

Adjudicator's Field Manual

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Chapter 39 Victims of Trafficking in Persons and other Crimes

39.1 U Immigrants [Chapter added AD08-12; 03-07-2008]

39.2 T Immigrants

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(a) Definitions.

As used in this chapter, the term:

(1) BIWPA means Battered Immigrant Women Protection Act of 2000 of the Victims of Trafficking and Violence Protection Act of 2000, div. B, Violence Against Women Act of 2000, tit. V, **Pub. L. No. 106-386**, 114 Stat. 1464, (2000), as amended by Violence Against Women and Department of Justice Reauthorization Act of 2005, tit. VIII, **Pub. L. No. 109-162**, 119 Stat. 2960 (2006), as amended by Violence Against Women and Department of Justice Reauthorization Act - Technical Corrections, **Pub. L. No. 109-271**, 120 Stat. 750 (2006).

(2) Certifying agency means a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

(3) Certifying official means: (i) the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency; or (ii) a Federal, State, or local judge.

(4) Indian Country is defined as: (i) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (ii) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (iii) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.

(5) Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.

(6) Military Installation means any facility, base, camp, post, encampment, station, yard, center, port, aircraft, vehicle, or vessel under the jurisdiction of the Department of Defense, including any leased facility, or any other location under military control.

(7) Next friend means a person appearing in a lawsuit to act for the benefit of a petitioner who is under the age of 16 or who is incapacitated or incompetent, and who has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity. The next friend is not a party to the legal proceeding and is not appointed as a guardian.

(8) Physical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.

(10) Qualifying family member means the spouse or child(ren) of an alien victim 21 years of age or older who is eligible for U nonimmigrant status as described in section **101(a)(15)(U)** of the Act, 8 U.S.C. 1101(a)(15)(U). In the case of an alien victim under the age of 21, qualifying family member means the spouse, child(ren), parents, or unmarried siblings under the age of 18 of such an alien.

(11) Territories and Possessions of the United States means American Samoa, Swains Island, Bajo Nuevo (the Petrel Islands), Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Serranilla Bank, and Wake Atoll.

(12) U nonimmigrant status certification means Form I-918, Supplement B, "U Nonimmigrant Status Certification," which confirms that the petitioner has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.

(13) U interim relief refers to the interim benefits that were provided by USCIS to petitioners for U nonimmigrant status, who requested such benefits and who were deemed prima facie eligible for U nonimmigrant status prior to the publication of the implementing regulations.

(14) Victim of qualifying criminal activity generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.

(i) The alien spouse, unmarried children under 21 years of age and, if the victim is under 21 years of age, parents and unmarried siblings under 18 years of age, will be considered victims of qualifying criminal activity where the direct victim is deceased due to murder or manslaughter, or is incompetent or incapacitated, and, therefore, unable to provide information concerning the criminal activity or be helpful in the investigation or prosecution of the criminal activity. For purposes of determining eligibility under this definition, USCIS will consider the age of the victim at the time the qualifying criminal activity first occurred.

(ii) A petitioner may be considered a victim of witness tampering, obstruction of justice, or perjury, including any attempt, solicitation, or conspiracy to commit one or more of those offenses, if:

(A) The petitioner has been directly and proximately harmed by the perpetrator of the witness tampering, obstruction of justice, or perjury; and

(B) There are reasonable grounds to conclude that the perpetrator committed the witness tampering, obstruction of justice, or perjury offense, at least in principal part, as a means:

(1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity; or

(2) To further the perpetrator's abuse or exploitation of or undue control over the petitioner through manipulation of the legal system.

(iii) A person who is culpable for the qualifying criminal activity being investigated or prosecuted is excluded from being recognized as a victim of qualifying criminal activity.

(b) Eligibility.

An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following in accordance with paragraph (c) of this chapter:

(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. Whether abuse is substantial is based on a number of factors, including but not limited to: the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level;

(2) The alien possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. In the event that the alien has not yet reached 16 years of age on the date on which an act constituting an element of the qualifying criminal activity first occurred, a parent, guardian or next friend of the alien may possess the information regarding a qualifying crime. In addition, if the alien is incapacitated or incompetent, a parent, guardian, or next friend may possess the information regarding the qualifying crime;

(3) The alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested. In the event that the alien has not yet reached 16 years of age on the date on which an act constituting an element of the qualifying criminal activity first occurred, a parent, guardian or next friend of the alien may provide the required assistance. In addition, if the petitioner is incapacitated or incompetent and, therefore, unable to be helpful in the investigation or prosecution of the qualifying criminal activity, a parent, guardian, or next friend may provide the required assistance; and

(4) The qualifying criminal activity occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.

(c) Application procedures for U nonimmigrant status .

(1) Filing a petition .

USCIS has sole jurisdiction over all petitions for U nonimmigrant status. An alien seeking U-1 nonimmigrant status must submit, by mail, **Form I-918** , “Petition for U Nonimmigrant Status,” applicable fees (or request for a fee waiver as provided in 8 CFR 103.7(c)) , and initial evidence to USCIS in accordance with this paragraph and the instructions to Form I-918. A petitioner who received interim relief is not required to submit initial evidence with Form I-918 if he or she wishes to rely on the law enforcement certification and other evidence that was submitted with the request for interim relief.

(A) Petitioners in pending immigration proceedings.

A petitioner who is in removal proceedings under section **240** of the Act, 8 U.S.C. 1229a, or in exclusion or deportation proceedings initiated under former sections **236** or **242** of the Act, 8 U.S.C. 1226 and 1252 (as in effect prior to April 1, 1997), and who would like to apply for U nonimmigrant status must file a **Form I-918** directly with USCIS. U.S. Immigration and Customs Enforcement (ICE) counsel may agree to file, at the request of the petitioner, a joint motion to terminate proceedings without prejudice with the Immigration Judge or Board of Immigration Appeals, whichever is appropriate, while a petition for U nonimmigrant status is being adjudicated by USCIS.

(B) Petitioners with final orders of removal, deportation, or exclusion.

A petitioner who is the subject of a final order of removal, deportation, or exclusion is not precluded from filing a petition for U-1 nonimmigrant status directly with USCIS. The filing of a petition for U-1 nonimmigrant status has no effect on ICE’s authority to execute a final order, although the petitioner may file a request for a stay of removal pursuant to **8 CFR 241.6(a)** and **8 CFR 1241.6(a)**. If the petitioner is in detention pending execution of the final order, the time during which a stay is in effect will extend the period of detention (under the standards of **8 CFR 241.4**) reasonably necessary to bring about the petitioner’s removal.

DHS may grant an administrative stay of a final order of removal to a petitioner for U nonimmigrant status in the United States if USCIS determines that the petitioner has set forth a prima facie case for approval. INA § 237(d)(1). The administrative stay will remain in effect until the petition for U nonimmigrant status is approved or there is a final administrative denial.

The U nonimmigrant status petitioner must apply for a waiver of inadmissibility and for a stay of removal along with the U nonimmigrant petition. Those U nonimmigrant status petitioners who have been detained for over six months and who have requested a stay of removal may also request a release from ICE detention. See, Memorandum from David J. Venturella, Acting Director, ICE, "Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants" (September 24, 2009). Also see, Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE, "Guidance Regarding U Nonimmigrant Status (U Visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal" (September 25, 2009). ICE may favorably view a petitioner's request for a stay of removal if USCIS has determined that the petitioner has established *prima facie* eligibility for U visa. If the petition for U nonimmigrant status is subsequently granted, and the final order of removal was filed by USCIS, the final order will be withdrawn. If the final order of removal was filed by ICE and the petition is granted, ICE may reopen the proceedings and terminate the removal order. If the U nonimmigrant status petition is denied, ICE may remove the applicant pursuant to the final order of removal.

(C) Fee Waiver. USCIS can waive any fees associated with the filing of an application for U nonimmigrant status through final adjudication of the adjustment of status applications. INA § 245(I)(7). USCIS will accept a request for fee waiver for any form that an applicant for U nonimmigrant status may file, including any applications that a U nonimmigrant may file before the final adjudication of an adjustment of status application.

(2) Initial evidence.

Form I-918 must include the following initial evidence:

(i) **Form I-918**, Supplement B, "U Nonimmigrant Status Certification," signed by a certifying official within the six months immediately preceding the filing of Form I-918. The certification must state that: the person signing the certificate is the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or is a Federal, State, or local judge; the agency is a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; the petitioner has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories, its possessions, Indian country, or at military installations abroad.

(ii) Any additional evidence that the petitioner wants USCIS to consider to establish that: the petitioner is a

victim of qualifying criminal activity; the petitioner has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity; the petitioner (or, in the case of a child under the age of 16 or petitioner who is incompetent or incapacitated, a parent, guardian or next friend of the petitioner) possesses information establishing that he or she has knowledge of the details concerning the qualifying criminal activity of which he or she was a victim and upon which his or her petition is based; the petitioner (or, in the case of a child under the age of 16 or petitioner who is incompetent or incapacitated, a parent, guardian or next friend of the petitioner) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement agency, prosecutor, or authority, or Federal or State judge, investigating or prosecuting the criminal activity of which the petitioner is a victim; or the criminal activity is qualifying and occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violates a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court;

(iii) A signed statement by the petitioner describing the facts of the victimization. The statement may also include information supporting any of the eligibility requirements set out in paragraph (b) of this chapter. When the petitioner is under the age of 16, incapacitated, or incompetent, a parent, guardian, or next friend may submit a statement on behalf of the petitioner; and

(iv) If the petitioner is inadmissible, **Form I-192**, "Application for Advance Permission to Enter as a Non-Immigrant," in accordance with **8 CFR 212.17**.

(v) If the Form I-918 was filed on or after November 1, 2009, the petition should be denied for lack of initial evidence if it does not include Form I-918 Supplement B.

However, if the petitioner previously submitted a law enforcement certification under the U Nonimmigrant Interim Relief program and received an approval for interim relief benefits, the Form I-918 should not be denied. In all cases, USCIS has discretion under **8 CFR 103.2(b)(8)(ii)** to issue a Request for Evidence rather than a denial if initial evidence is missing. Such discretion should be used in accordance with the general standards governing the use of discretion.

(3) Biometric capture.

All petitioners for U-1 nonimmigrant status must submit to biometric capture and pay a biometric capture fee. USCIS will notify the petitioner of the proper time and location to appear for biometric capture after the petitioner files **Form I-918**.

(4) Evidentiary standards and burden of proof.

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her **Form I-918** for consideration by USCIS. USCIS shall conduct a de novo review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, "U Nonimmigrant Status Certification."

(5) Decision.

After completing its de novo review of the petition and evidence, USCIS will issue a written decision approving or denying **Form I-918** and notify the petitioner of this decision. USCIS will include in a decision approving Form I-918 a list of nongovernmental organizations and available resources to which the petitioner can refer regarding his or her options while in the United States.

(i) Approval of Form I-918, generally.

If USCIS determines that the petitioner has met the requirements for U-1 nonimmigrant status, USCIS will approve **Form I-918**. For a petitioner who is within the United States, USCIS also will concurrently grant U-1 nonimmigrant status, subject to the annual limitation as provided in paragraph (d) of this chapter. For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918.

(A) Notice of Approval of Form I-918 for U-1 petitioners within the United States.

After USCIS approves **Form I-918** for a petitioner who filed his or her petition from within the United States, USCIS will notify the petitioner of such approval on Form I-797, "Notice of Action," and include Form I-94, "Arrival-Departure Record," indicating U-1 nonimmigrant status.

(B) Notice of Approval of Form I-918 for U-1 petitioners outside the United States.

After USCIS approves **Form I-918** for an petitioner who filed his or her petition from outside the United States, USCIS will notify the petitioner of such approval on Form I-797, "Notice of Action," and will forward notice to the Department of State for delivery to the U.S. Embassy or Consulate having jurisdiction over the area in which the petitioner is located, or, for a visa exempt petitioner, to the appropriate port of entry.

(ii) Denial of Form I-918.

USCIS will provide written notification to the petitioner of the reasons for the denial. The petitioner may appeal a denial of **Form I-918** to the Administrative Appeals Office (AAO) in accordance with the provisions of **8 CFR 103.3**. For petitioners who appeal a denial of their Form I-918 to the AAO, the denial will not be deemed administratively final until the AAO issues a decision affirming the denial. Upon USCIS' final denial of a petition for a petitioner who was in removal proceedings that were terminated pursuant to **8 CFR 214.14(c)(1)(i)**, DHS may file a new Notice to Appear (see section **239** of the Act, 8 U.S.C. 1229) to place the individual in proceedings again. For petitioners who are subject to an order of removal, deportation, or exclusion and whose order has been stayed, USCIS' denial of the petition will result in the stay being lifted automatically as of the date the denial becomes administratively final.

(6) Petitioners granted U interim relief.

Petitioners who were granted U interim relief as defined in paragraph (a)(13) of this chapter and whose **Form I-918** is approved will be accorded U-1 nonimmigrant status as of the date that a request for U interim relief was initially approved.

(7) Employment authorization.

An petitioner granted U-1 nonimmigrant status is employment authorized incident to status. USCIS automatically will issue an initial Employment Authorization Document (EAD) to such petitioners who are in the United States. For principal petitioners who applied from outside the United States, the initial EAD will not be issued until the petitioner has been admitted to the United States in U nonimmigrant status. After admission, the petitioner may receive an initial EAD, upon request and submission of a copy of his or

her Form I-94, "Arrival-Departure Record," to the USCIS office having jurisdiction over the adjudication of petitions for U nonimmigrant status. No additional fee is required. An petitioner granted U-1 nonimmigrant status seeking to renew his or her expiring EAD or replace an EAD that was lost, stolen, or destroyed, must file Form I-765 in accordance with the instructions to the form.

(d) Annual cap of U-1 nonimmigrant status .

(1) General .

In accordance with section **214(p)(2)** of the Act, 8 U.S.C. 1184(p)(2), the total number of aliens who may be issued a U-1 nonimmigrant visa or granted U-1 nonimmigrant status may not exceed 10,000 in any fiscal year.

(2) Waiting list .

All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement. Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed. USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.

(3) Unlawful presence .

During the time a petitioner for U nonimmigrant status who was granted deferred action or parole is on the waiting list, no accrual of unlawful presence under section **212(a)(9)(B)** of the INA, 8 U.S.C. 1182(a)(9)(B), will result. However, a petitioner may be removed from the waiting list and the deferred action or parole may be terminated at the discretion of USCIS.

(e) Restrictions on use and disclosure of information relating to petitioners for U nonimmigrant classification .

(1) General .

The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved petition for U nonimmigrant status is prohibited unless the disclosure is made:

(i) By the Secretary of Homeland Security, at his discretion, in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under 13 U.S.C. 8;

(ii) By the Secretary of Homeland Security, at his discretion, to law enforcement officials to be used solely for a legitimate law enforcement purpose;

(iii) In conjunction with judicial review of a determination in a manner that protects the confidentiality of such information;

(iv) After adult petitioners for U nonimmigrant status or U nonimmigrant status holders have provided written consent to waive the restrictions prohibiting the release of information;

(v) To Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for benefits pursuant to 8 U.S.C. 1641(c);

(vi) After a petition for U nonimmigrant status has been denied in a final decision;

(vii) To the chairmen and ranking members of the Committee on the Judiciary of the Senate or the

Committee on the Judiciary of the House of Representatives, for the exercise of congressional oversight authority, provided the disclosure relates to information about a closed case and is made in a manner that protects the confidentiality of the information and omits personally identifying information (including locational information about individuals);

(viii) With prior written consent from the petitioner or derivative family members, to nonprofit, nongovernmental victims' service providers for the sole purpose of assisting the victim in obtaining victim services from programs with expertise working with immigrant victims; or

(ix) To federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending federal criminal proceedings.

(2) Agencies receiving information under this chapter, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.

(3) Officials of the Department of Homeland Security are prohibited from making adverse determinations of admissibility or deportability based on information obtained solely from the perpetrator of substantial physical or mental abuse and the criminal activity.

(f) Admission of qualifying family members.

(1) Eligibility.

An alien who has petitioned for or has been granted U-1 nonimmigrant status (i.e. principal petitioner) may petition for the admission of a qualifying family member in a U-2 (spouse), U-3 (child), U-4 (parent of a U-1 petitioner who is a child under 21 years of age), or U-5 (unmarried sibling under the age of 18) derivative status, if accompanying or following to join such principal petitioner. A qualifying family member who committed the qualifying criminal activity in a family violence or trafficking context which established the principal petitioner's eligibility for U nonimmigrant status shall not be granted U-2, U-3, U-4, or U-5 nonimmigrant status. To be eligible for U-2, U-3, U-4, or U-5 nonimmigrant status, it must be demonstrated that:

(i) The alien for whom U-2, U-3, U-4, or U-5 status is being sought is a qualifying family member, as defined in paragraph (a)(10) of this chapter; and

(ii) The qualifying family member is admissible to the United States.

(2) Filing Procedures.

A petitioner for U-1 nonimmigrant status may apply for derivative U nonimmigrant status on behalf of qualifying family members by submitting a **Form I-918**, Supplement A, "Petition for Qualifying Family Member of U-1 Recipient," for each family member either at the same time the petition for U-1 nonimmigrant status is filed, or at a later date. A petitioner who has been granted U-1 nonimmigrant status may also apply for derivative U nonimmigrant status on behalf of qualifying family members by submitting Form I-918, Supplement A for each family member. Each Form I-918, Supplement A must be accompanied by initial evidence and the required fees specified in the instructions to the form. Forms I-918, Supplement A that are not filed at the same time as Form I-918 but are filed at a later date must be accompanied by a copy of the Form I-918 that was filed by the principal petitioner or a copy of his or her Form I-94 demonstrating proof of U-1 nonimmigrant status, as applicable.

(i) Qualifying family members in pending immigration proceedings. The principal petitioner of a qualifying family member who is in removal proceedings under section **240** of the Act, 8 U.S.C. 1229a, or in exclusion or deportation proceedings initiated under former sections **236** or **242** of the Act, 8 U.S.C. 1226 and 1252 (as in effect prior to April 1, 1997), and who is seeking U nonimmigrant status, must file a **Form I-918**, Supplement A directly with USCIS. ICE counsel may agree to file, at the request of the qualifying family member, a joint motion to terminate proceedings without prejudice with the Immigration Judge or Board of Immigration Appeals, whichever is appropriate, while the petition for U nonimmigrant status is being adjudicated by USCIS.

(ii) Qualifying family members with final orders of removal, deportation, or exclusion. A petitioner who is the subject of a final removal order, deportation, or exclusion is not precluded from filing a petition for U-2, U-3, U-4 or U-5 nonimmigrant status directly with USCIS. The filing of a petition for U-2, U-3, U-4 or U-5 nonimmigrant status has no effect on ICE's authority to execute a final order, although the petitioner may file a request for a stay of removal pursuant to **8 CFR 241.6(a)** and **8 CFR 1241.6(a)**. If the petitioner is in detention pending execution of the final order, the time during which a stay is in effect will extend the period of detention (under the standards of **8 CFR 241.4**) reasonably necessary to bring about the petitioner's removal.

(3) Initial evidence.

Form I-918 , Supplement A, must include the following initial evidence:

(i) Evidence demonstrating the relationship of a qualifying family member, as provided in paragraph (f)(4) of this chapter;

(ii) If the qualifying family member is inadmissible, **Form I-192** , “Application for Advance Permission to Enter as a Non-Immigrant,” in accordance with 8 CFR 212.17 .

(4) Relationship . A principal petitioner may seek U nonimmigrant status for a qualifying family member through the filing of a derivative petition with USCIS. The age-out protections discussed at sections (f)(4)(ii) and (iv) of this chapter do not apply to a change in a child or sibling’s marital status.

(i) Spouse. The relationship between the U-1 principal petitioner and his or her spouse must exist at the time the principal petition is properly filed, and the relationship must continue to exist at the time the derivative petition is properly filed, and at the time of the spouse’s subsequent admission to the United States.

(ii) Child. The relationship between the U-1 principal petitioner and his or her unmarried children under 21 years of age must exist at the time the U-1 principal petitioner properly files his or her principal petition. The age of the U-1 principal petitioner’s unmarried children under 21 years of age shall be set on the date the U-1 principal’s petition is properly filed. The child shall continue to be classified as a child for purposes of section 101(a)(15)(U)(ii) if the child attains 21 years of age and remains unmarried after the U-1 principal’s petition was properly filed and while it was pending.

If the U-1 principal petitioner establishes that he or she has become the parent of a child after the principal petition was properly filed, the child shall be eligible to accompany or follow to join the U-1 principal petitioner.

(iii) Parent. If the U-1 principal petitioner was under 21 years of age at the time he or she properly filed for U-1 principal status, USCIS will continue to consider such parent(s) as a qualifying family member for purposes of U nonimmigrant status, even if the principal petitioner is no longer under 21 years of age at the time of adjudication of the derivative petition.

(iv) Sibling. The age of the U-1 principal petitioner's unmarried siblings shall be set on the date the U-1 principal's petition is properly filed. If the U-1 principal petitioner was under 21 years of age at the time he or she properly filed for U-1 principal status, USCIS will continue to consider an unmarried sibling(s) under 18 years of age as a qualifying family member for purposes of U nonimmigrant status, even if the principal petitioner is no longer under 21 years of age and the derivative is no longer under 18 years of age at the time of adjudication of the derivative petition.

(v) Interim Relief. For U-1 principal petitioners granted interim relief, the age of the principal petitioner and any of the principal petitioner's children and siblings as referred to in paragraphs (ii) - (iv) above shall be set on the date the principal petitioner's request for U interim relief was properly filed.

(vi) USCIS will grant the full four-year statutory period for U nonimmigrant status to those qualifying family members who are under 21 years of age at the time of approval, but who will turn 21 years of age during the four-year statutory period. Current qualifying family members who are under 21 years of age and in valid derivative U nonimmigrant status, but will turn 21 years of age during the four-year statutory period, may apply for an extension of U nonimmigrant status to receive the full four years of U nonimmigrant status.

(vii) In cases where the qualifying family members were previously granted U nonimmigrant status and the derivative status expired upon reaching 21 years of age, the derivative petitioner may file for an extension of status. Upon approval of the extension, the derivative will be granted status that dates back to his or her 21st birthday when the initial grant expired, and will be granted any remaining time of the four-year statutory period for U nonimmigrant status.

If this time period totals more than the statutory period of four years of U nonimmigrant status, the qualifying family member will be given an additional extension period of up to one year of U nonimmigrant status from the date of the approval of the extension of status to allow for sufficient time to apply for adjustment of status to a lawful permanent resident.

(5) Biometric capture and evidentiary standards.

The provisions for biometric capture and evidentiary standards in paragraphs (c)(3) and (c)(4) of this chapter also are applicable to petitions for qualifying family members.

(6) Decision.

USCIS will issue a written decision approving or denying **Form I-918**, Supplement A and send notice of this decision to the U-1 principal petitioner. USCIS will include in a decision approving Form I-918 a list of nongovernmental organizations and available resources to which the qualifying family member can refer regarding his or her options while in the United States. For a qualifying family member who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918, Supplement A.

(i) Approvals for qualifying family members within the United States.

When USCIS approves a **Form I-918**, Supplement A for a qualifying family member who is within the United States, it will concurrently grant that petitioner U-2, U-3, U-4, or U-5 nonimmigrant status. USCIS will notify the principal of such approval on Form I-797, "Notice of Action," with Form I-94, "Arrival-Departure Record," indicating U-2, U-3, U-4, or U-5 nonimmigrant status. Petitioners who were previously granted U interim relief as defined in paragraph (a)(13) of this chapter will be accorded U nonimmigrant status as of the date that the request for U interim relief was approved. Petitioners who are granted U-2, U-3, U-4, or U-5 nonimmigrant status are not subject to an annual numerical limit. USCIS may not approve Form I-918, Supplement A unless it has approved the principal's Form I-918.

(ii) Approvals for qualifying family members outside the United States.

When USCIS approves **Form I-918**, Supplement A for a qualifying family member who is outside the United States, USCIS will notify the principal of such approval on Form I-797. USCIS will forward the approved Form I-918, Supplement A to the Department of State for delivery to the U.S. Embassy or Consulate having jurisdiction over the area in which the qualifying family member is located, or, for a visa exempt alien, to the appropriate port of entry.

(iii) Denial of the Form I-918, Supplement A.

In accordance with 8 CFR 103.3(a)(1), USCIS will provide written notification of the reasons for the

denial. The principal may appeal the denial of Form I-918, Supplement A to the Administrative Appeals Office in accordance with the provisions of 8 CFR 103.3 . Upon USCIS' final denial of Form I-918, Supplement A for a qualifying family member who was in removal proceedings that were terminated pursuant to 8 CFR 214.14(f)(2)(i) , DHS may file a new Notice to Appear (see section 239 of the Act, 8 U.S.C. 1229) to place the individual in proceedings again. For qualifying family members who are subject to an order of removal, deportation, or exclusion and whose order has been stayed, USCIS' denial of the petition will result in the stay being lifted automatically as of the date the denial becomes administratively final.

(7) Employment authorization .

A petitioner granted U-2, U-3, U-4, or U-5 nonimmigrant status is employment authorized incident to status. To obtain an Employment Authorization Document (EAD), such petitioner must file Form I-765, "Application for Employment Authorization," with the appropriate fee or a request for a fee waiver, in accordance with the instructions to that form. For qualifying family members within the United States, the **Form I-765** must be filed after Form I-918, Supplement A, is approved. For qualifying family members who are outside the United States, Form I-765 may only be filed after admission to the United States in U nonimmigrant status.

(g) Duration of U nonimmigrant status .

(1) In General .

U nonimmigrant status may be approved for a period not to exceed 4 years in the aggregate. A qualifying family member granted U-2, U-3, U-4, or U-5 nonimmigrant status will be approved for a period that does not exceed the expiration date of the initial period.

(2) Extension of status .

(A) Where a U nonimmigrant's approved period of stay on Form I-94 is less than 4 years, he or she may file **Form I-539**, "Application to Extend/Change Nonimmigrant Status," to request an extension of U nonimmigrant status for an aggregate period not to exceed 4 years.

If a qualifying family member requests an extension of status beyond the expiration of the principal U-1 nonimmigrant's status, USCIS may approve the extension for any reason that is consistent with the goals of the statute, including but not limited to a situation where the qualifying family member is unable to enter

the United States timely due to delays in consular processing, and where an extension of status is necessary to ensure that the qualifying family member is able to attain at least 3 years in nonimmigrant status for purposes of adjusting status under section 245(m) of the Act, 8 USC 1255.

(B) USCIS will extend U nonimmigrant status in three circumstances (INA § 214(p)(6)):

- Upon attestation by the certifying official that the petitioner's presence in the United States continues to be necessary to assist in the investigation or prosecution of the qualifying criminal activity. In order to obtain an extension of U nonimmigrant status based upon such an attestation, the petitioner must file Form I-539 and a newly executed Form I-918, Supplement B in accordance with the instructions to Form I-539.
- If the alien is eligible for adjustment under 245(m) of the INA but is unable to apply for adjustment because implementing regulations have not been issued.
- During the pendency of an application for adjustment of status under section 245(m) of the INA.

(C) In its discretion, USCIS may extend U nonimmigrant status if it is determined an extension is warranted due to extraordinary circumstances. The burden is on the applicant to demonstrate that circumstances warrant this exception. To request such an extension, an applicant may submit an affirmative statement and any other credible evidence.

(3) Procedures for Extension of Status.

(A) Filing

- The extension of status based on the pendency of an application for adjustment of status is automatic when the applicant files Form I-485.
- To request an extension of status based on law enforcement request or exceptional circumstances, the applicant files Form I-539.

(B) Documentation

- In general, when granting an extension of status, USCIS will issue a Form I-797, Notice of Action.
- The applicant continues in valid U nonimmigrant status with all the rights, privileges, and responsibilities provided to a U nonimmigrant.
- Extensions of status based on a pending application for adjustment of status will be valid until USCIS makes a final decision on the application for adjustment of status.
- Extensions of status based on law enforcement request or exceptional circumstances will be valid for a period of one year beginning on the date U nonimmigrant status did or would end.
- Any EAD issued with the Form I 485 pending shall be issued using the (c)(9) eligibility code.
- Any EAD issued with the Form I 539 shall be issued using the (a)(19) or (a)(20) eligibility code, as applicable.

- Derivatives who properly file Form I 485, or when a principal files a Form I 539 requesting extension for derivatives in writing, will also be issued a Form I 797 in the same manner as the principal.

(C) Supporting evidence:

- If seeking an extension of status due to a law enforcement need, an applicant must submit a new Form I-918 Supplement B from law enforcement certifying the presence of the U nonimmigrant is necessary to assist in the investigation or prosecution of the qualifying criminal activity.
- If seeking an extension of status due to exceptional circumstances, an applicant may submit an affirmative statement and any other credible evidence.

(h) Revocation of approved petitions for U nonimmigrant status.

(1) Automatic revocation.

An approved petition for U-1 nonimmigrant status will be revoked automatically if, pursuant to **8 CFR 214.14(d)(1)**, the beneficiary of the approved petition notifies the USCIS office that approved the petition that he or she will not apply for admission to the United States and, therefore, the petition will not be used.

(2) Revocation on notice.

(i) USCIS may revoke an approved petition for U nonimmigrant status following a notice of intent to revoke. USCIS may revoke an approved petition for U nonimmigrant status based on one or more of the following reasons:

(A) The certifying official withdraws the U nonimmigrant status certification referred to in **8 CFR 214.14(c)(2)(i)** or disavows the contents in writing;

(B) Approval of the petition was in error;

(C) Where there was fraud in the petition;

(D) In the case of a U-2, U-3, U-4, or U-5 nonimmigrant, the relationship to the principal petitioner has terminated; or

(E) In the case of a U-2, U-3, U-4, or U-5 nonimmigrant, the principal U-1's nonimmigrant status is revoked.

(ii) The notice of intent to revoke must be in writing and contain a detailed statement of the grounds for the revocation and the time period allowed for the U nonimmigrant's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of the date of the notice. USCIS shall consider all relevant evidence presented in deciding whether to revoke the approved petition for U nonimmigrant status. The determination of what is relevant evidence and the weight to be given to that evidence will be within the sole discretion of USCIS. If USCIS revokes approval of a petition and thereby terminates U nonimmigrant status, USCIS will provide the alien with a written notice of revocation that explains the specific reasons for the revocation.

(3) Appeal of a revocation of approval.

A revocation on notice may be appealed to the Administrative Appeals Office in accordance with 8 CFR 103.3 within 30 days after the date of the notice of revocation. Automatic revocations may not be appealed. The denial upon which an appeal is filed will not become final until the appeal is adjudicated.

(4) Effects of revocation of approval.

Revocation of a principal alien's approved **Form I-918** will result in termination of status for the principal alien, as well as in the denial of any pending Form I-918, Supplement A filed for qualifying family members seeking U-2, U-3, U-4, or U-5 nonimmigrant status. Revocation of a qualifying family member's approved Form I-918, Supplement A will result in termination of status for the qualifying family member. Revocation of an approved Form I-918 or Form I-918, Supplement A also revokes any waiver of inadmissibility granted in conjunction with such petition.

(i) Removal proceedings.

Nothing in this chapter prohibits USCIS from instituting removal proceedings under section 240 of the Act, 8 U.S.C. 1229(a), for conduct committed after admission, for conduct or a condition that was not disclosed to USCIS prior to the granting of U nonimmigrant status, for misrepresentations of material facts in Form I-918 or Form I-918, Supplement A and supporting documentation, or after revocation of U nonimmigrant status.

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39.2 T Immigrants

(a) [Reserved]

(b) Eligibility.

(1) [Reserved]

(2) Physical Presence. Physical presence on account of trafficking in persons includes aliens who were allowed entry into the United States for participation in investigative or judicial processes associated with an act of perpetrator of trafficking. INA § 101(a)(15)(T)(i)(II).

(3) Compliance with Reasonable Requests. In its discretion, USCIS may determine that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance in an investigation or prosecution. In that case, the victim remains eligible for T nonimmigrant status. INA § 101(a)(15)(T)(iii). To establish eligibility for this exception, an applicant may submit an affirmative statement describing the trauma, along with any other credible evidence. An applicant's statement alone may be sufficient to establish eligibility for the exception. However, USCIS encourages applicants to submit other evidence along with their statement. One example of suggested evidence is a signed statement on official letterhead from a professional who makes determinations of this type in the course of his or her job, such as a medical professional or social worker or victim advocate, and can attest to the victim's mental state. USCIS reserves the right to contact the law enforcement agency involved in this case, if appropriate. See 8 CFR 214.11(h)(1).

(c) Application Process.

(1) Filing an Application.

(A) Fee Waiver. USCIS can waive any fees associated with the filing of an application for T nonimmigrant status through final adjudication of the adjustment of status applications. INA § 245(l)(7). USCIS will accept a request for fee waiver for any form that an applicant for T nonimmigrant status may file, including any applications that a T nonimmigrant may file before the final adjudication of an adjustment of status application.

(B) [Reserved]

(C) Applicants with Final Orders of Removal, Deportation, or Exclusion. DHS may grant an administrative stay of a final order of removal to an applicant for T nonimmigrant status in the United States if USCIS determines that the applicant has set forth a prima facie case for approval. INA § 237(d)(1). The administrative stay will remain in effect until the application for T nonimmigrant status is approved or there is a final administrative denial.

(d) [Reserved]

(e) [Reserved]

(f) Derivative Status of Immediate Family Members.

(1) Eligibility.

(A) Regardless of the T nonimmigrant applicant's age, USCIS may grant derivative T nonimmigrant status to the applicant's parents or unmarried siblings under 18 years of age who USCIS determines face a present danger of retaliation as a result of the applicant's escape from the severe form of trafficking or cooperation

with law enforcement. It is the applicant's burden to establish that a family member faces a danger of retaliation. An applicant may submit an affirmative statement describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement. An applicant's statement alone is not sufficient to establish that a family member faces a danger of retaliation. An applicant may submit any other credible evidence. A non-exhaustive list of evidence includes previous grants of advanced parole to family members, a signed statement from a law enforcement official describing the danger of retaliation, trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses. USCIS also reserves the right to contact the law enforcement agency involved in the case, if appropriate.

(g) Duration of T Nonimmigrant Status.

(1) [Reserved]

(2) Extension of Status.

(A) In its discretion, USCIS may extend T nonimmigrant status in three circumstances (INA § 214(o)(7)(B)):

- If the law enforcement official investigating or prosecuting the activity related to human trafficking certifies that the presence of the T nonimmigrant is necessary to assist in the investigation or prosecution.
- If the T nonimmigrant is eligible to apply for adjustment of status under section 245(l) of the INA, but is unable because the regulations have not been issued to permit T nonimmigrants to adjust status.
- If USCIS determines that an extension of the period of nonimmigrant status is warranted due to exceptional circumstances.

(B) USCIS will extend T nonimmigrant status during the pendency of an application for adjustment of status under section 245(l) of the INA. INA § 214(o)(7)(C).

Appendix 39-1 Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants (Sept. 24, 2009), Memorandum from David J. Venturella, Acting Director, ICE [Appendix Added 07/22/2010]

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U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

SEP 24 2009

MEMORANDUM FOR: Field Office Directors
FROM: 
David J. Venturella
Acting Director
SUBJECT: Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant
Status (U-visa) Applicants

Purpose

This memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO) Field Office Directors (FODs) about the factors to consider when adjudicating requests for a Stay of a Final Administrative Order of Removal filed by an alien with a pending petition for U Nonimmigrant Status (U-visa).

Background

U-visas are available to aliens who, among other requirements, have "suffered substantial physical or mental abuse" as a result of certain enumerated criminal acts pursuant to section 101(a)(15)(U) of the Immigration and Nationality Act (INA) who assist government officials in investigating or prosecuting such criminal activity. An alien seeking a U-visa must file, or have someone file on his or her behalf, a Petition for U Nonimmigrant Status, Form I-918, with U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center (VSC).

The Secretary of the Department of Homeland Security and her delegates have discretion to grant a Stay of an Administrative Final Order of Removal under section 241(c)(2) of the INA to an alien with a pending petition for a U-visa if the alien establishes *prima facie* eligibility for the benefit. See INA § 237(d). The Stay of Removal may remain in effect until: (1) USCIS approves the petition for a U-visa; or (2) USCIS denies the U-visa petition after the alien has exhausted all administrative appeals. USCIS has jurisdiction to decide if an alien has established *prima facie* eligibility. See 8 C.F.R. § 214.14(c).

Applications for Stay of Deportation or Removal

When adjudicating Stay requests, FODs must comply with the applicable regulation at 8 C.F.R. § 241.6 and the guidance below when assessing whether to grant an alien's application for a Stay of Removal.

Eligibility

The FOD should favorably view an alien's request for a Stay of Removal if USCIS has determined that the alien has established *prima facie* eligibility for a U-visa. When deciding the stay request, the FOD should also consider favorably any humanitarian factors related to the alien or the alien's close relatives who rely on the alien for support (*Cf* 8 C.F.R. § 212.5). For aliens with pending U-visa petitions who are not subject to a final order of deportation or removal, but who are detained and/or in removal proceedings, the FOD should contact its local Office of Chief Counsel (OCC) for additional guidance.

A Stay of Removal on the basis of a pending application for a U-visa is not appropriate in the following situations: 1) USCIS has determined that the alien is not *prima facie* eligible for a U-visa; 2) USCIS has denied the alien's petition for a U-visa on the merits; or 3) serious adverse factors weigh against granting a Stay of Removal. Serious adverse factors include the following: (1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns. In the absence of any of the above factors, the FOD should generally grant the alien a Stay of Removal when USCIS has found the alien to be *prima facie* eligible for a U-visa.

Procedure

If DRO assumes custody of an alien who claims to have a pending U-visa petition, but who has not filed for a Stay of Removal, DRO must provide the alien with an Application for Stay of Removal, Form I-246, along with a fee waiver policy. If the alien does not file for a Stay of Removal or present evidence of the pending U-visa petition and the FOD finds no evidence of a pending petition, DRO may continue to process the alien for removal. Regardless of whether or not a Stay is requested, the FOD should use his or her discretion in making any determination about whether to remove an alien who has a pending U-visa petition and has exhibited no adverse factors. If the alien provides evidence of a pending U-visa petition but declines to file a Stay request, or if the alien claims to have a pending U-visa petition, but there is no record of it, the FOD shall notify both the OCC and the Assistant Director for Field Operations prior to scheduling the alien's removal.

Upon receiving a Stay request from an alien with a pending U-visa petition, the local DRO office must contact its local OCC to request a *prima facie* determination from USCIS's VSC. DRO should allow USCIS a minimum of five business days to make a *prima facie* determination. During this time, the FOD should not deport or remove the alien, although DRO may continue to

SUBJECT: Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants

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secure the necessary documents to effect the alien's removal in the event USCIS finds that the alien is not *prima facie* eligible for a U-visa or denies the petition on the merits. The VSC will e-mail the respective DRO Field Office Stay mailbox and the local OCC point of contact with the results of the *prima facie* review or a copy of the decision notice.

If USCIS finds that the alien has established *prima facie* eligibility, the FOD, working in conjunction with the local OCC, will adjudicate the stay request. The FOD should view a Stay request favorably, unless serious adverse factors exist, as outlined above. If the FOD finds that serious adverse factors exist and is inclined to deny the Stay request despite the USCIS *prima facie* eligibility finding, the FOD must provide a summary of the case to DRO Headquarters for further review.

The Stay may remain in effect for up to 180 days. If at the end of 180 days, USCIS has not made a final decision about the merits of the U-visa petition, and no new adverse factors are apparent, the FOD should extend the stay as needed for USCIS to complete adjudication of the petition. For a petitioner whose Form I-918 has been approved, an order of exclusion, deportation, or removal issued by the Secretary will be deemed canceled by operation of the law. A petitioner whose Form I-918 has been approved, but who is subject to an order issued by an immigration judge or the Board of Immigration Appeals, may seek cancellation of the order through a filing of a motion to reopen and terminate. In cases where USCIS denies a petition, the Stay will be lifted automatically as of the date the denial becomes administratively final. See 8 C.F.R. § 214.14(c)(5)(i) and (f)(6). The FOD, or his or her designee, should continually work with USCIS to ensure the U-visa petition is adjudicated as quickly as possible.

Upon deciding whether to grant or deny an alien's Stay request, the FOD shall provide the alien or the attorney of record with written notice, place a copy of the notice in the alien's A-file, and enter the decision into the ENFORCE Alien Removal Module. .

Although DRO has the authority to detain an alien while USCIS adjudicates a U-visa petition, DRO should release the alien while the petition is pending unless serious adverse factors weigh against release or the alien is subject to mandatory detention under the INA. The issuance of an administrative Stay of Removal will not toll the period of detention under the standards of 8 C.F.R. § 241.4. See 8 C.F.R. § 214.14(c)(1)(ii) and (f)(ii). Therefore, for those cases where the alien is detained and the U-visa petition remains pending, DRO shall inform USCIS that the alien is detained and request that USCIS expedite the case.

This document provides only internal Immigration and Customs Enforcement guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful enforcement or litigative prerogatives of DHS or ICE.

Appendix 39-2 Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009), Memorandum from Peter S. Vincent, Principal Legal Advisor, ICE [Appendix Added 07/22/2010]

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U.S. Immigration
and Customs
Enforcement

SEP 25 2009

MEMORANDUM FOR: OPLA Attorneys

FROM: Peter S. Vincent *PSV*
Principal Legal Advisor

SUBJECT: **Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal**

Purpose

This memorandum provides field guidance to ensure compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) regarding aliens with pending U visa petitions who are either (1) subject to a final administrative order of deportation or removal and request a stay of removal or (2) in removal proceedings.

Background

The Office of Detention and Removal Operations (DRO) has issued field guidance for handling U visa applicants who are under a final order of removal. For aliens with final orders of removal, DRO is to contact its local Office of Chief Counsel (OCC) in order to request a *prima facie* determination from the U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center (VSC). DRO is also to contact its local OCC in cases of detained aliens in removal proceedings with pending petitions.

Final Order Aliens who Request a Stay of Deportation or Removal

The Secretary of Homeland Security and her delegates have discretion to grant a stay of an administrative final order of removal under section 241(c)(2) of the Immigration and Nationality Act (INA) to an alien with a pending petition for a U visa if the alien establishes *prima facie* eligibility for the benefit. See INA § 237(d). A determination that a petition is *prima facie* eligible does not prevent a subsequent denial of the pending U nonimmigrant status petition. The stay of removal may remain in effect until (1) USCIS approves the petition for a U visa or (2) USCIS denies the U visa petition after the alien has exhausted all administrative appeals.

SUBJECT: Administrative Stay of Removal for U Nonimmigrant Status (U visa) Applicants

The FOD should favorably view an alien's request for a stay of removal if USCIS has determined that the alien has established *prima facie* eligibility for a U visa. When deciding the stay request, the FOD should also consider favorably any humanitarian factors related to the alien or the alien's close relatives who rely on the alien for support. Cf. 8 C.F.R. § 212.5.

A stay is not appropriate on the basis of the U visa in the following situations: (1) USCIS has determined that the alien is not *prima facie* eligible for a U visa; (2) USCIS has denied the alien's petition for a U visa on the merits; or (3) serious adverse factors weigh against a stay of removal. Serious adverse factors include the following: (1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns.

Upon receiving a stay request from an alien with a pending U visa petition, the local DRO office must contact its local OCC to request a *prima facie* determination from USCIS's Vermont Service Center (VSC). DRO should allow USCIS a minimum of five (5) business days to make a *prima facie* determination. During this time, the FOD should not deport or remove the alien, although DRO may continue to secure the necessary documents to effect the alien's removal in the event USCIS finds that the alien is not *prima facie* eligible for a U visa or denies the petition on the merits. The VSC will e-mail the respective Field Office DRO stay mailbox and the local OCC point of contact with the results of the *prima facie* review or a copy of the decision notice.

If USCIS finds that the alien has established *prima facie* eligibility, the FOD, working in conjunction with the local OCC, will adjudicate the stay request. The FOD should view a stay request favorably, unless serious adverse factors exist, as outlined above. If the FOD finds that serious adverse factors exist and is inclined to deny the stay request despite the USCIS *prima facie* eligibility finding, the FOD must provide a summary of the case to DROHQ for further review.

Aliens in Removal Proceedings

If an alien in removal proceedings states that he or she has filed a U visa petition with USCIS, and provides proof of such filing, the OCC shall request a continuance to allow USCIS to make a *prima facie* determination. Once USCIS has determined that the alien has made a *prima facie* case, the OCC should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition.

If USCIS grants the petition while the alien is still in proceedings and relief in the form of adjustment of status appears clearly approvable, the OCC, exercising its prosecutorial discretion, should favorably consider moving to terminate proceedings. If USCIS grants the petition after the alien receives a final order of removal, the OCC, exercising its prosecutorial discretion, should favorably consider a joint motion to reopen and terminate proceedings with either the immigration court or the Board of Immigration Appeals, whichever has jurisdiction.

This document provides only internal Immigration and Custom's Enforcement guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful enforcement or litigative prerogatives of DHS or ICE.