



July 21, 2010

**PM-602-0004**

## Policy Memorandum

**SUBJECT:** William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator's Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38)

### **Purpose**

This Policy Memorandum (PM) informs immigration services officers who adjudicate petitions for T and U nonimmigrant status and related applications for adjustment of status about new legislation affecting the T and U nonimmigrant programs.

### **Scope**

Unless specifically exempted herein, this PM applies to and is binding on all USCIS employees.

### **Authority**

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 122 Stat. 5044 (2008).

### **Background**

Section 201 of TVPRA 2008 amends the requirements for T and U nonimmigrant classifications at sections 101(a)(15)(T) and 101(a)(15)(U) of the Immigration and Nationality Act (INA) and the adjustment of status requirements for T and U nonimmigrants at sections 245(l) and (m) of the INA. Section 201 of TVPRA 2008 took effect immediately and applies to applications filed on or after December 23, 2008, the date of enactment.

### **Policy**

All USCIS officers adjudicating applications for benefits under the T and U nonimmigrant classifications and related adjustment of status applications filed on or after December 23, 2008 will apply the provisions of TVPRA 2008 as summarized in this PM.

## **A. TVPRA 2008 Provisions Affecting T Nonimmigrants**

### ***Eligibility Requirements***

TVPRA 2008 amended the provisions of the INA affecting six aspects of the eligibility requirements and application process for T nonimmigrant status. Those changes are listed below.

- Persons allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of trafficking are deemed physically present on account of trafficking. INA 101 § (a)(15)(T)(i)(II). This change codified existing USCIS interpretation.
- Persons unable to cooperate with law enforcement requests due to physical or psychological trauma are exempted from the requirement of compliance with those requests and remain eligible for T nonimmigrant status. INA 101 § (a)(15)(T)(i)(III)(bb).
- Trafficking victims may request derivative status for a parent or an unmarried sibling under 18 years of age who faces a present danger of retaliation as a result of the victim's escape from trafficking or because of the victim's cooperation with law enforcement. INA § 101(a)(15)(T)(ii)(III).
- Congress provided for fee waivers of forms filed by trafficking victims. USCIS interprets this authority broadly and may waive *any* fees associated with the filing of an application for relief under section 101(a)(15)(T) of the INA, including all fees arising through the final adjudication of the adjustment of status applications filed by T nonimmigrants.
- DHS may grant an administrative stay of a final order of removal to an applicant for T nonimmigrant status if USCIS determines that the applicant has set forth a prima facie case for approval. INA § 237(d)(1).
- There are now three circumstances in which USCIS may extend T nonimmigrant status and one circumstance in which USCIS must extend T nonimmigrant status. INA § 214(o)(7). Extension of status will be addressed in a separate memorandum.

### ***Adjustment of Status***

TVPRA 2008 amended the provisions of the INA affecting four aspects of the T adjustment of status eligibility requirements. Those changes are briefly described below.

- For T nonimmigrants, TVPRA 2008 creates two exceptions to the general rule that an applicant for adjustment of status fails to meet the continuous physical presence requirement if he or she departs United States for a single trip exceeding 90 days or for multiple trips exceeding 180 days in the aggregate. INA § 245(1)(3).
- TVPRA 2008 made no changes to the requirement at 8 CFR 245.23(e)(2)(i)(B) that T nonimmigrants who have less than three years of continuous physical presence in the

United States when applying for adjustment of status must submit a document from the Attorney General attesting that the investigation or prosecution is complete.

- A T nonimmigrant applicant for adjustment who was under the age of 18 at the time of the trafficking victimization does not need to demonstrate compliance with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking. INA § 245(l)(1)(C)(iii). Immigration officers should adjudicate this exemption in the same manner as the exemption from cooperation at the T nonimmigrant application phase.
- USCIS may waive consideration of a disqualification from good moral character, including the grounds found at section 101(f) of the INA, if the disqualification was caused by, or incident to, the acts of trafficking that formed the basis of the underlying application for T nonimmigrant status. INA § 245(l)(6).

### ***Jurisdiction over Assistance in the Investigation or Prosecution***

Before TVPRA 2008, the INA contained a reference to the Attorney General at section 245(l)(1)(C) describing the requirement of assistance in the investigation or prosecution of acts of trafficking. TVPRA 2008 amended the INA so that the Secretary of Homeland Security is now required only to consult with the Attorney General as appropriate. INA § 245(l)(1)(C). Therefore, USCIS now has sole jurisdiction over the entire T nonimmigrant adjustment of status process, including the determination of whether an applicant complied with any reasonable requests for assistance in the investigation or prosecution, and will consult the Attorney General as it deems appropriate.

USCIS regulations state that the Attorney General has jurisdiction to determine whether an applicant received any reasonable request for assistance in the investigation or prosecution, and, if so, whether the applicant complied with that request. 8 CFR 245.23(d). If the Attorney General determined that an applicant failed to comply with any reasonable request for assistance, immigration officers were previously instructed to deny an application for adjustment of status unless USCIS found an applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States. An applicant for adjustment of status was therefore required to submit a document issued by the Attorney General or his or her designee certifying that the applicant had complied with any reasonable requests for assistance in the investigation or prosecution of the human trafficking offenses. 8 CFR 245.23(f).

After TVPRA 2008, an applicant is no longer required to obtain a certification from the Attorney General to demonstrate compliance with any reasonable requests in the investigation or prosecution. Immigration officers should no longer deny an application for lack of an Attorney General certification, but instead must determine whether the applicant has met the statutory requirement to comply with any reasonable request to assist in the investigation or prosecution of acts of trafficking.

## **B. TVPRA 2008 Provisions Affecting U Nonimmigrants**

### ***Eligibility Requirements***

TVPRA 2008 amended the provisions of the INA affecting four aspects of the eligibility requirements for U nonimmigrant status. Those changes are listed below.

- There are now three circumstances in which USCIS must extend U nonimmigrant status and one circumstance in which USCIS may extend U nonimmigrant status. INA § 214(p)(6). Extension of status will be addressed in a separate memorandum.
- Congress provided for fee waivers of forms filed by victims of crimes. USCIS interprets this authority broadly and may waive *any* fees associated with the filing of an application for relief under section 101(a)(15)(U) of the INA, including all fees arising through the final adjudication of adjustment of status applications filed by U nonimmigrants.
- USCIS may grant employment authorization to any alien who has a pending, bona fide petition for U nonimmigrant status. INA § 214(p)(6). This authority will be addressed in a separate memorandum.
- 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 applicant has set forth a prima facie case for approval. INA § 237(d)(1). More information regarding procedures for requesting a stay can be found in the memoranda issued by ICE.<sup>1</sup>

### ***Adjustment of Status***

TVPRA 2008 amended the provisions of the INA affecting one aspect of U nonimmigrants' eligibility to adjust status. This change is described below.

### ***Jurisdiction over Assistance in the Investigation or Prosecution***

Before TVPRA 2008, section 245(m)(1) of the INA required the Attorney General to make a determination that an applicant unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity. TVPRA 2008 amended the INA so that now the Secretary of Homeland Security is required only to consult with the Attorney General as appropriate in making a determination that affirmative evidence demonstrates that an applicant unreasonably refused to provide assistance to a Federal law enforcement official, Federal prosecutor, Federal judge, or other Federal authority investigation or prosecuting qualifying criminal activity. INA § 245(m)(1). TVPRA 2008 gives USCIS discretion to consult the Attorney General in making that determination.

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<sup>1</sup> 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).

Immigration officers therefore must determine whether the applicant has unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity. Guidance on determining what constitutes an unreasonable refusal will be addressed in a separate memorandum.

### **Implementation**

The Adjudicator's Field Manual (AFM) is revised as follows:

1. The existing paragraph (n) of Chapter 23.5 of the AFM is redesignated as paragraph (p) and new paragraphs (n) and (o) are added to Chapter 23.5 of the AFM to read:

### **Chapter 23.5 Adjustment of Status under Section 245 of the INA**

\* \* \*

#### **(n) Adjustment of Status by T Nonimmigrants.**

##### **(1) Eligibility.**

(A) [Reserved]

(B) Physical Presence for a Requisite Period. A T nonimmigrant will not be considered to have failed to maintain continuous physical presence in two circumstances:

- If the T nonimmigrant's absence from the United States was necessary to assist in the investigation or prosecution of the acts of trafficking. The applicant should provide an affirmative statement detailing his or her role in the investigation or prosecution of the acts of trafficking. Along with the statement, the applicant must submit a signed statement from an official involved in the investigation or prosecution of the acts of trafficking on official letterhead describing how the applicant's absence from the United States was necessary to assist in the investigation or prosecution.
- If an official involved in the investigation or prosecution of the acts of trafficking certifies that the absence from the United States was otherwise justified. The applicant should provide a signed statement from an official involved in the investigation or prosecution of the acts of trafficking on official letterhead describing how his or her absence from the United States was otherwise justified.

(C) Good Moral Character. USCIS may waive consideration of a disqualification from good moral character, including the bars to making a good moral character

determination found at INA § 101(f), if the disqualification was caused by, or incident to, the acts of trafficking that formed the basis of the underlying application for T nonimmigrant status. INA § 245(l)(6). A T nonimmigrant applying for adjustment bears the burden of demonstrating that the acts that would otherwise prevent USCIS from making a finding of good moral character were caused by or incident to the acts of trafficking. In order to meet this burden, the T nonimmigrant may submit:

- An affirmative statement explaining the relation between the bar-of-good-moral-character finding and the acts of trafficking; and
- Any other credible evidence.

(D) Assistance in an Investigation or Prosecution, Extreme Hardship, or Age.

(i) The burden is on the applicant, where applicable, to establish continued compliance with any reasonable requests for assistance. At a minimum, an applicant should submit an affirmative statement describing how he or she continues to be helpful in the investigation or prosecution and any other credible evidence. A non-exhaustive list of evidence includes a statement from a Federal, State or local law enforcement official describing how the applicant complied with any reasonable requests for assistance, trial transcripts, court documents, police reports, and news articles. If an applicant wants to rely on evidence previously submitted as part of the T nonimmigrant application, the applicant need not resubmit that evidence but can instead point to any evidence already contained in his or her DHS file.

(a) If an applicant submitted a Form I-914, Supplement B, along with the application for T nonimmigrant status stating that he or she was assisting law enforcement, but is no longer doing so at the time of the application for adjustment of status, the applicant should describe in the affirmative statement the reasons he or she is no longer assisting. Reasons could include, but are not limited to, the fact that the investigation or prosecution is now over or that a request for assistance was not reasonable. If a T nonimmigrant did not submit a Form I-914, Supplement B, but was granted status on the basis of the applicant's willingness to assist, the applicant should explain in the affirmative statement that he or she continues to be willing to assist and that no requests or reasonable requests were made to assist in any investigation or prosecution.

(b) USCIS will consult the Attorney General as it deems appropriate to determine compliance with the requirement of assistance in the investigation or prosecution of acts of trafficking. Applicants are not required to submit a document issued by the Attorney General or his or

her designee certifying that the applicant has complied with any reasonable requests for assistance. 8 CFR 245.23(f) is superseded.

(c) An applicant who was granted the trauma exception to compliance with reasonable requests for assistance in an investigation or prosecution at the T nonimmigrant petition phase does not need to demonstrate compliance with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking at the adjustment of status phase.

(ii) An applicant who was under the age of 18 at the time of the trafficking victimization does not need to demonstrate compliance with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking at the adjustment of status phase. INA § 245(l)(1)(C)(iii).

(iii) An applicant can demonstrate extreme hardship involving unusual and severe harm upon removal from the United States instead of demonstrating compliance with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking. INA § 245(l)(1)(C)(ii).

(2) Application Procedures for T Nonimmigrant Adjustment of Status.

(A) Jurisdiction. USCIS has sole jurisdiction over all applications for adjustment of status for T nonimmigrants.

(o) Adjustment of Status by U Nonimmigrants.

(1) Eligibility.

(A) [Reserved]

(B) [Reserved]

(C) Unreasonable Refusal to Assist in the Investigation or Prosecution. USCIS will determine whether the applicant has unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity. In its discretion, USCIS may consult the Attorney General in making a determination that affirmative evidence demonstrates that the applicant unreasonably refused to provide assistance to a State or local law enforcement official, State or local prosecutor, State or local judge, or other State or local authority investigating or prosecuting qualifying criminal activity.

2. Paragraphs (c)(1)(B) and (c)(1)(C) of Chapter 39.1 of the AFM are revised to read:

## Chapter 39.1 U Nonimmigrants

\* \* \*

### (c) Application Procedures for U Nonimmigrant Status.

(1) \* \* \*

(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](#)) as is 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 a 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(l)(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.

3. Paragraphs (g)(2)(B) and (g)(2)(C) of Chapter 39.1 of the AFM are revised to read:

(g) Duration of U Nonimmigrant Status.

(1) \* \* \*

(2) Extension of Status.

(A) \* \* \*

(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 of status 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 exceptional 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.

4. Chapter 39.2 of the AFM is added to read:

## Chapter 39.2 T Nonimmigrants

(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 or 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 the 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).

5. The AFM **Transmittal Memoranda** button is revised by adding, in numerical order, the following entry:

AD 10-38 July 21, 2010	<b>Chapter 23.5</b> and <b>Chapter 39</b>	Provides guidance regarding new statutory changes to the T and U nonimmigrant status and related adjustment of status.
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#### Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

#### Contact Information

This guidance is effective immediately. Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy or the Office of Service Center Operations.