

# U.S. House of Representatives

## Committee on the Judiciary

Washington, DC 20515-6216  
One Hundred Sixteenth Congress

December 17, 2019

The Honorable Chad Wolf  
Acting Secretary  
Department of Homeland Security  
300 7th Street, SW  
Washington, D.C. 20528

Dear Acting Secretary Wolf:

We write to draw your attention to an improper citation related to unaccompanied alien children in proposed guidance on the so-called “Cooperation Agreement” between the United States and Guatemala (herein “Guatemala Safe Third Country Agreement”).<sup>1</sup> The improper citation will have profound impacts on unaccompanied children and runs contrary to multiple federal statutes, as well as the Guatemala Safe Third Country Agreement itself. We ask that you immediately correct the citation, issue new guidance unambiguously stating that unaccompanied children are not subject to the Guatemala Safe Third Country Agreement, and exclusively use the definition of “unaccompanied alien child” provided in federal statute.

On November 20, 2019, *Reuters* published what appears to be Department of Homeland Security (Department) field guidance for asylum officers on the Guatemala Safe Third Country Agreement.<sup>2</sup> Page 11 of that document correctly notes that unaccompanied children are not subject to the Agreement.<sup>3</sup> However, on the same page, the guidance purports to define “unaccompanied alien child” by citing to a federal regulation implementing a safe third country agreement with Canada, rather than the definition provided in federal statute.<sup>4</sup> The regulatory

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<sup>1</sup> Office of Strategy, Policy, and Plans, *Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims*, Dep’t of Homeland Security, 84 Fed. Reg. 64095 (Nov. 20, 2019), <https://www.federalregister.gov/documents/2019/11/20/2019-25288/agreement-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic>.

<sup>2</sup> Unpublished guidance from U.S. Citizenship and Immigration Services, *US-Guatemala Asylum Cooperation Agreement (ACA) Threshold Screening, Guidance for Asylum Officers and Asylum Office Staff*, Dep’t of Homeland Security (Nov. 19, 2019), <https://fingfx.thomsonreuters.com/gfx/mkt/12/8962/8874/ACA%20Guatemala.pdf>; Ted Hesson, *Trump administration prepares to send asylum seekers to Guatemala*, *Reuters News* (Nov. 20, 2019), <https://www.reuters.com/article/us-usa-immigration-guatemala-asylum/trump-administration-prepares-to-send-asylum-seekers-to-guatemala-idUSKBN1XU2SI>.

<sup>3</sup> The exemption is the result of federal law, not DHS policy or regulations. *See* 8 U.S.C. § 1158(a)(2)(E).

<sup>4</sup> The incorrect citation is to 8 CFR 208.30(6)(iii)(D), but that appears to be a scrivener’s error as such citation does not exist. We presume the guidance was attempting to cite 8 CFR 208.30(e)(6)(iii)(D), which purports to exempt unaccompanied children from return under the Canada Safe Third Country Agreement. As described below,

definition is not fully consistent with statutory authority and thus should not serve as a basis for the Guatemala Safe Third Country Agreement. Without taking a position on the legality of the federal regulation at issue, it is the *Homeland Security Act of 2002* that serves as the authoritative source for the definition of “unaccompanied alien child,”<sup>5</sup> and such children are categorically exempt from any safe third country agreement.<sup>6</sup> There are no exceptions. The specific provision in the Immigration & Nationality Act (INA) authorizing safe third country agreements expressly states that unaccompanied children, “as defined by section 462(g) of the Homeland Security Act of 2002,” are not subject to safe third-country agreements.<sup>7</sup>

The effect of this improper citation for unaccompanied children is concerning. Under the Homeland Security Act of 2002, the term “unaccompanied alien child” is defined as “any child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) *no parent or legal guardian in the United States is available to provide care and physical custody.*”<sup>8</sup> The proposed guidance implementing the Guatemala Safe Third Country Agreement would effectively eliminate subclause (ii) from that definition, thus potentially making certain unaccompanied children subject to the agreement despite the statutory prohibition on such treatment. For example, a child meets the statutory definition of an “unaccompanied alien child” if she has a parent in the United States, but that parent is unable to provide care and physical custody. Under the regulatory definition used by DHS’ field guidance, however, that same child could be deemed accompanied and thus subject to expedited removal and return pursuant to the Guatemala Safe Third Country Agreement.

DHS must immediately correct the erroneous citation and issue clarifying guidance to the field that unambiguously states that unaccompanied alien children are not subject to the Guatemala Safe Third Country Agreement. The Department must also commit to exclusively using the definition of “unaccompanied alien child” provided in federal statute. Moreover, while we assume the improper citation was made in error and was not an intentional attempt to thwart federal protections for vulnerable children, we wonder whether this error could have been caught and remedied prior to its widespread distribution, if the Guatemala Safe Third Country Agreement had gone through the proper notice-and-comment process, rather than published hurriedly as an interim final rule. Advance notice and the opportunity for public comment are critical to effective and legitimate policymaking, and we ask that you engage in such rulemaking as required by the Administrative Procedure Act.

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however, the definition used in that provision is not fully consistent with the statutory definition of an unaccompanied alien child in 6 U.S.C. § 279(g)(2).

<sup>5</sup> Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2).

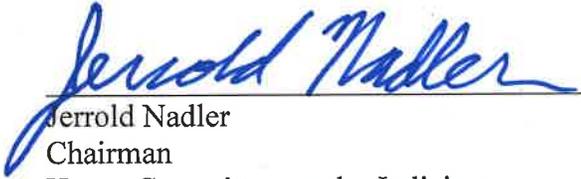
<sup>6</sup> 8 USC § 1158(a)(2)(E) states that safe third country agreements “shall not apply to an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 USC 279(g)).”

<sup>7</sup> *Id.*

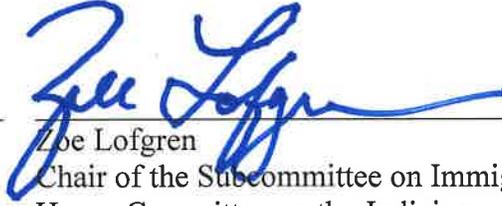
<sup>8</sup> Homeland Security Act of 2002 § 462(g)(2), 6 USC § 279(g) (emphasis added).

If you have any questions about the content of this letter, please contact Committee staff Jennifer Piatt ([jennifer.piatt@mail.house.gov](mailto:jennifer.piatt@mail.house.gov)) or Josh Breisblatt ([josh.breisblatt@mail.house.gov](mailto:josh.breisblatt@mail.house.gov)). We look forward to your prompt response.

Sincerely,



Jerrold Nadler  
Chairman  
House Committee on the Judiciary



Zoe Lofgren  
Chair of the Subcommittee on Immigration  
House Committee on the Judiciary

cc: The Honorable Doug Collins, Ranking Member, House Committee on the Judiciary