by virtue of their age, have difficulty making reasoned and mature decisions, those who have experienced past trauma or violence experience these challenges in even greater measure. That the vast majority of child and youth asylum seekers are likely to have suffered such past trauma counsels in favor of broadly defining the term “minor” to include youth under age 21.

Studies analyzing the effects of childhood trauma confirm that youth who have experienced trauma or violence are at “great risk for profound emotional, behavioral, physiological, cognitive, and social problems.” Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and “Use-dependent” Development of the Brain: How “States” Become “Traits,”* 6 *Infant Mental Health J.* 271, 276 (1995). They are more likely to exhibit problems with planning and organizing behavior. *Brain Maturity Extends Beyond Teen Years*, NPR News, Oct. 10, 2011, <http://www.npr.org/templates/story/story.php?storyId=141164708>. Such trauma affects their sense of agency and ability to plan for the future. *See* Kathleen J. Moroz, Vermont Agency of Human Services, Dep’t of Health, *The Effects of Psychological Trauma on Children and Adolescents* 4 (2005), *available at* http://mentalhealth.vermont.gov/sites/dmh/files/report/cafu/DMH-CAFU_Psychological_Trauma_Moroz.pdf (“Children who experience severe early

trauma often develop a foreshortened sense of the future” and “come to expect that life will be dangerous, that they may not survive, and as a result . . . give up hope and expectations for themselves that reach into the future.”).

Researchers assessing the impact of trauma on asylum-seeking populations have found they are especially susceptible to developing psychological conditions such as post-traumatic stress disorder that directly impede their ability to timely file for asylum. Refugee children, in particular, are at “significant risk of developing psychological disturbances” and demonstrate a higher incidence of “emotional and behavioral disorders.” M. Fazel & A. Stein, *The mental health of refugee children*, 87 *Archives of Disease in Childhood* 366, 367, 370 (2002). Indeed, many child trauma survivors distance themselves psychologically from the trauma through behaviors like numbing and avoidance, which bears directly upon their ability to file their asylum applications – a task that often forces them to confront the trauma and violence they have fled. *See Perry, How States Become Traits*, at 28.

The majority of asylum-seeking minors in the United States hail from El Salvador, Guatemala, Honduras, and Mexico, where they almost universally experience disruption and violence at very young ages. *See* Ctr. for Gender & Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices, and Challenges* (2015), available at http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_FullBook_English.pdf, at 7 (describing how in these countries, “childhood has become synonymous with witnessing or suffering violence”). Violence, both inside and outside the home, permeates all aspects of life in Central America and is one of the primary forces driving children and youth of the

region. Because of pervasive violence and a dearth of economic opportunity, family units have broken apart, leaving minors unprotected from gangs and criminal units. Comm. on Migration to the United States, Conf. of Catholic Bishops, Mission to Central America: The Flight of Unaccompanied Children to the United States 6 (2013), *available at* <http://www.usccb.org/about/migration-policy/fact-finding-mission-reports/upload/Mission-To-Central-America-FINAL-2.pdf>. Those minors who do manage to flee the violence are then exposed to mistreatment by actors along the migration journey to the United States. *Id.* at 5. These past traumas undoubtedly affect their psychological development and ability to apply for asylum.

In light of the reduced decision-making capacity of youth aged 18 to 20, and the particularly deleterious effect of persecution, trauma, and violence on psychological development, the Board should hold that asylum-seeking youth under age 21 are under a legal disability categorically excusing them from the one-year filing deadline.

II. If a youth files before she turns 21, she has per se filed within a “reasonable period,” and if she files once she turns 21, the Board should conduct a holistic determination of her individualized circumstances to determine whether she has filed within a “reasonable period.”

Once the “extraordinary circumstance” of a legal disability has ceased to exist, the applicant must file within a “reasonable period” of the lifting of the disability. *See* 8 C.F.R. § 1208.4. This determination “is to be determined on the basis of *all the factual circumstances* of the case.” *Husyev v. Mukasey*, 527 F.3d 1172, 1182 (9th Cir. 2008).

If the Board holds that all youth under age 21 are minors, and therefore are under a legal disability constituting extraordinary circumstances, it should conclude that a youth who files her asylum application at any point *before* turning 21 has per se filed within a “reasonable period,” because she applied for asylum while her legal disability was still in

effect. If the applicant files the application at some point *after* turning 21, the Board should hold that the adjudicator must engage in a rigorous and holistic analysis of her individualized circumstances to determine whether she has filed within a “reasonable period.” Because young applicants are likely to encounter a host of obstacles in filing their asylum applications, the Board should refrain from deeming a certain period of time as presumptively unreasonable.⁷

A. If a youth files her asylum application at any point before she turns 21, she has per se filed within a “reasonable period,” because she is still under a legal disability.

First, it is well established that an individual who applies for asylum while still under a legal disability has per se filed within a reasonable period. The regulations explain that extraordinary circumstances exempt an individual from the one-year filing deadline if the applicant files “within a reasonable period given those circumstances,” and lists “legal disability” as one such circumstance. 8 C.F.R. § 1208.4(a)(5). Agency guidance further explains that if a minor applicant “applies for asylum while still a minor (while the legal disability is in effect), the applicant should be found to have filed within a reasonable period of time.” USCIS Guidelines for Children’s Asylum Claims at 46.

Such a rule is commonsense. A child who enters the country at age six, and applies for asylum at age 20, continues to be under a legal disability at the time of filing because she has not yet turned 21. She need not additionally demonstrate that she has

⁷ Although the Board is bound by the regulation requiring applicants to file within a “reasonable period given th[e] extraordinary circumstances,” *see* 8 C.F.R. § 1208.4(a)(5), this portion of the regulation is likely illegal, because it is beyond the rulemaking power delegated to the agency by the relevant statutory provision. *Cf., e.g., Schneider v. Chertoff*, 450 F.3d 944, 953-54 (9th Cir. 2006) (disapproving of as *ultra vires* a DHS regulation imposing time limits not contained in the statute).

filed within a “reasonable period” of the lifting of her extraordinary circumstances, because the extraordinary circumstances continue to exist at the time of filing. *Cf., e.g., Husyev*, 528 F.3d at 1182 (explaining that the period of time to be analyzed commences at the point at which “extraordinary circumstances” are lifted); *Viridiana v. Holder*, 646 F.3d 1230, 1238 (9th Cir. 2011) (remanding for the Board to consider whether applicant had filed “within a reasonable time *after*” encountering the extraordinary circumstance of immigration consultant fraud (emphasis added)).

Therefore, if the Board agrees that all youth under 21 are under a legal disability for purpose of the extraordinary circumstances exception to the one-year deadline, it should hold that a youth who has filed before turning 21 has necessarily filed within a reasonable period of time considering the circumstances.⁸

B. Rather than setting a fixed period of time as “presumptively unreasonable” after the expiration of the legal disability, the Board should consider a broad set of factors and undertake a rigorous analysis of each applicant’s individualized circumstances to determine whether the applicant filed within a reasonable period.

Neither statute nor regulation defines what constitutes a “reasonable period” of time to file an asylum application upon the lifting of a legal disability. However, cases issued by the Board, as well as by various federal circuit courts, make clear that the determination of what constitutes a “reasonable period” must be made based on individualized circumstances. *See, e.g., Matter of T-M-H- & S-W-C-*, 25 I. & N. Dec. 193, 196 (BIA 2010) (“[T]he Immigration Judge should make additional findings of fact with respect to the particular circumstances involved in the delay of the respondents’

⁸ If the Board instead concludes that 18 is the age at which an applicant ceases to be under a legal disability, it should also hold that a child who files any time before she turns 18 has per se established that she has filed within a reasonable period.

applications” rather than applying a bright-line rule); *Husyev*, 528 F.3d at 1183 (“[T]he term ‘reasonable period’ . . . suggests an amount of time that is to be determined on the basis of all the factual circumstances of the case.”).

In *Matter of T-M-H- & S-W-C-*, the Board interpreted the “reasonable period” standard in a case involving Chinese respondents who claimed childbirth as a “changed circumstance” and who filed for asylum within a year after the birth of the child. Although the Board did not explicitly so hold, it cited to text in the preamble of the relevant regulation suggesting that a delay of over six months could be presumptively *unreasonable*. See *Matter of T-M-H-*, 25 I. & N. Dec. at 193 (citing 65 Fed. Reg. 76, 121 (Dec. 6, 2000)). *Amici* strongly urge the Board to refrain from setting a certain time limit as per se unreasonable in this context. Given the cognitive and developmental challenges children and youth experience, as well as the double disruption they face in transitioning both to adulthood and to a new culture, setting such a bright-line rule is likely to work unjust outcomes for young asylum applicants.⁹

Instead, the Board should adopt a rule requiring a rigorous and holistic analysis of each applicant’s case, keeping in mind that a broad set of factors may affect a youth’s ability to file her asylum application within a reasonable period. See *Wakkary v. Holder*, 558 F.3d 1049, 1058-59 (9th Cir. 2009) (“[T]he reasonableness determination must be

⁹ Importantly, even in *Matter of T-M-H- & S-W-C-*, the Board acknowledged that reasonableness could vary depending on the complexity of the individual circumstances and could reasonably warrant a delay of a year or more. See 25 I. & N. Dec. at 195 (“We draw no conclusion with respect to whether the respondents’ situation is akin to that of aliens whose immigration status is simply terminated or expires, such that a delay of less than 6 months may be reasonable under the circumstances, or whether it is one of those ‘rare cases’ involving changed or extraordinary circumstances in which a delay of 1 year or more may be justified.”).

made ‘under the circumstances,’ on a case-by-case basis.”). Such factors may include, but are not limited to, the following:¹⁰

- *Applicant’s history of trauma.* In considering whether an applicant has filed within a reasonable period, the Board should consider whether the applicant has suffered past trauma that could affect her ability to file once her legal disability has expired. As described above, many asylum applicants suffer traumas that directly bear upon their ability to file an asylum application. *See supra* Section I.C (discussing high incidence of trauma-related psychological conditions among child asylum seekers). An applicant who has suffered trauma may, for example, exhibit symptoms of avoidance and dissociation to shield herself from her painful history, and therefore may file her asylum application belatedly. *See, e.g.,* Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 J. Contemp. L. & Pol. 283, 312 n.184 (2013) (citing expert psychologist’s statement that “PTSD frequently causes people to avoid anything that reminds them of their trauma and renders them unable to participate in activities unrelated to immediate survival, such as the process of seeking asylum.”). Whether or not an applicant has been formally diagnosed with post-traumatic stress disorder or a similar condition (particularly since such diagnoses hinge on access to mental health services that many

¹⁰ The factors *amici* outline here are salient regardless whether the Board sets the age cut-off at 18 or 21. If the Board defines “minor” as an individual under the age of 18, rather than 21, amici urge it to define “reasonable period” particularly generously, in light of the well-documented developmental challenges youth between the ages of 18 and 20 – especially those who have survived trauma – face. *See supra* Section I.

applicants lack), the Board should take into account past trauma in considering whether she filed within a reasonable period.

- *Other mental health issues or developmental disabilities.* In addition to post-traumatic stress disorder, many applicants, and particularly those who have suffered persecution, displacement, and violence, may suffer from developmental disabilities or other mental health issues that can adversely affect their ability to timely file for asylum even after they turn 21. Childhood trauma, including abuse and neglect, can “profoundly affect” brain development, leading to a host of “cognitive, physical, emotional, social, health, and developmental problems.” Child Welfare Info. Gateway, *Supporting Brain Development in Traumatized Children and Youth*, Childwelfare.gov, Aug. 2011, <https://www.childwelfare.gov/pubPDFs/braindevtrauma.pdf>. These problems, in turn, could make applying for asylum a particularly difficult task. The Board should take into account potential developmental disabilities and mental health issues in considering whether an asylum application was filed within a reasonable time after the applicant turned 21.
- *Family circumstances.* Asylum seekers who lack a caring and knowledgeable parent or family member face particular challenges in navigating the application process that should be taken into account in determining whether the applicant has filed within a “reasonable period” of the lifting of her legal disability. As agency guidance makes clear, “minors, whether accompanied or not, are generally dependent on adults for their care and cannot be expected to navigate adjudicatory systems in the same manner as adults.” *See USCIS Guidelines for Children’s*

Asylum Claims at 46. Applicants who lack stable home lives, or who suffer from strained or abusive relationships within the home, may struggle in the face of disruption, violence, and homelessness. Emmy Werner, *Risk, Resilience, and Recovery: Perspectives from the Kauai Longitudinal Study* (1993) 5 Dev. & Psychopathology 503, 513 (describing poverty and familial discord as “risk factors” impeding a child’s ability to develop). Although the presence of an adult does not necessarily mean the child has support in navigating the complex U.S. asylum-seeking process, the *lack* of such a figure should be taken into account in considering the timeliness of the applicant’s request for asylum.

- *Socioeconomic factors.* The Board should also broadly consider socioeconomic factors that may contribute to an applicant’s delay in filing her asylum application once she turns 21. Oftentimes, prospective asylum applicants are forced to work rather than continue their education. This reality may be prompted by homelessness, their adult caretaker’s inability to make ends meet economically, particularly the need to pay debts or fees, or the youth’s desire to care for family still living in her country of origin. *See, e.g.,* Meribah Knight, *Far from Family, Alone, Homeless and Still Just 18*, N.Y. Times (Feb. 25, 2012) <http://www.nytimes.com/2012/02/26/us/of-young-immigrants-who-arrive-alone-many-end-up-homeless-in-chicago.html> (describing how, “[i]n some cases [involving unaccompanied children who turn 18], homeless shelters become their only refuge as they apply for asylum or special visas”). The less economically stable the applicant’s home, the more difficulty she will have in seeking help to file an asylum application or attempting to pursue an application.

- *Educational status.* Asylum-seeking youth have to negotiate a vast number of new challenges in the country where they seek protection, such as learning a new language and understanding the educational and cultural environments of a new school. R.A. Tyrer & M. Fazel, *School and community-based interventions for refugee and asylum seeking children: a systematic review*, PLOS ONE, 9, 2, e.89359 (2014). In the United States, undocumented children have the right to public education through high school, yet this is not a commonly known fact among immigrant communities. Those children who do exercise this right can benefit from the supportive community that may be present at school, which can link youth to competent and affordable legal counsel. See Denisa R. Superville, *Unaccompanied Minors Face New Milestone: Graduation*, EdWeek, <http://www.edweek.org/ew/articles/2016/06/08/unaccompanied-minors-face-new-milestone-graduation.html> (June 7, 2016) (school administrator explaining that, for undocumented youth, “school, for all intents and purposes, has become their home because of so much uncertainty in their lives”). Youth who are not in school, by contrast, may be all the *less* likely to have access to social services and resources that can connect them to legal aid or affordable counsel.¹¹ The Board should therefore consider a youth’s educational status, and the existence of school-based support services, in considering whether the period of time between

¹¹ At the same time, the benefit of school attendance presumes that the schools have the means and interest to reach out to this vulnerable population, and that these youth will not become further marginalized by bullying or isolation in school. Such negative outcomes could exacerbate preexisting trauma and render youth more insular and less connected to social services and resources.

the lifting of the applicant's legal disability and the filing of the application is reasonable.

- *English language knowledge.* The Board should also consider whether the applicant can speak and comprehend English, particularly if she is pursuing an asylum application pro se. The asylum application form is a complex document that spans over nine pages and is available only in English. *See* I-589, Application for Asylum and for Withholding of Removal, USCIS, <https://www.uscis.gov/i-589> (last accessed Aug. 16, 2016); *see also* Rachel Roubein, *Here's How Hard It Is for Unaccompanied Minors to Get Asylum*, The Atlantic, July 15, 2014, <http://www.theatlantic.com/politics/archive/2014/07/heres-how-hard-it-is-for-unaccompanied-minors-to-get-asylum/456267/>.

Applicants who do not speak English – as many members of this population may not – may need additional time to secure help in order to complete and file their asylum applications, and the Board should take this need into consideration in determining whether they have filed within a reasonable period of time.

- *Physical health.* In many states, asylum-seeking youth are not eligible for health benefits, yet may fall physically ill. Without health benefits and the ability to pay for medical care, youth must wait out the illness and rely on whatever over-the-counter medicine they can afford. *See* Nat'l Immig. Law Ctr., *Unaccompanied Children and Health Care*, Aug. 18, 2014, at 2, *available at* <https://www.nilc.org/wp-content/uploads/2015/11/unaccompanied-children-health-care-2014-08-18.pdf> (“Health care services available to unaccompanied children vary from state to state and locality to locality. As a group, children are

not eligible to access a particular health care coverage program.”). A longer-lasting illness will affect the youth’s school or employment attendance, which can in turn produce anxiety for the youth. Similarly, emergency room visits without insurance are costly and will add to the socioeconomic anxiety most asylum-seeking youth face. For those youth who have undertaken dangerous employment such as construction, these emergency room visits are common. The Board should take this factor into account in considering whether the applicant filed within a reasonable period of the lifting of her legal disability.

- *Competent legal counsel or representation.* Many asylum applicants lack competent legal representation. In some cases, the lack of legal representation correlates to a broader lack of community resources to serve immigrant youth, particularly in rural or otherwise isolated areas. Often, this leaves applicants to fend for themselves and rely on incomplete information, such as a television report that mentions the one-year deadline but fails to explain the legal requirements for asylum in detail. Those minors who do seek legal counsel may fall in the hands of incompetent or fraudulent legal practitioners who take the limited resources these youth have, leaving them with no resources to continue their search for competent counsel. *See, e.g., Viridiana v. Holder*, 646 F.3d 1230, 1238 (9th Cir. 2011) (discussing how fraudulent representation by a non-attorney legal representative could excuse failure to timely file asylum application). Those applicants who do make it to immigration court on a pro se basis have no one to clarify any confusing instructions by the immigration judge or poor interpretation by the court interpreter. Therefore, the Board should construe what constitutes a

“reasonable period” especially generously for asylum applicants who proceed pro se.

- *Detention status.* As the Board recognized in *Matter of Y-C-*, 23 I. & N. Dec. 286, 288 (BIA 2002), whether or not an applicant is detained is a factor the Board should take into consideration in determining whether she has filed within a “reasonable period” upon lifting of the disability.¹² *See id.* Applicants who are detained have access to far fewer legal resources and have a significantly more difficult time gathering supporting evidence than applicants who are not.
- *Suggestibility of children and youth.* The Board should also take into account the tendency of young people to over-rely on the representations of authority figures, including attorneys, judges, and other adults. Studies demonstrate that children and youth, “when faced with legal decisions . . . are more likely to accede to the wishes of, and follow the advice of authorities.” Steinberg Decl. ¶ 22. In the very case at bar, the respondent’s failure to timely file was due to her reliance on a

¹² *Amici* urge the Board to explicitly disavow its age-related reasoning in *Matter of Y-C-*, which declined to hold that an unaccompanied minor, who was still just 15 years old when he filed his asylum application, had established an extraordinary circumstance due to age alone (though the Board did conclude that the minor’s detention status along with his age constituted an extraordinary circumstance excusing the untimely filing). Though this case was largely superseded by INA § 208(a)(2)(E), which categorically exempts individuals deemed unaccompanied minors at time of arrival from the one-year deadline, it could continue to thwart vulnerable children from seeking the asylum relief for which they are eligible. *See* INA § 208(a)(2)(E); Penn State Law Ctr. for Immig. Rts., et al., *The One-Year Asylum Deadline and the BIA: No Protection, No Process*, Oct. 2010, at 8 (analyzing and criticizing the Board’s approach to the one-year deadline as “inflexible and unnecessarily technical”); Jacqueline Bhabha and Susan Schmidt, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.*, John D. and Catherine T. MacArthur Foundation, June 2006, available at http://www.childmigration.net/files/SAA_UK.pdf, at 29-47 (describing the plight of minors who are seeking asylum).

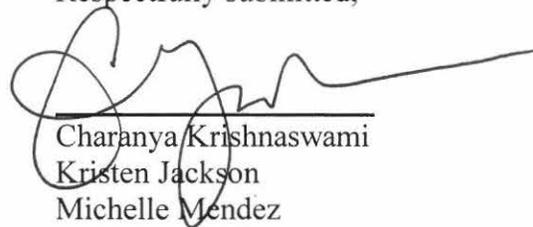
lawyer's erroneous assurances that the one-year deadline would not impact her until she turned 21. In determining whether an applicant's failure to timely file was reasonable, the Board should consider advice, representations, or statements made to the applicant given the particular suggestibility of young people.

CONCLUSION

For the foregoing reasons, the Board should conclude that all applicants under age 21 are under a legal disability constituting extraordinary circumstances that exempts them from the one-year filing deadline. If an applicant files any time before she turns 21, she continues to operate under a legal disability and has therefore per se filed within a reasonable period of time. If the applicant turns 21 before she files for asylum, the Board should consider a broad and holistic set of factors in determining whether she has filed within a "reasonable period" of the lifting of the legal disability, given the unique challenges young people face in navigating the complex asylum process and life in a new country.

Dated: September 1, 2016

Respectfully submitted,



Charanya Krishnaswami
Kristen Jackson
Michelle Mendez

Counsel for *amici curiae*

PROOF OF SERVICE

I, Charanya Krishnaswami, certify that I mailed a copy of the foregoing

PROPOSED BRIEF OF AMICI CURIAE PUBLIC COUNSEL, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., KIDS IN NEED OF DEFENSE, YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, CENTER FOR GENDER AND REFUGEE STUDIES, IMMIGRANT LEGAL RESOURCE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, BOSTON UNIVERSITY IMMIGRANTS' RIGHTS CLINIC, JUSTICE FOR OUR NEIGHBORS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEBREW IMMIGRANT AID SOCIETY OF PENNSYLVANIA, FIRST FOCUS, SAFE PASSAGE PROJECT, MASSACHUSETTS LAW REFORM INSTITUTE, AND IMMIGRATION LAW PROFESSORS

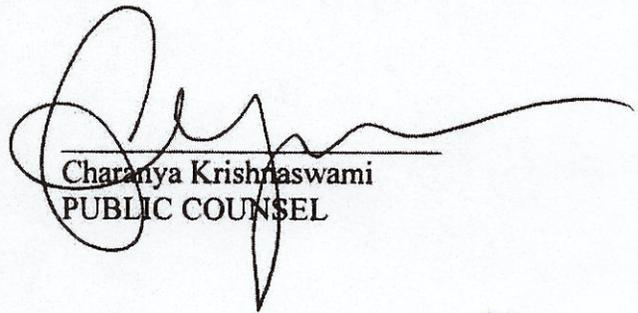
to the Department of Homeland Security and counsel for respondent at the following addresses:

Office of the Chief Counsel
Immigration and Customs Enforcement
Department of Homeland Security
26 Federal Plaza, Room 1130
New York, NY 10278

David Rodkin, Esq.
401 Broadway, Ste. 705
New York, NY 10013

via first-class mail.

Date: September 1, 2016



Charanya Krishnaswami
PUBLIC COUNSEL

RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2016 SEP -1 PM 4: 08
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK