Note: Banishing Children: The Legal (In) Capacity of Unaccompanied Alien Children to Falsely Claim U.S. Citizenship

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NOTE: BANISHING CHILDREN: THE LEGAL (IN)CAPACITY OF UNACCOMPANIED ALIEN CHILDREN TO FALSELY CLAIM U.S. CITIZENSHIP

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I. INTRODUCTION

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”¹

Lady Liberty’s proclamation has, for years, signaled the United States’ welcoming attitude towards immigrant populations. This welcoming decree, however, stands in sharp contrast with the harsh realities faced by unaccompanied alien children in the U.S. immigration system.

Unaccompanied alien children face severe and permanent penalties in the U.S. immigration system for falsely claiming citizenship.² For such minors, the golden door to legal immigration into the United States may be forever closed for mistakes made while U.S. law considered them children.

This note addresses the legal capacity of unaccompanied alien children to make a false claim to U.S. citizenship under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (INA).³

² See infra Part III (discussing permanent inadmissibility stemming from falsely claiming citizenship).
First, this note will explain important INA definitions and concepts critical to understanding the full weight of the false claims provision. Second, it will outline the history of the INA and some notable amendments. Third, it will address Minnesota’s recent encounter with the false claims provision by outlining a case pending at the Eighth Circuit Court of Appeals. Fourth, it will explore various provisions of the INA and agency regulations that support a categorical rule excluding unaccompanied alien children from section 212(a)(6)(C)(ii). Fifth, it will rely on the United States’ long tradition of distinguishing between minor and adult offenders in the criminal context to justify such a distinction in immigration law. Sixth, it will present policy reasons for concluding unaccompanied alien children lack legal capacity to falsely claim U.S. citizenship. Finally, it will propose potential options for shielding unaccompanied alien children from the severe consequences of the false claims provision.

II. KEY TERMINOLOGY IN THE IMMIGRATION AND NATIONALITY ACT

This section explains important statutory definitions and concepts helpful to understanding the INA and false claims provision.

All noncitizens are considered “aliens” under the INA.

exempting unaccompanied alien children from section 212(a)(6)(C)(ii) apply to all minor aliens. This note, however, will focus exclusively on the need to exclude unaccompanied alien children as immigration law takes their unaccompanied status into account in a variety of other provisions and regulations. See infra Part V.

4. See infra Part II.
5. See infra Part III.
6. See infra Part IV.
7. See infra Part V.A.
8. See infra Part V.B.
9. See infra Part VI.
10. See infra Part VII.
11. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006). It is important to note that, under the INA, there is a rare group of individuals who are considered neither “citizens” nor “aliens.” People falling into this group are considered “nationals” of the United States. See INA § 101(a)(22), 8 U.S.C. § 1101(a)(22). Although all “citizens” are considered “nationals,” not all “nationals” are considered “citizens.” Id. However, instances where an individual can properly be designated a “national” and not a “citizen” are very rare. See Certificates of Non Citizen Nationality, U.S. Department of State, http://travel.state.gov/law/citizenship/citizenship_781.html (last visited Mar. 13, 2011). As a result, the distinction between “citizen” and “noncitizen national” is immaterial for purposes of this note.
Within the category of “alien,” “immigrant”\(^{12}\) refers to all aliens except those falling within specified categories of “nonimmigrant aliens.”\(^{13}\) Nonimmigrant aliens, for example, include ambassadors, diplomats, temporary students, and foreign government officials.\(^{14}\) The immigrant-nonimmigrant alien distinction is important in the context of discretionary waivers discussed in Part III.\(^{15}\)

The INA defines “child” as an unmarried individual under the age of twenty-one for the purposes of family-based petitions.\(^{16}\) The INA primarily defines “child” in reference to the “parent.”\(^{17}\) It should be noted that the statute and the implementing agencies

\(^{13}\) Id.
\(^{14}\) See id. § (a)(15)(A)–(V) (outlining the categories of nonimmigrant aliens). A common factor among the nonimmigrant alien categories is the requirement that the alien have no intention to abandon the foreign residence at the time of entry. See id.
\(^{15}\) See infra Part III and notes 61–62.

use somewhat inconsistent terminology to refer to individuals under eighteen years old. The term “juvenile” is defined as someone under age eighteen. 18 “Minor,” however, is not defined in the INA. Nonetheless, “juvenile” and “minor” appear to be used interchangeably. 19 “Unaccompanied alien child” is defined elsewhere in the U.S. Code as a child: under the age of eighteen; without legal immigration status; and who lacks a parent or guardian. 20 To add to the confusion, a “special immigrant juvenile” (SIJ) is an alien under twenty-one years old who has been deemed a dependent of the state by a juvenile court. 21

This note will use the term “minor” when referencing all aliens under age eighteen and “unaccompanied alien children” for individuals meeting the definition outlined above. The term “juvenile” will be used to reference the same group of aliens but in the juvenile and criminal court settings.

19. Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1158 (9th Cir. 2004). The agency also attempts to distinguish between minors under age fourteen and those age fourteen to seventeen. See id. (rejecting the Board of Immigration’s (BIA) reliance on the provision requiring notice to the authorized adult only in the case of minors under the age of fourteen); 8 C.F.R. § 103.5a(c)(2)(ii) (“[I]n the case of a minor under 14 years of age, service shall be made upon the person with whom the . . . minor resides . . . .”).
At the heart of the INA are provisions governing inadmissibility and deportability. Inadmissibility and deportability grounds are separated by whether a noncitizen has been admitted to the United States. “Admission” refers to whether an alien has lawfully entered the country after inspection by an immigration official. Aliens seeking admission into the country are subject to the grounds of inadmissibility. Aliens may be inadmissible for actions such as crimes, fraud, terrorist activity, and falsely claiming to be U.S. citizens.

Most grounds of inadmissibility have corresponding grounds of deportability that apply to noncitizens who have been legally admitted into the United States. Admitted aliens may be deportable for violating their immigration status or for being inadmissible at the time of entry. Deportable aliens have historically been afforded more constitutional protections than inadmissible aliens.

23. Compare INA § 212(a), 8 U.S.C. § 1182(a) (inadmissible aliens who are ineligible to be admitted to the United States) (emphasis added), with INA § 237(a), 8 U.S.C. § 1227(a) (categories of deportable aliens who have been admitted to the United States) (emphasis added).
24. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). Prior to 1996, the defining act was physical entry into the United States. See Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 508 (5th ed. 2003). When applying the admission framework to noncitizens in the country without authorization, a legal fiction arises: despite being physically present, they are considered to be standing, for legal purposes, at the border seeking admission. See id. (explaining how after the 1996 reforms undocumented aliens within the U.S. border no longer have an advantage over aliens seeking admission at the border).
25. See INA § 212, 8 U.S.C. § 1182. Aliens bear the burden of establishing that they are “clearly and beyond doubt entitled to be admitted and [that they are] not inadmissible.” Matovski v. Gonzales, 492 F.3d 722, 738 (6th Cir. 2007) (quoting 8 C.F.R. § 1240.8(b)).
27. INA § 237, 8 U.S.C. § 1227. The INA includes language of deportability and removability. Both terms reference the expulsion of aliens from the country. See id. (governing grounds of deportability); INA § 240, 8 U.S.C. § 1229a (governing removal proceedings). This note will follow the statutory language and use “deportability” in reference to grounds of deportability and “removability” in the context of removal proceedings.
29. Compare United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”), with Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953) (“The Bill of Rights is a futile authority for the alien
After admission, noncitizens may apply for adjustment of status to become legal permanent residents (LPR). A key component of the adjustment process is that the alien must be "eligible to receive an immigrant visa and . . . admissible." If an applicant is permanently inadmissible, as in the case of the false claims provision, adjustment of status is permanently barred. Thus, in the Minnesota case discussed below, the respondent’s permanent inadmissibility due to the false claim of citizenship permanently bars adjustment of status, despite the availability of an immediate visa through a U.S. citizen spouse.

The INA contains two mechanisms for expelling aliens from the country. First, aliens may be placed in removal proceedings. Removal proceedings take place before an immigration judge who may grant relief or order the alien removed from the United States. Inadmissible and deportable aliens may be placed in removal proceedings. Second, aliens may be subjected to expedited removal. Expedited removal, unlike removal proceedings, applies only to arriving aliens who have not been admitted. After determining the alien is inadmissible under section 212(a)(6)(C)—the false claims provision—the officer "shall order the alien [expeditiously] removed from the United States without further hearing or review . . . ."

seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."
III. HISTORICAL UNDERPINNINGS OF THE FALSE CLAIMS PROVISION

A. Immigration and Nationality Act of 1952

The Immigration and Nationality Act (INA) of 1952, also known as the McCarran-Walter Act,40 was the first major codification of comprehensive immigration laws for the United States.41 The INA established the provisions governing, among many topics, inadmissibility and deportability of aliens.42 The INA is reflective in its structure, with all of the grounds of inadmissibility appearing in the grounds of deportability.

The original INA contained the precursor to the false claims provision.44 This provision makes aliens who have misrepresented themselves as U.S. citizens for the purpose of obtaining an immigration benefit inadmissible.45 Under this provision, the false statement has to be made with the goal of obtaining an immigration-related benefit such as a visa, passport, or other immigration document.46 Additionally, the misrepresentation has to be made to a government official for the alien to be considered inadmissible under the INA.47 Thus, aliens claiming to be citizens on employment applications, for example, would not have made a

41. HUMEL MONTWIELER, supra note 40. While various iterations of immigration laws preceded the 1952 act, it represented the “first piece of legislation to include all aspects of immigration policy, including naturalization, in one statute.” AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 1:3 (4th ed. 2010).
42. INA § 101, 8 U.S.C. § 1101. The McCarran-Walter Act introduced the preference system for relatives and skilled workers and continued the quota system used since the 1920s. HUMEL MONTWIELER, supra note 40. The 1952 version was significant in that it was the first time all aspects of immigration policy were embodied in one statute. FRAGOMEN, JR. & BELL, supra note 41.
44. Pub. L. No. 82-414, 66 Stat. 182. The original misrepresentation provision was codified as section 212(a)(19) in the INA. See id.
46. Id. (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”).
47. See 5 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 63.07 (Matthew Bender rev. ed. 2008) (explaining a false claim to citizenship need not be made to a government official like the misrepresentation ground requires).
misrepresentation under INA section 212(a)(6)(i). 48

B. Notable Amendments to the INA

The INA has seen various amendments since its 1952 enactment. 49 The Immigration Reform and Control Act (IRCA) of 1986 warrants mention as it demonstrated Congress’ increasing concern over illegal immigration. 50 The Act included employer sanctions in an effort to curb the hiring of undocumented workers. 51 Congress’ effort to mitigate “out of control” illegal immigration paved the way for some of the most restrictive measures in the INA’s history.

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), a bill aimed at combating illegal immigration trends. 54 IIRIRA provisions are scattered

48. See In re John Doe, 2007 WL 5326372 (Admin. App. Office June 1, 2007) (reaffirming the BIA’s position that using fraudulent documents to secure employment is not a benefit under the INA); see also INS Memoranda: INS on False Claims to Citizenship, in 3 Bender’s Immigr. Bull. 425 (1998) (explaining that the misrepresentation provision requires misrepresentation for purposes of obtaining a specific benefit under the INA such as a passport, visa, or passport).


54. Pub. L. No. 104-208, 110 Stat. 3009 (1996); Austin T. Fragomen, Jr. et al., Immigration Law & Business § 1.9 (2010). In a subcommittee hearing on the shortcomings of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), a former INS General Counsel testified that the “one size fits all” approach tends to treat law-abiding immigrants the same as criminals. He also criticized the new grounds of inadmissibility which leave many otherwise eligible immigrants stranded in unlawful status. Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigr. Citizenship, Refugees, Border
throughout the INA and amend nearly every provision. IIRIRA included strict measures that expanded the grounds of inadmissibility and deportability while decreasing the availability of discretionary relief and judicial review.

Among the 1996 additions was the ground of inadmissibility for falsely claiming to be a U.S. citizen. The Act added section 212(a)(6)(C)(ii) to the INA. The provision reads, “Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . or any other Federal or State law is inadmissible.” After 1996, a false claim could be made to any private person with authority to inquire into the alien’s nationality, such as an employer.

55. See Pub. L. No. 104-208, 110 Stat. 3009–10; Shortfalls of the 1996 Legislation, supra note 54, at 27 (testifying that the IIRIRA amended almost every section of Title II of the INA).

56. FRAGOMEN, JR. ET AL., supra note 54, at § 5:12. This “failure to look at the totality of the circumstances, to exercise discretion and compassion where warranted, and to evaluate each case on the merits, reflects a failure in our system.” Shortfalls of the 1996 Legislation, supra note 54, at 30.

57. INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (2006). False claims to U.S. citizenship appear in two other contexts. First, the INA has a corresponding ground of deportability for falsely claiming to be a citizen. INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D). Second, falsely claiming to be a citizen carries a criminal penalty, with the potential of being fined and/or imprisoned. 18 U.S.C. § 911 (2006) (“Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.”). See United States v. Clark, 316 F.3d 210, 213 (3d Cir. 2003) (finding the use of a false birth certificate to obtain a state identification card constitutes a false claim in violation of the criminal provision).

58. See Pub. L. No. 104-208. The amendment containing the false claims provision, known as the Simpson Amendment, was designed to discourage legal permanent residents and undocumented aliens from claiming to be citizens. 142 CONG. REC. S4017 (1996). Senator Simpson claimed the proposed amendment would deter such behavior because the risks of claiming citizenship would be too high. Id. The amendment also sought to deter undocumented aliens from seeking work in the United States. Id.

59. INA § 212(a)(6)(c)(ii), 8 U.S.C. § 1182. Courts have found the “any purpose or benefit” requirement to include falsely claiming citizenship in a broad variety of settings. See Ferrans v. Holder, 612 F.3d 528 (6th Cir. 2010) (affirming denial of petitioner’s application for adjustment of status based on his false claim to citizenship on an Employment Eligibility Verification Form); Estevez v. Attorney Gen. of U.S., 307 F. App’x 694 (3d Cir. 2009).

60. 3C AM. JUR. 2D Aliens and Citizens § 2710 (2010). Various forms of documents may be sufficient to find that an alien has falsely claimed to be a U.S.
In enacting section 212(a)(6)(C)(ii), Congress did not create a waiver of this ground of inadmissibility for aliens. The discretionary waiver for section 212(a)(6)(C) has been applied only to the misrepresentation provision under section 212(a)(6)(C)(i). The 1996 provision effectively created a permanent statutory bar to citizenship, with a few exceptions, for aliens found inadmissible for making a false claim to citizenship.

Congress enacted a narrow exception to the inadmissibility of aliens falsely claiming citizenship in the Child Citizenship Act (CCA) of 2000. In addition to revising how children born outside the country acquire U.S. citizenship, the CCA provides protection from a finding of bad moral character, unlawful voting charges, citizen. See generally Ateka v. Ashcroft, 384 F.3d 954 (8th Cir. 2004) (denying defendant’s petition for review of the BIA’s order of removal for defendant who indicated he was a U.S. citizen on an employment eligibility form); United States v. Clark, 316 F.3d 210 (3d Cir. 2003) (concluding that defendant’s use of a counterfeit birth certificate constituted a false claim to citizenship). But cf. Falsely Claiming to Be U.S. National Does Not Bar Adjustment of Status, BIA Rules, 84 INTERPRETER RELEASES 1088 (2007) (discussing BIA case in which the BIA found no error in the immigration judge’s grant of adjustment of status based on respondent’s false claim to being a U.S. national).

61. GORDON ET AL., supra note 47. See In re Odwoa, A097-672-154, 2008 Immig. Rptr. LEXIS 6635 (concluding that no waiver is available for false claims to citizenship and applicant is barred from adjusting status); Theodros v. Gonzales, 490 F.3d 399 (5th Cir. 2007) (explaining that unlike the crime involving moral turpitude (CIMT) provision, no waiver is available for falsely claiming U.S. citizenship); Paz v. Gonzales, 140 F. App’x 752 (9th Cir. 2005) (concluding that 212(i) waiver applies only to 212(a)(6)(i) misrepresentations). While immigrants who falsely claim to be U.S. citizens are permanently barred from adjusting status, non-immigrants may seek a discretionary waiver of such a claim. INA § 212(d)(3)(A) or (B), 8 U.S.C. § 1182; 3 BENDER’S IMMIGR. BULL., supra note 48, at 425.

62. Paz, 140 F. App’x, at 752.

63. See INA § 245(h)(2)(A); 8 U.S.C. § 1255 (exempting special immigrants as defined in INA § 101(a)(27)(f) from § 212(a)(6)(C)); INA § 101(A)(15)(U); INA § 209(c) (authorizing waiver for humanitarian purposes, family unity, or if otherwise in the public interest).

64. The permanent ineligibility from falsely claiming to be a U.S. citizen per section 212(a)(6)(C)(ii) stems from never being able to adjust status to permanent residence under 8 U.S.C. § 1255. The Attorney General has the discretionary power to allow an alien to adjust to legal permanent residents (LPR) status if, among other qualifications, the alien is “eligible to receive an immigrant visa and is admissible to the United States for permanent residence.” 8 U.S.C. § 1255.


66. Id. § 101–02.

67. Id. § 201(a).

68. Id. § 201(b)(1).
and allegations of falsely claiming citizenship if certain criteria are met. First, each natural or adoptive parent of the child must be a citizen of the United States, either by birth or naturalization.

Second, the alien must have permanently resided in the United States prior to attaining age sixteen. Finally, the alien must have reasonably believed he or she was a U.S. citizen when committing the prohibited act, such as voting or claiming to be a U.S. citizen.

The Homeland Security Act of 2002 officially abolished the Immigration and Naturalization Service (INS) and transferred most of its functions to the Department of Homeland Security (DHS). Responsibility for care of unaccompanied alien children in detention, however, transferred to the Office of Refugee Resettlement (ORR). ORR is charged with ensuring that the interests of minors are considered in policies relating to the care and detention of unaccompanied alien children.

C. Notable Proposed Amendments to the INA

In 2005, the Senate passed the Unaccompanied Alien Child Protection Act (UACPA). The Act focused on some of the issues surrounding the detention and care of unaccompanied alien children. The Act included provisions on custody and release of unaccompanied alien children, access to guardians ad litem, and measures strengthening protections of unaccompanied alien children. The UACPA asserts the government has a "fundamental responsibility to protect unaccompanied children in its custody."
Most recently, Congress addressed the proposed Development, Relief, and Education for Alien Minors Act of 2010 (DREAM Act). The DREAM Act would have afforded a path to permanent residence in the United States for certain aliens who entered the country as children and fulfilled certain educational requirements. While the measure passed the House, it failed to garner enough votes to invoke cloture to reach a vote in the Senate. Nonetheless, future passage of the DREAM Act could have a significant impact on efforts to address the permanent ineligibility of unaccompanied alien children claiming false citizenship.

The DREAM Act contained a provision giving the Secretary of Homeland Security discretionary authority to cancel removal of certain aliens and grant conditional nonimmigrant status. In order to be eligible for cancellation in this context, the alien must have met various statutory requirements, including an educational component. The DREAM Act included one provision of particular importance to this discussion: a waiver for section 212(a)(6)—the umbrella provision which contains the ground of inadmissibility for falsely claiming U.S. citizenship. This waiver made it possible for minors who have falsely claimed U.S. citizenship to at least apply for the benefits afforded under the Act rather than face a permanent bar to U.S. immigration benefits.

80. See id. § 6(a).
82. Id. The opportunity to adjust to conditional nonimmigrant status appears to be available only in the context of removal proceedings. See id. § 6 (allowing cancellation of removal and granting conditional nonimmigrant status). Thus, to gain such status, qualified aliens would have to enter removal proceedings to be able to apply.
83. Id. § 6(a)(1)(D).
84. Id. § 6(a)(2) (allowing the secretary of Homeland Security to waive misrepresentations under § 212(a)(6) of the Immigration and Nationality Act (8 U.S.C. § 1182(a)(2006))).
The initial period of conditional nonimmigrant status was five years\(^85\) and, provided certain additional requirements were met, might have been extended for a second period of five years.\(^86\) Upon completing a ten-year period, conditional nonimmigrants may file an application to adjust their status to that of LPR.\(^87\) Cancellation of removal combined with granting conditional nonimmigrant status could have been one of the few, if not only, routes around the permanent bar to permanent legal status for some inadmissible aliens.

Despite the DREAM Act’s failure in the Senate, it once again demonstrates congressional recognition that, in certain instances, the current immigration system may produce harsh results that necessitate a legislative response. Congress is unlikely to take up the DREAM Act in the next session;\(^88\) however, enacting the DREAM Act or a similar bill in the future could significantly impact the status quo for certain unaccompanied alien children deemed inadmissible under section 212(a)(6)(C)(ii).

This legislative trend indicates increasing concern for unaccompanied alien children in terms of detention and custody. While this is a step in the right direction, legislative actions have thus far fallen short of adequately protecting unaccompanied alien children who face permanent and serious consequences for mistakes made before reaching adulthood.

**IV. MINNESOTA TACKLES FALSE CLAIMS BY AN UNACCOMPANIED ALIEN CHILD**

The Eighth Circuit recently heard oral arguments in a Minnesota immigration case involving a false claim to citizenship made by an unaccompanied alien child.\(^89\)

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85. Id. § 7(a).
86. Id. § 7(d). While granting the initial period of conditional nonimmigrant status is discretionary, the second period appears to be mandatory, provided the statutory requirements are met. Compare id. § 6(a)(1) (“Secretary of Homeland Security may cancel removal . . . .”), with id. § 7(d)(1) (“Secretary of Homeland security shall extend conditional nonimmigrant status . . . .” (emphasis added)).
87. Id. § 8(c).
In 1998, the sixteen-year old respondent attempted to enter the country from Mexico by presenting her sister’s birth certificate to immigration officials at the airport. The respondent admitted her real identity only after being presented with evidence demonstrating she was not the true owner of the birth certificate.

A decade later, despite qualifying for an immediate relative visa through her U.S. citizen spouse, she was placed in removal proceedings as statutorily ineligible for adjustment of status and, thus, removable. DHS concluded she was ineligible for adjustment of status based on her false claim to citizenship made at age sixteen.

In the 2005 removal proceedings, the immigration judge in Bloomington, Minnesota held that minors categorically lack the legal capacity to make false claims under the INA and granted the respondent’s petition for adjustment of status. The judge referred to permanently barring the respondent from the United States for actions taken while an unaccompanied alien child as the “immigration equivalent of the death penalty.”

DHS promptly appealed the immigration judge’s 2005 decision. On appeal, the Board of Immigration Appeals (BIA) rejected the judge’s interpretation in an unpublished opinion, stating simply, “We find no legal authority . . . for the Immigration Judge’s ‘bright line rule.”

Both opinions issued by the BIA in this case (In re Sandoval, No. A29 303 178, 2007 WL 3301476 (B.I.A. Sept. 28, 2007), and In re Sandoval, No. A029-303-178, 2009 Immig. Rptr. LEXIS 5568 (B.I.A. Oct. 8, 2009)) are unpublished and are not relied on as official interpretations by the BIA.

The BIA simply cited the judge’s lack of authority and did not explain its position in its two-paragraph, unpublished decision. The panel of judges at the Eighth Circuit oral argument appeared concerned about what rule the BIA was promulgating. After some confusion over what significance the BIA’s short opinion had, the court asked the government attorney, “Can you describe the BIA’s rule or holding in twenty words or less?”
ruled the respondent had falsely claimed citizenship and, thus, was statutory ineligible to apply for adjustment. The BIA affirmed the decision and dismissed the respondent’s second appeal.

The respondent appealed the BIA’s second decision and the Eighth Circuit recently heard oral arguments on the case. At oral argument, DHS asserted the respondent knew what she was doing at the time was wrong and that she was old enough to appreciate her actions. DHS further argued she had not timely retracted her false claim since she did not admit her real identity until presented with evidence of the underlying misrepresentation. The respondent asked the court to interpret the false claims provision in a manner consistent with Congress’ otherwise protective treatment of minors elsewhere in the INA by categorically excluding minors. At the very least, the respondent asked the court to remand the case to the BIA so it could issue a formal decision.

V. UNACCOMPANYED ALIEN CHILDREN LACK LEGAL CAPACITY TO FALSELY CLAIM CITIZENSHIP

Categorically excluding unaccompanied alien children from being found permanently inadmissible to the United States is consistent with the treatment of minors under other provisions of the INA. Minors are prohibited from seeking most benefits

99. Id. at *5–8.
101. Id. at 14:11-15:58.
102. Id. at 16:01-17:41. Timely retractions of false testimony or misrepresentations may overcome the permanent bar to relief for some aliens. Matter of M, 9 I & N. Dec. 118, 118 (B.I.A. 1960). An alien who “voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony” may be considered to have timely retracted the false statement. Id. at 119.
104. Id. at 10:41.
105. It should be noted that some consulates have made some exceptions for minors of various ages who have made false claims to citizenship. Wheeler, Update from Ciudad Juarez, in 12-1 Bender’s IMMIGR. BULL. 2 (2007). Minors fifteen or younger may be found by the consulate to lack the mental capacity to falsely claim citizenship. Id. For minors age sixteen or seventeen, the consulate may look at
under the INA and are protected from some of the harshest consequences. The permanent and severe sting of the false claims provision, therefore, appears contrary to this broader protective treatment of unaccompanied alien children. The following section addresses the process of statutory interpretation courts undertake when reviewing official agency decisions. For the sake of argument, this section will proceed as if the BIA had issued a formal interpretation that section 212(a)(6)(C)(ii) includes unaccompanied alien children.

A. Statutory Interpretation Warrants Exempting Unaccompanied Alien Children

When reviewing the official interpretations of the agency charged with implementing a statute, courts generally apply Chevron deference. Unofficial interpretations are given the lower Mead/Skidmore deference, in which agency decisions are only given their inherent persuasive value.

A Chevron analysis consists of two steps. The first question is whether Congress has already addressed the specific issue and if its intent is clear. If so, the intent of Congress governs.

the surrounding circumstances and the child’s mental capacity to determine if an exception will apply. Id. A categorical approach, however, is preferred since it conforms to the ideals underlying the United States’ traditional treatment of minors in the juvenile and criminal systems. See infra part VI.B.

106. See, e.g., INA § 349(a), 8 U.S.C. § 1481(a) (2006) (requiring a national to have achieved eighteen years of age before allowing many of the actions resulting in irrevocable renunciation of citizenship to take effect); INA § 351(b), 8 U.S.C. § 1483(b) (allowing six months after attaining the age of eighteen for a national to assert claim to nationality and revoke any renunciation of such under § 349(a)(3) and (5) (8 U.S.C. § 1481(a)(3) and (5)) prior to eighteenth birthday); INA § 334(b), 8 U.S.C. § 1445(b) (prohibiting application for naturalization by persons under the age of eighteen); 8 U.S.C. § 1304(e) (requiring possession of, and punishing for failure to possess, registration card for aliens over the age of eighteen only).


111. Chevron, 467 U.S. at 842.
should not evaluate the statutory provision in isolation, but rather evaluate it in the context of the statutory scheme.\textsuperscript{113} If Congress has not directly addressed the issue, or if the statute is silent, the second step is to evaluate whether the agency’s\textsuperscript{114} interpretation of the statute is permissible.\textsuperscript{115} Agency regulations created to fill gaps in the statute control unless they are “arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{116}

1. Section 212(a)(6)(C)(ii) Is Arguably Ambiguous in Light of Other INA Provisions and Agency Regulations

The false claims provision states, “Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . or any other Federal or State law is inadmissible.”\textsuperscript{117} The plain language is silent on the provision’s application to unaccompanied alien children. Congressional intent elsewhere in the INA demonstrates an overall concern for and protective treatment of minors, warranting a conclusion that the false claims provision is at least arguably ambiguous in light of the statutory scheme.\textsuperscript{118}

The next section demonstrates why an agency’s treatment of unaccompanied alien children under the false claims provision is arbitrary based on its departure from the INA’s broader protective treatment of minors.

\begin{footnotes}
\item 112 Id. at 843.
\item 114 “Agency” will be used to reference the Department of Homeland Security (DHS), the Office of the Chief Immigration Judge (OCIJ), Executive Office of Immigration Review (EOIR), the Department of Justice (DOJ), or any other government agency charged with implementing the INA or promulgating regulations to supplement the Act.
\item 115 Chevron, 467 U.S. at 843.
\item 116 Id. at 844.
\item 118 See infra Part V.A.2.b.
\end{footnotes}
2. Including Unaccompanied Alien Children Within 212(a)(6)(C)(ii)’s Reach Is Contrary to the Statutory Scheme’s Protective Nature

a. INA Provisions Support Special Treatment for Unaccompanied Alien Children

A categorical exclusion of unaccompanied alien children from the harsh consequences of section 212(a)(6)(C)(ii) finds support among other provisions of the INA. A comprehensive reading of the INA demonstrates that minors are generally prohibited from independently seeking immigration benefits and are shielded from the harshest consequences.

First, the INA authorizes the Secretary of Homeland Security to grant SIJ status on minors who have been declared dependent on a juvenile court or placed in the custody of a state agency, department, or court-appointed individual. SIJs are able to adjust status, even in spite of a false claim to citizenship, as section 212(a)(6) does not apply to the determination of an SIJ’s admissibility.

An alien cannot file a valid application for naturalization until age eighteen. The only way for a minor alien to achieve citizenship is as a derivative of a parent’s application for citizenship. Interestingly though, minor aliens cannot petition for members of their family until age twenty-one. This imbalance creates a situation where minor aliens can only be included on a parent’s application and cannot file for their parent until age twenty-one. Additionally, minor aliens are prohibited from filing an affidavit of support for a sponsored alien until turning twenty-one.

121. INA § 334, 8 U.S.C. § 1445.
122. See id.; INA § 320, 8 U.S.C. § 1431 (discussing governing requirements for children born outside the United States to acquire citizenship); INA § 322(a), 8 U.S.C. § 1433(a) (stating conditions for parents or grandparents applying for certificate of citizenship for the minor child).
124. Thronson, Thinking Small, supra note 123, at 252–53 (discussing the INA’s effective subordination of children’s status to that of their parents).
Thus, minor aliens lack the autonomy and legal capacity to seek U.S. citizenship for either themselves or their family members.

Unaccompanied alien children receive special treatment in the asylum provision governing the one-year filing deadline. Typically, an application for asylum must be filed within one year of arriving in the United States or the opportunity is lost. The statute allows for applications outside the one-year deadline due to “extraordinary circumstances” which caused the delay. Since the INA does not define “extraordinary circumstances,” DHS promulgated a non-exhaustive list of such circumstances. The regulation includes “legal disabilities” for which the applicant may be exempt from the one-year cutoff. Unaccompanied alien children, due to their legal disability of minority, fall within the exception to the one-year filing deadline as interpreted by the agency.

126. In many respects, minors are treated as subsets of their parents for immigration purposes. For example, the BIA consistently imputes the parents’ state of mind to the child. Senica v. Immigration & Naturalization Serv., 16 F.3d 1013, 1015 (9th Cir. 1994) (imputing the mother’s failure to reasonably investigate her inadmissibility to her minor son). The BIA has also imputed the parents’ abandonment of legal status to that of the minor. In re Zamora, 17 I. & N. Dec. 395, 395 (B.I.A. 1980) (imputing the mother’s intent to abandon legal permanent residence status to the child, preventing re-entry to the United States).
128. INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (requiring an alien to demonstrate by clear and convincing evidence that the application has been filed within a year of arriving in the United States).
129. INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D) (“[I]f the alien demonstrates to the satisfaction of the Attorney General . . . the existence of . . . extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).”).
130. 8 C.F.R. § 208.4(a)(5).
131. Id.
132. Advocates have called for extending the legal disability exemption to all minors, arguing “[a]ll children suffer from a legal disability because of their minority.” Lee Berger & Davina Figeroux, Protecting Unaccompanied Child Refugees from the One-Year Deadline: Minority as a Legal Disability, 16 GEO. IMMIGR. L.J. 855, 857 (2002) (urging that all children be exempted from the one year filing deadline in asylum cases). In crafting the exemption, the agency relied on the definition of “legal incapacity” in reference to someone vested with a legal right but who is prevented from exercising it due to an impediment, citing minority as an example. Id. at 858 (citing BLACK’S LAW DICTIONARY 685 (5th ed. 1979)). The definition relied on by the agency appears to include all minors, regardless of accompaniment. Id. at 859.
The INA also protects minors from certain grounds of inadmissibility or deportability that normally would apply had an adult committed the offense. Ordinarily, a crime involving moral turpitude (CIMT), which includes offenses such as theft, fraud, and lying, renders an alien either inadmissible or removable from the country.\(^{133}\) However, if the alien committed the CIMT before turning eighteen, the conviction does not make the minor inadmissible or removable.\(^ {134}\) Likewise, juvenile delinquency adjudications are not considered “convictions” for purposes of the INA.\(^ {135}\)

Recently, Congress provided further protections for unaccompanied alien children in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).\(^ {136}\) Section 235 of the TVPRA addresses increased efforts to prevent child trafficking.\(^ {137}\) Several provisions pertain to protecting unaccompanied alien children. First, immigration officials have discretion to allow an unaccompanied alien child who is deemed inadmissible at the border to withdraw his or her application for admission.\(^ {138}\) Second, officials are directed to place unaccompanied alien children in removal rather than expedited


\(^{134}\) INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I) (exempting minors who have committed a CIMT from being found inadmissible). The exception is limited to minors who have committed only one CIMT either five years before applying for a visa or when the maximum penalty possible was less than one year. Id. at § 212(a)(2)(A)(ii)(I)-(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(I)-(II).

\(^{135}\) 18 U.S.C. § 5031 (2006); see In re Devison-Charles, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000) (“We have consistently held that . . . acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.”); In re Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981) (“It is settled that an act of juvenile delinquency is not a crime in the United States and that an adjudication of delinquency is not a conviction for a crime within the meaning of our immigration laws.”); In re De La Nues, 18 I. & N. Dec. 140, 142 (B.I.A. 1981) (concluding a foreign conviction is not considered a crime for U.S. immigration laws if it “constitutes an act of juvenile delinquency under United States standards”). Additionally, congressional records do not indicate an intention to include juvenile delinquency adjudications within the purview of INA section 101(a)(48)(A)’s definition of “conviction.” Devison-Charles, 22 I. & N. Dec. at 1369.


removal proceedings. Third, the Act transfers initial jurisdiction over asylum applications filed by unaccompanied alien children to the United States Immigration Citizenship and Immigration Service (USCIS) Asylum Division. As a result, unaccompanied alien children applying for asylum, even if already in removal proceedings, will have their cases reviewed by USCIS rather than an immigration judge. Finally, the Act calls for regulations that take into account the specialized needs of unaccompanied alien children and training for all staff working with such minors.

Thus, while section 212(a)(6)(C)(ii) does not explicitly exclude minors from its reach, reading the false claims provision in reference to other sections provides support for modifying the way minors are treated under this ground of inadmissibility.

\[b\] Agency Policies and Regulations Contemplate Special Treatment of Unaccompanied Alien Children

Agency policies and official guidelines also recognize the complicated situation presented by unaccompanied alien children in detention and immigration court. Several regulations attempt to address the need for specialized treatment and modified procedures when dealing with unaccompanied alien children.

The first area in which the agency seeks to differentiate between unaccompanied alien children and adults is detention. One of the greatest challenges is how to deal with unaccompanied alien children in immigration detention. The agency identifies its “paramount concern” as the minor’s welfare and emphasizes family reunification when possible. When release is not possible, agency regulations show a preference for home or shelter-care environment, with detention being the exception. 

139. See TVPRA § 1232(a)(5)(D)(i).
141. See id.; USCIS Asylum Division Memorandum, supra note 20.
142. TVPRA § 235(d)(8), 122 Stat. at 5081.
143. Id. § 235(e), 122 Stat. at 5081.
144. Over the years, the number of unaccompanied alien children entering the country has risen dramatically. The significant increase prompted the former Immigration and Naturalization Service to codify a uniform policy for dealing with unaccompanied alien children in exclusion and deportation proceedings. Detention and Release of Juveniles, 53 Fed. Reg. 17449-01 (May 17, 1988) (codified at 8 C.F.R. § 242.24 (1992)).
145. Id. at 17450 (“[R]eunification of the juvenile with his or her family is in the best interest of all concerned.”).
146. Id. The preference for placing unaccompanied alien children in a shelter
least, the regulations suggest keeping unaccompanied alien children separate from the general adult detainee population. 147

Third, when a minor alien is the respondent in removal proceedings, agency policies suggest the immigration judge use “child sensitive procedures” in the courtroom. 148 A child-sensitive approach in the courtroom includes measures such as allowing the child to explore the courtroom before the proceedings, bring a toy, sit next to a friend or adult companion, or allowing the judge to conduct the proceedings without the judicial robe. 149 When possible, unaccompanied alien children should be assigned to a separate docket than adult immigrant detainees in removal proceedings. 150 At a minimum, dockets should be scheduled to prevent forcing unaccompanied alien children to be transported with adult detainees. 151

Fourth, minors are not considered responsible for their rights and responsibilities with respect to preparing and appearing for final hearings at Immigration Court. 152 The regulations require the

environment rather than detention mirrors the Federal Juvenile Delinquency Act’s treatment of minors in custody pending juvenile delinquency adjudications. Id. at 17449.

147. Id. at 17451. Despite the Flores settlement (see Flores v. Meese, 942 F.2d 1352, 1354–57 (9th Cir. 1991), rev’d sub nom. Reno v. Flores, 507 U.S. 292 (1993)) and agency promises for improving the conditions of detained minors, the requirements set out in Flores have largely been ignored. See Nafziger, supra note 78, at 379–85 (examining the conditions unaccompanied alien children face in detention settings). Roughly eighty percent of unaccompanied alien children in secure facilities have not committed any criminal offenses. Id. at 382. Minors in such facilities are more likely to be strip-searched, shackled, and abused. Id. at 383. Also in violation of the Flores Settlement, non-delinquent minors are often housed alongside adjudicated juvenile offenders. Id. Finally, unaccompanied alien children in such facilities are also subjected to solitary confinement. Id. These examples all violate the Flores settlement’s mandate to hold minors in the “least restrictive setting.” Id. at 384.

148. Office of the Chief Immigration Judge Memorandum, supra note 20, at 3; see Mejilla-Romero v. Holder, 614 F.3d 572 (1st Cir. 2010) (remanding case to BIA to re-evaluate case record in light of child-sensitive guidelines).

149. Office of the Chief Immigration Judge Memorandum, supra note 20, at 4–5. Other suggestions include changing tone and language choice when questioning minors in court, giving leniency to inconsistent statements by children when ascertaining credibility, and explaining the procedures before starting. Id. at 4.

150. Id. at 5.

151. Id.

152. See Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1157 (9th Cir. 2004) (interpreting the regulatory framework as contemplating “that no minor alien under age eighteen should be presumed responsible for understanding his rights and responsibilities in preparing for and appearing at final immigration hearings.”).
adult to whom the minor may be released to ensure the minor’s appearance at future hearings. Additionally, agency regulations require personal service of the hearing notice to both the minor, under age fourteen in this case, and to the adult to whom the minor is released from custody.

Finally, the Executive Office for Immigration Review (EOIR) and the Department of Justice (DOJ) have also promulgated regulations supplementing the INA. In immigration court, the immigration judge cannot accept an admission of removability from an unaccompanied and unrepresented minor in removal proceedings. Courts have relied on such regulations in their decisions, explaining that “[t]he regulatory framework . . . contemplates that no minor alien under age eighteen should be presumed responsible for understanding his rights and responsibilities in preparing for and appearing at final immigration proceedings.” As such, unaccompanied alien children are presumed unable to appear in immigration court without an adult or representative.

153. 8 C.F.R. § 236.3 (2010) (requiring the adult to whom the minor is released to ensure presence at future hearings).
154. 8 C.F.R. § 103.5a(c)(2)(ii) (2010); Flores-Chavez, 362 F.3d at 1153 (requiring service upon both the juvenile and the person to whom the regulations authorize the juvenile’s release).
155. 8 C.F.R. § 1240.10(c) (“The immigration judge shall not accept 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 . . . .”).
156. 8 C.F.R. § 1240.10(c) (2010)
157. Id. Additionally, admissions by unaccompanied alien children to border patrol during custodial interrogations have also been treated as suspect in removal proceedings. See Davila-Bardales v. Immigration & Naturalization Serv., 27 F.3d 1, at 4 (1st Cir. 1994) (criticizing the BIA’s reliance on statements made by unaccompanied alien children to Border Patrol agents when similar statements in court would have lacked trustworthiness). In Davila-Bardales, the court held that since minors lack the ability to appreciate the significance and consequences of Border Patrol interrogations, scrutiny of admissions made by minors should extend to the initial stages of the investigative process. Id. at 4. The court relied on the pre-1996 version of the regulation banning admissions of removability by minors. See id. (citing 8 C.F.R. § 242.16(b)); see also 8 C.F.R. § 1240.10 (2010) (replacing section 242.16(b)).
Some agency policies and guidelines are not mandatory instructions. Their promulgation, however, demonstrates the agencies’ acknowledgement that unaccompanied alien children may warrant different treatment than their adult counterparts. Thus, blanket treatment of all aliens under section 212(a)(6)(C)(ii) may not be appropriate, especially when unaccompanied alien children are involved.

Even if courts decline to interpret the BIA’s treatment of unaccompanied alien children under section 212(a)(6)(C)(ii) as inconsistent with the INA, the preceding arguments demonstrate ample need to legislatively resolve such discordant treatment of minors.

B. Age as a Mitigating Factor in Juvenile and Criminal Courts

1. The Advent of the Juvenile Court System

The juvenile justice system is a primary example of the United States’ recognition that the misdeeds of juveniles should be handled differently than those of adults. Juvenile courts developed as part of the progressive social movements of the late nineteenth century. Social reformers of the time believed juveniles were not responsible for their delinquent behavior. They based this belief on juveniles’ dependency on adults, underdeveloped sense of responsibility, and impaired ability to understand consequences. As a result, juvenile courts more closely resembled social welfare institutions than adult criminal courts. Reformers, through juvenile courts, hoped to rehabilitate juvenile offenders into law-abiding citizens.

158. While the Foreign Affairs Manual “provides guidance for State Department officers, the Service is not bound by it.” DEPT OF JUSTICE, INSPECTOR’S FIELD MANUAL § 17.5 (2001).
159. Ira M. Schwartz et al., Nine Lives and Then Some: Why the Juvenile Court Does Not Roll Over and Die, 33 WAKE FOREST L. REV. 533, 534 (1998) (describing the origins of the juvenile court system and the reformers’ belief that juveniles, unlike adults, could more easily be reformed).
160. Id. at 535.
161. Id.
162. Id. at 534–35.
163. Id.
The Federal Juvenile Delinquency Act (FJDA), passed in 1938, defines "juvenile delinquency" as resulting from an act committed by an individual under eighteen that would be "a crime if committed by an adult . . . ." This distinction reflects the United States’ long-standing tradition of dealing with juvenile offenders differently than adults. One of the persistent justifications for addressing juvenile crime differently is "the hope that juveniles can be rechanneled into becoming law abiding citizens." The protections afforded under the FJDA are not limited to juveniles with U.S. citizenship; the Act specifically applies to non-citizen juveniles as well. Thus, even when the juvenile in question is undocumented with parents living abroad, the government must still make reasonable efforts to notify the parents or, alternatively, the foreign consulate of the juvenile’s custody. Additionally, the FDJA requires officials to bring juveniles before a magistrate judge as soon as possible or, at the latest, within a reasonable time period.

In addition to notice and arraignment requirements, the FJDA mandates housing alleged juvenile offenders in an appropriate juvenile facility in which they will not interact with adult offenders or already adjudicated juvenile delinquents. Like DHS guidelines, the FJDA urges that juveniles be placed in a foster home or community-based facility when possible.

167. Id.
168. United States v. Doe, 862 F.2d 776, 779 (9th Cir. 1988). The court explained that the Federal Juvenile Delinquency Act (FJDA) was enacted to protect the due process rights of juveniles. Such protection, however, is not "coextensive with constitutional guarantees." Id. at 783 (Wallace, J., concurring in part).
169. Id. at 779–80. The court ultimately remanded the case for failure to notify the parents or the Mexican consulate and for an unreasonable delay in arrainging the juvenile. Id. at 781.
170. 18 U.S.C. § 5033; Doe, 862 F.2d at 780 (explaining under what circumstances a delay of thirty-six hours before arraignment would be considered reasonable under the FDJ[A].)
172. See id. The Act requires that juveniles be given adequate heat, food, water, and recreational opportunities in whatever facility they have been placed. Id.
U.S. law recognizes that minors are in a special category of the population. The juvenile system considers age as a mitigating factor in punishing offenders.\footnote{173} The recognition of minors’ inexperience, immaturity, and vulnerability is also found in the immigration system to a limited extent. However, provisions that address the situation of minors fall short of the protection necessary to adequately protect the interests of unaccompanied alien children in the U.S. immigration system.

2. Juveniles Exempted from Harshest Penalties in Criminal Courts

The U.S. Supreme Court has long “recognized that the status of minors under the law is unique...”\footnote{174} Thus, for juveniles who go through the criminal courts, rather than the juvenile system, their age and immaturity may still be limiting factors protecting them from the most severe sentences.\footnote{175} The Supreme Court has employed categorical rules in two decisions shielding juvenile offenders from the two most severe penalties available in criminal law: the death penalty and a life sentence without parole.

\textit{a. Juveniles Are Categorically Ineligible for the Death Penalty}

In \textit{Roper v. Simmons}, the Court drew the line for death penalty eligibility at age eighteen.\footnote{176} The Court explained, “[T]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”\footnote{177} The Court reasoned...
an offender should not be eligible for the most severe sanction until reaching the age at which American society recognizes adulthood.\textsuperscript{178}

The Court cited three rationales justifying its categorical line-drawing. First, youth generally lack the maturity and responsibility found in adults that may lead to “impetuous and ill-considered actions and decisions” on the part of juveniles.\textsuperscript{179} Juveniles’ lack of maturity, the Court argues, is what prompts nearly every state to prohibit minors “from voting, serving on juries, or marrying without parental consent.”\textsuperscript{180} Second, minors are more affected by negative or peer pressure than their adult counterparts.\textsuperscript{181} Finally, a juvenile’s character is not as fully formed as that of an adult.\textsuperscript{182} These reasons convinced the Court that allowing juveniles to be condemned to death violated the Eighth and Fourteenth Amendments.\textsuperscript{183}

Prior to \textit{Roper}, the Supreme Court had laid the groundwork for avoiding the “uncritical\[l\] transfer\[l\] [of legal theories] to [the] determination of a State’s duty towards children.”\textsuperscript{184} First, the Court noted that due to juveniles’ vulnerability, the State may modify its legal system when dealing with juveniles to account for the “needs [of juveniles] for ‘concern, . . . sympathy, and . . . paternal attention.’”\textsuperscript{185} Second, states may impose certain limitations on a juvenile’s right to make important decisions that carry “serious consequences.”\textsuperscript{186} This limitation reflects the belief that minors lack the necessary experience and judgment to avoid making decisions that will have harmful consequences.\textsuperscript{187} Finally, the state may require parental consent for certain decisions to protect juveniles from adverse consequences or “their own immaturity.”\textsuperscript{188} Applying unmodified legal principles to juveniles

\textsuperscript{178}. \textit{Id.} at 574 (“The age of 18 is . . . where society draws the line . . . between childhood and adulthood. It is . . . the age at which the line for death eligibility ought to rest.”).

\textsuperscript{179}. \textit{Id.} at 569 (quoting \textit{Johnson v. Texas}, 509 U.S. 350, 367 (1993)).

\textsuperscript{180}. \textit{Id.}

\textsuperscript{181}. \textit{Id.}

\textsuperscript{182}. \textit{Id.} at 570.

\textsuperscript{183}. \textit{Id.} at 578.


\textsuperscript{185}. \textit{Id.} at 635 (quoting \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 550 (1971)).

\textsuperscript{186}. \textit{Id.}

\textsuperscript{187}. \textit{Id.}

\textsuperscript{188}. \textit{Id.} at 637.
appears incompatible with protective measures taken by courts and states.

b. Juveniles Are Categorically Exempted from Life in Prison Without Parole

A recent Supreme Court decision broadened the protective treatment of juvenile offenders charged as adults in criminal courts. In *Graham v. Florida*, the Supreme Court again employed a categorical rule to prevent courts from imposing a life sentence in prison without the possibility of parole on non-homicide juvenile offenders. In its decision, the Court wrote: "Categorical rules tend to be imperfect, but one is necessary here."

The Court’s concern over the possibility of injustice with a case-by-case approach greatly informed the decision. In particular, the Court focused on the special problems attorneys may face in representing juvenile offenders. The Court noted that juveniles tend to mistrust adults and do not fully understand the criminal justice system. As such, they are less likely to assist counsel with their own defense. A categorical rule, the Court argues, is more likely to remedy such difficulties.

More importantly, the Court wrote, "a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." The Court found sentencing juveniles to a life without hope of "fulfillment outside prison walls" and "no chance for reconciliation with society" too harsh to allow.

189. 130 S. Ct. 2011 (2010). Prior to the *Graham* decision, the United States was one of only two countries—the other being Somalia—that had not ratified the Convention on Rights of the Child of 1989, which forbids sentencing juveniles to life in prison without parole. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983, 1009 (2008) ("The CRC . . . codifies an international customary norm of human rights that forbids the sentencing of child offenders to [life in prison without parole]."). Although life in prison without parole is the harshest penalty available next to the death penalty, critics argue it is "effectively a death sentence carried out by the state over a long period of time." *Id.* at 984.


191. *Id.* at 2030.

192. *See id.* at 2031–33.

193. *Id.* at 2032.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 2032–33.
Many of the same concerns that have prompted the Supreme Court over the years to protect juvenile offenders from the harshest consequences are also found in the immigration context. The *Graham* decision is especially compelling since a case-by-case analysis for unaccompanied alien children presents concerns similar to those that convinced the Court to craft a categorical rule in that case.

Like sentencing juveniles to life in prison without parole, permanently barring unaccompanied alien children from the United States destroys all hope of reuniting with family in the country. A categorical rule excluding unaccompanied alien children from the false claims provision allows the minor some hope of returning to the United States with legal status at some point in his or her life.

Recognizing the need to be flexible in responding to the offenses of minors is not a new concept in the United States. Extending this understanding into the realm of immigration does not give unaccompanied alien children a free pass to disregard the laws of the country without consequences. It does, however, prevent the door to legal status in the United States from being permanently closed to these individuals based on acts committed at the age when even U.S. citizens cannot fully participate in society.

**VI. POLICY JUSTIFICATIONS**

Policy reasons support recognizing the unique and vulnerable situation in which unaccompanied alien children may find themselves.

First, international law principles warrant affording better protections to unaccompanied alien children. The Convention on Rights of the Child of 1989 (CRC) mandates a new child-centered perspective when dealing with children. The CRC’s preamble

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quotes the Universal Declaration’s assertion that “childhood is entitled to special care and assistance . . . .” Signatories to the CRC are required to protect children and provide them with adequate care. While the United States has not ratified the CRC, the international community has demonstrated its concern for the rights of children.

Second, “[u]naccompanied alien children represent the intersection of three” populations historically denied full protection in the United States—aliens in general, aliens without lawful status, and minors. The experiences of these “[u]nenviable [h]ybrid[s]” seldom inform the discussion on immigration law in any meaningful way. As such, lawmakers should be careful to include protective measures that reflect the reality faced by such individuals.

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201. Opponents to U.S. ratification cite concerns over sovereignty, federalism, family planning, and parental rights as reasons the United States has not ratified the CRC. Rutkow & Lozman, supra note 198, at 173–80 (“As a direct result of these concerns . . . opponents of the treaty’s ratification introduced bills in the House and Senate . . . to ‘protect the fundamental right of a parent to direct the upbringing of a child . . . .’”). They argue it interferes with parental rights in a way that threatens “fundamental family relationships.” Id. at 179.

202. Corneal, supra note 17, at 617 (“[D]etermining the rights of unaccompanied alien children under U.S. law is a complex task requiring an examination of immigration law broadly, domestic law as it pertains to children, and the intersection of the two.”).

203. Id. at 625.

204. See id. at 656. Commentators have called for including children’s perspectives in the discussion surrounding immigration policies in order to better protect immigrant children. Id. For further discussion of children’s rights in the immigration system see Thronson, Kids Will Be Kids, supra note 17, at 980 (“[L]ife-altering determinations in immigration matters routinely are reached without consideration of the voices and viewpoints of children who are directly involved.”).
VII. RECOMMENDATIONS

Several potential approaches to the false claims provision could drastically improve the situation for unaccompanied alien children. The following recommendations do not deviate from or unreasonably stretch current laws; instead, as demonstrated in previous sections, they fall within well-established boundaries of existing law in the United States.\(^{205}\)

First, the courts could interpret section 212(a)(6)(C)(ii) to categorically exclude unaccompanied alien children from its scope. The INA and agency regulations present ample examples of specialized treatment for unaccompanied alien children that make little sense when compared to the severe penalties imposed for false claims to citizenship.\(^{206}\)

Second, if courts cannot interpret the INA to exclude unaccompanied alien children, a legislative amendment could explicitly exclude unaccompanied alien children from being permanently barred under the INA.\(^{207}\) The legislature has demonstrated its concern for minor aliens over the years and has previously excluded them from severe penalties in the INA.\(^{208}\)

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\(^{205}\) See supra Part V (discussing existing INA provisions, regulations, and criminal court decisions).

\(^{206}\) See supra Parts V.B, V.C.

\(^{207}\) Advocates for reforming the asylum provisions cite a congressional mandate as a preferred option. Villarreal, supra note 200, at 772–73 (arguing Congress is the appropriate forum for substantive changes to asylum procedures for unaccompanied alien children given the deference it receives in the immigration arena). Since the earliest days of immigration laws, courts have deferred to Congress’ plenary power in enacting immigration regulations. Id. at 772. Congress is considered the “appropriate forum” for proposing such changes since it presents the best opportunity to fully evaluate and debate the merits of reforms. Id. at 772–73. An advantage to the legislative route for asylum reform is that “Congress could . . . consider whether amending the Immigration and Nationality Act ‘would further the humanitarian policy reasons underpinning grant of asylum.’” Id. at 773 (citations omitted). A congressional mandate exempting unaccompanied alien children from section 212(a)(6)(C)(ii) would likewise allow for comprehensive debate, investigation, and be afforded deference by the courts. See id. at 772–73.

Child Citizenship Act of 2000 and DREAM Act of 2010 are just a few examples of laws Congress can use to lessen the sting of the permanent bar. A legislative amendment would ensure uniformity in the treatment of unaccompanied alien children under section 212(a)(6)(C)(ii) and prevent injustices that might arise from case-by-case treatment. In this regard, a legislative amendment may be the ideal option for addressing section 212(a)(6)(C)(ii)’s harsh results.

A third option is to statutorily create a waiver for unaccompanied alien children who falsely claim citizenship. The legislature could extend the waiver available for misrepresentations under section 212(a)(6)(C)(i) to include false claims to citizenship. This option would be less protective of minors’ rights but would at least remove the sting of the automatic permanent bar.

Finally, courts could treat false claims by unaccompanied alien children as automatically retracted if made before being in the presence of a guardian or legal guardian. As unaccompanied alien children are not presumed to be responsible during removal proceedings, the same minors should not be presumed capable of making a rational decision to expose the false claim before evidence of it surfaces. Their inability to make decisions in their best interests via cost-benefit analyses should not determine their inadmissibility for the rest of their lives.

209. See supra Part III.B (discussing historical amendments to the INA).
210. The Supreme Court’s concern over potential injustices from a case-by-case analysis has prompted it to promulgate categorical rules excluding minors and mentally retarded defendants from the most severe penalties in criminal court. See Graham v. Florida, 130 S. Ct. 2011 (2010) (holding non-homicidal juvenile offenders cannot be sentenced to life in prison without parole); Roper v. Simmons, 543 U.S. 551 (2005) (excluding juveniles from death penalty eligibility); Atkins v. Virginia, 536 U.S. 304 (2002) (concluding mentally retarded defendants are not eligible for the death penalty). In the Roper decision, the Court’s categorical rule stemmed from the concern that a gruesome crime could overpower mitigating factors that may warrant a lesser sentence on the juvenile. 543 U.S. at 573. Such potential represented an “unacceptable likelihood” for the Court. Id.
212. Agency regulations supplementing other provisions prevent unaccompanied alien children from taking actions adverse to their interests. See, e.g., 8 C.F.R. § 1240.10(c) (2010) (preventing unaccompanied alien children from admitting removability in immigration court without an attorney or guardian present).
Any one of these recommendations could significantly improve the situation for unaccompanied alien children who make false claims to citizenship. Recognizing the unique situation unaccompanied alien children are in does not sanction ignoring U.S. immigration laws. Even if such measures are implemented, unaccompanied alien children who make false claims would not be receiving a free pass into the country. Such minors would still be required to demonstrate they are otherwise admissible and that they have a legal avenue for being in the United States. More lenient measures would, however, prevent the door to legal immigration to the United States from being forever closed and dead-bolted for mistakes made while legally a child.

VIII. CONCLUSION

Unaccompanied alien children comprise one of the most disadvantaged populations to go through the U.S. immigration system. Despite their disadvantaged position, they are afforded only a few protections modified to adequately address their situation. Permanently barring unaccompanied alien children from seeking legal status in the United States hardly seems compatible with Lady Liberty’s welcoming decree or the INA’s broader statutory treatment of such minors.

Section 212(a)(6)(C)(ii) of the INA should exclude unaccompanied alien children from the sting of permanent inadmissibility for falsely claiming citizenship. Such an exemption upholds the United States’ tradition of modifying legal processes to account for the immaturity and unique needs of minors. Excluding unaccompanied alien children from the permanent bar

213. In fact, creating a non-immigrant visa category for unaccompanied alien children has been largely criticized. See Carolyn J. Seugling, Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States, 37 Vand. J. Transnat’l L. 861, 889 (2004) (“[F]amily reunification and unity has been a longstanding goal of immigration policy, and statutory provisions should not be created that would thwart this policy which is in the best interest of the child”). One side effect of such a status could be encouraging families to separate if they believed sending their child to the United States would be in the child’s best interests. Id. The potential negative effects of such a visa, not to mention the ensuing political firestorm, indicate other options may be preferable in this situation. See id.

214. See INA § 212(a), 8 U.S.C. § 1182(a) (describing grounds of inadmissibility); INA § 245(a), 8 U.S.C. § 1255(a) (explaining requirements for adjustment of status).
to citizenship is also justified when looking at the INA as a whole. This protection should extend to inadmissibility based on false claims to citizenship. Unaccompanied alien children, legally children by U.S. standards, should not be permanently barred from all legal avenues into the United States based on childhood mistakes.