



ASISTA NEWSLETTER

November 30, 2010

Dear Readers:

This newsletter features an in-depth article on how to cure final removal orders in U cases, an ongoing issue for many U visa holders. Ellen Kemp, Director of Legal Advocacy at the National Immigration Project of the National Lawyers Guild, worked with ASISTA Co-Director Gail Pendleton to identify the problems and suggest strategies for solving them. As with everything related to the U visa, the interpretation of the law continues to evolve, affecting you and your clients' choices. The strategies we suggest today may be different several months from now, so please be sure you subscribe to our list serve, VAWA Updates, so you receive any updates. In addition, if there are other issues which would benefit from a similar in-depth treatment, please let us know.

We also describe several amicus briefs filed by the National Network to End Violence Against Immigrant Women, of which ASISTA is a Co-Chair. These briefs combine immigration law and domestic violence expertise and may be helpful to you in framing your own arguments for individual cases and appeals. If you have a VAWA case in immigration proceedings, at the Board of Immigration Appeals or in federal court, please contact us as soon as possible, so we can provide background materials and strategy.

Finally, we provide some updates on memoranda and court decisions that affect VAWA, U and T applicants, and a Frequently Asked Question (FAQ) gleaned from technical assistance we've provided to you, our grantees. If there are other subjects you'd like to see explained in this Q & A format, please let us know.

Sonia Parras-Konrad and Gail Pendleton
ASISTA Co-Directors

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MOTIONS TO REOPEN FINAL ORDERS OF REMOVAL IN U NONIMMIGRANT STATUS CASES: LEGAL AND PRACTICAL CONSIDERATIONS

By Ellen Kemp and Gail Pendleton¹

I. Introduction

This article addresses filing a motion to reopen for U nonimmigrant status² applicants or holders who have a final order of removal³ from the Executive Office of Immigration Review (EOIR),⁴ with the purpose being to nullify the immigration consequences of the order and erase its history from government records. Although CIS will grant U status to victims of crimes with final orders, Immigration and Customs Enforcement (ICE) may deport without further hearing anyone they encounter whose system data indicate they have a final order. It is imperative, therefore, that you identify whether your clients are subject to a final order⁵ and to take steps to address that order in both your U application and in immigration court. Unless you “cure” the order in immigration court, your client may be deported despite an approved U.

This article focuses only on motions to reopen before the immigration judge or the Board of Immigration Appeals. For more information on filing a motion to reconsider or a motion to reopen the denial of a U status application by CIS (or, in the alternative, an appeal to the Administrative Appeals Office), please send your questions to ASISTA at questions@asistahelp.org.

¹ Ellen Kemp is a legal worker and the Director of Legal Advocacy at the National Immigration Project of the National Lawyers Guild. She is also a consultant to the ASISTA network. Gail Pendleton is the Co-Director of ASISTA. The authors thank Trina Realmuto, National Immigration Project of the National Lawyers Guild, for her thoughtful review and contributions.

²“U” *nonimmigrant status* is different than a “U” *visa*. In immigration jargon, the terms are often used interchangeably, although doing so is technically inaccurate. U experts define the distinction thus: “[Therefore,] the U visa allows your client to enter the United States. U nonimmigrant status allows your client to remain in the United States.” Kinoshita, Bowyer, & Ward-Seitz, *THE U VISA: OBTAINING STATUS FOR IMMIGRANT VICTIMS OF CRIME* §1.1 (2010)

³ As part of the 1997 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress restructured and renamed what we now call the “admission/deportation” grounds. Pub.L. 104-208, Div. C, 110 Stat. 3009-546. Clients in proceedings on or prior to April 1, 2007 were in either “exclusion” proceedings or “deportation” proceedings. Clients in proceedings on or after April 1, 2007, are in “removal” proceedings. Different rules apply for those in proceedings prior to the 1997 change, so it is important to check your clients’ immigration documents to determine which rules apply.

⁴ EOIR consists of the immigration courts, presided over by immigration judges (IJs), and the Board of Immigration Appeals (BIA), which reviews IJ decisions.

⁵ Note that orders on appeal are not “final.”

II. Background on U Status and Final Orders of Removal

In 2000, Congress created new forms of immigration status for victims of intimate partner violence, sexual violence, human trafficking, and other crimes who are helpful to law enforcement agencies.¹ The “U” visa was born.²

For a number of victims of crimes who are helpful to law enforcement, the U visa may be their first and only experience with federal immigration authorities. In other cases, victims of crimes may have an earlier immigration history. In those cases, an “old” final order of deportation or removal may exist in the person’s immigration file.

The regulations implementing the U visa statute allow specifically for a qualifying crime victim (and her family members) with an outstanding (unexecuted) final order of removal to apply for U status despite the existence of a final order.³ They do not, however, prevent the immigration authorities’ enforcement arm, Immigration and Customs Enforcement (ICE), from “executing” the order and deporting the crime victim.⁴ The reality is that a final order in the immigration history – whether executed or not – may cause severe legal and practical problems for a noncitizen victim of crime who has worked with law enforcement and otherwise qualifies for the U visa. Potential repercussions may include detention, forcible removal, and prohibitions on future immigration relief.

III. Jurisdiction Over Motions to Reopen Final Orders of Removal

Existing final orders of deportation, exclusion, or removal may have been issued by a variety of agencies within the immigration bureaucracy. The agencies have changed over the years, further complicating the issue. There is no unified way to nullify a final order. Instead, only the entity which issued the order has the authority to make it go away.

In promulgating regulations to implement the U visa, the Department of Homeland Security (DHS), through its sub-agency, Citizenship and Immigration Services (CIS), created a very simple mechanism for nullifying existing final orders for which it has responsibility. The

¹ Title V of the Victims of Trafficking and Violence Prevention Act of 2000 (VTVPA), Pub. L. No. 106-386, Title V, 114 Stat. 1464 (October 28, 2000).

² The “U” visa derives its name from the subsection of the immigration law where it appears: section 101(a)(15)(U) of the Immigration and Nationality Act (INA).

³ 8 C.F.R. §§ 214.14(c)(1)(ii) & (f)(2)(ii). Perfected orders, where the applicant left the US under an outstanding order, impact inadmissibility grounds under INA § 212(a) and will require waivers of inadmissibility.

⁴ *Id.*

Defending Against Reinstatement

The reinstatement provision at INA § 241(a)(5) targets noncitizens with prior removal orders who have departed the country and reentered without permission. Once a reinstatement order is issued, the statute bars noncitizens from applying for any relief from removal (except withholding and relief under the U.N. Convention Against Torture) and mandates their removal, regardless of their helpfulness to law enforcement.

The arguments against reinstatement orders in the U context, on which CIS has yet to comment, include cancellation of prior orders by operation of law and a broad waiver of inadmissibility grounds:

- Reinstatement of prior removal orders at INA § 241(a)(5) is within the sole jurisdiction of DHS. Thus, reinstatement is cancelled by operation of law when the victim is granted U status. Similarly, any final order *issued by DHS* that might give rise to a reinstatement proceeding is similarly cancelled by operation of law.
- Waiving the grounds of inadmissibility that are essential elements of 241(a)(5), namely sections 212(a)((9)(A) - (C), effectively eliminates the predicates to a reinstatement order. It is critical to specifically include these grounds when seeking the inadmissibility waiver.

This is a brief summary only. Please contact the authors[†] if you have clients facing potential or actual reinstatement. ASISTA also strongly encourages you to consult the reinstatement of removal practice advisory and litigation updates available on the website of the Legal Action Center of the American Immigration Council at www.legalactioncenter.org.

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regulations deem the final order automatically cancelled by operation of law when the U status is granted.⁵

The U regulations state that an applicant may seek cancellation of a final order issued by EOIR by filing a motion to reopen and terminate. DHS trial counsel may agree, as a matter of discretion, to join such a motion to overcome any applicable time and numerical limitations.⁶

⁵ 8 C.F.R. §§ 214.14(c)(5)(i) & (f)(6).

⁶ *Id.*

1. Because DHS lacks jurisdiction over EOIR, which is governed by the Department of Justice (DOJ), there is a dearth of formal guidance on how and when to reopen and terminate proceedings for approved U applicants with orders issued by IJs and the BIA. Immigration and Customs Enforcement (ICE), which governs DHS trial attorneys who appear in immigration court, has not yet implemented a clear, formal national policy on when its attorneys should join motions to reopen and terminate for crime victims.

As a result, some of the strategies described in the article are theories only. ASISTA encourages readers to share your experiences with us by contacting Co-Director Gail Pendleton,⁷ who has been coordinating discussions with CIS personnel working to fix problems with U visas generally and motions to reopen for purposes of terminating specifically.

IV. Before Filing the Motion: Preparing the U Status & Waiver Applications When A Final Order Exists

Applicants for U status are subject to the grounds of inadmissibility at INA § 212(a), although a waiver is available for all but one ground of inadmissibility (Nazi persecution, genocide, torture or extrajudicial killing).⁸ If a U applicant is subject to a ground of inadmissibility, she must not only prove that she meets the requirements for U status but also must obtain a waiver of inadmissibility pursuant to INA § 212(d)(14) in order to receive U status.⁹ A noncitizen with an existing final order of removal most likely will have triggered one or more grounds of inadmissibility and must request a waiver for them.

It is of paramount importance that a U waiver application list and explain all potential grounds of inadmissibility that the applicant has violated or may have violated. Only by including all potential grounds may an applicant preserve certain legal arguments. For more information, see section V, below.

If CIS denies a waiver for a U status applicant, a new waiver may be filed.¹⁰ The Administrative Appeals Office (AAO), which reviews appeals of many types of CIS decisions, believes it lacks jurisdiction to review the Vermont Service Center's denial of these waivers.¹¹

⁷ Please send an email to gailpendleton@comcast.net.

⁸ INA § 212(d)(14), 8 C.F.R. § 212.17

⁹ Note that CIS also may grant waivers under INA § 212(d)(3) and that this is the only ground mentioned on Form I-192 for nonimmigrant waivers. ASISTA strongly encourages practitioners to use and emphasize the use of (d)(14), however, because Congress designed this waiver specifically for U visas and obtaining waivers based only on (d)(3) may have future unintended and unforeseen consequences.

¹⁰ INA § 212(d)(14), 8 C.F.R. § 212.17(b)(3)

¹¹ 8 C.F.R. § 212.17(b)(3). Note: ASISTA and her national partners are researching potential appellate avenues for due process and other constitutional claims. Please contact Gail Pendleton at gailpendleton@comcast.net for more information.

To learn more about how to prepare a waiver application for a U visa case, please consult the training materials and samples on the ASISTA website at www.asistahelp.org.

In Absentia Order or Voluntary Departure Failure?

Be aware that there may be U adjustment issues for victims with *in absentia* final orders or who failed to comply with voluntary departure orders. Contact the authors if you have U applicant clients who accepted voluntary departure or who have *in absentia* orders.[†]

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V. When No Motion Is Needed: Final Orders of Removal Issued by the Secretary of Homeland Security

Victims of crimes with an existing final order of removal in their immigration files are treated differently, depending on the government agency that issued the final order. If the existing final order was an order issued by the Secretary of Homeland Security (or its predecessor organization, the Immigration and Naturalization Service (INS)), the regulations provide that a motion to reopen need not be filed to nullify it. The regulations deem the final order of removal cancelled by operation of law when U status is granted.¹²

Examples of orders of removal issued by DHS include orders issued pursuant to the following statutes:

- INA § 217 (administrative removal for those admitted under the visa waiver program)
- INA § 235(b)(1) (expedited removal of “arriving aliens”)
- INA § 238(b) (administrative removal of aggravated felons who are not lawful permanent residents)
- INA § 241(a)(5) (summary reinstatement of prior removal order)

VI. When A Motion Is Necessary: Final Orders Issued By the Executive Office of Immigration Review (EOIR)

Given the lack of national ICE guidance, when to file a motion is a risk/benefit analysis; your job is to help crime victims understand and weigh the risks and benefits. On the one hand, clients with outstanding final orders may encounter ICE (e.g., a traffic stop), and ICE may remove them swiftly. On the other hand, filing a motion (and an attendant stay of removal) will definitely bring a crime victim to the attention of ICE. You can't assure victims that ICE will not detain and try to remove them. In fact, ASISTA is aware of at least one recent case in which ICE removed a pending U applicant.

¹² 8 C.F.R. §§ 214.14(c)(5)(i) & (f)(6)

Until ICE adopts formal national policies of (a) not removing pending U applicants and (b) joining in motions to reopen once a U is approved, ASISTA generally recommends waiting until a U applicant has attained lawful permanent residence before filing a motion to reopen. This section discusses both the general approaches and arguments you may use when filing your motions at any time, and then examines what to do if your client needs to file before adjustment.

The U regulations promulgated by DHS/CIS address final orders issued by EOIR—that is, immigration judges or the Board of Immigration Appeals—in several places.¹³ The relevant language is reproduced below, emphasis added:

“[...]A petitioner who is subject to an order of exclusion, deportation, or removal issued **by an immigration judge or the Board [of Immigration Appeals]** may seek cancellation of such order by filing, with the immigration judge or the Board, a motion to reopen and terminate removal proceedings. ICE counsel may agree, as a matter of discretion, to join such a motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23.”

A. Arguments for Motions to Reopen (Rescind) in the U Context

Merely having a pending U application, an approved U application, or even an approved U adjustment may not guarantee that a motion to reopen (or rescind) a final order issued by EOIR will succeed. Apply the “tried and true” bases for motions to reopen (see box on *Motions to Reopen Generally*). Combine them with the following U-based analysis and tactics.

Plan A: Seek a joint motion with ICE counsel. If ICE counsel will not join the motion, seek a position of “non-opposition” to the motion from ICE counsel.

Argument: In the U context, regulations and guidance memoranda support government counsel joining (or not opposing) a motion.

First, the U regulations specifically suggest that ICE counsel agree to join such a motion.¹⁴ Second, several agency internal guidance memoranda support a request to the Office of the Chief Counsel (OCC) to join (or not oppose) a motion to reopen. Most recently, ICE issued two internal memoranda in September 2009 related to stays of removal for U status applicants. Although the memoranda focus on stays, they also directly address, briefly, motions to reopen (or rescind) final orders of removal.

The first memorandum, through ICE’s Detention and Removal Operations office (DRO), adopts the language of the U regulations:

¹³ *Id.*

¹⁴ *Id.*

A petitioner whose Form 1-918 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.¹⁵

The second, issued by ICE's Office of the Principal Legal Advisor (OPLA), states, in relevant part:

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. (emphasis supplied)¹⁶

Note that this latter memo exhorts ("should") rather than suggests to ("may") ICE counsel that they join in motions.

A series of historical guidance memoranda supports these requests. Memoranda issued in 2001 and 2003 emphasize that possible crime victims should not be removed without an opportunity to seek protection under the VTVPA of 2000.¹⁷ In May 2004, a guidance memorandum describes an agreement with ICE (again, through OPLA) that "ICE OCC shall then terminate removal proceedings on the basis of VSC's approval of interim relief."¹⁸

All these memoranda taken together support an ICE policy of joining motions to reopen U visa cases. This should be especially true for cases in which final orders must be erased from the system.

Plan B: Request *sua sponte* reopening from the immigration judge. Share the Plan A regulations, guidance and arguments with the court. Argue that ICE's refusal to join in a motion undermines the goals of the law and the judge should use the "other" category to grant a *sua sponte* motion.

¹⁵ David Venturella, Acting Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, to Field Office Directors, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U visa) Applicants* (Sept. 24, 2009) at 3 (available on the ASISTA website, www.asistahelp.org).

¹⁶ Peter S. Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, to OPLA Attorneys, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009) at 2 (available on the ASISTA website, www.asistahelp.org).

¹⁷ Michael Cronin, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, to Michael Pearson, Executive Associate Commissioner, Office of Programs, *Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 - "T" and "U" Nonimmigrant Visas*, HQ INV 50/1 (Aug. 30, 2001); William Yates, Associate Director of Operations, Citizenship and Immigration Services, to Director, Vermont Service Center, *Centralization of Interim Relief for U Nonimmigrant Status Applicants* (Oct. 8 2003). Both memoranda available at www.asistahelp.org

¹⁸ William Yates, Associate Director, Operations, U.S. Citizenship and Immigration Services, to Paul Novak, Director, Vermont Service Center, *Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings*, HQOPRD 70/6.2 (May 6, 2004), at 2 (available at www.asistahelp.org).

“Other” is defined in the EOIR practice manuals as follows:

Other. — In addition to the regulatory exceptions for motions to reopen, exceptions may be created in accordance with special statutes, case law, directives, or other special legal circumstances.¹⁹

Law enforcement has certified that your client was helpful to them; failing to cure her final order leaves her in jeopardy and thwarts the will of Congress. ICE's refusal to join in your motion not only harms your helpful client, it generally deters others from accessing justice and providing vital assistance to law enforcement. The judge should, therefore, rectify the problem.

Finally, argue that BIA case law supports reopening in “exceptional situations.” See *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999), *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998), *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). A claim to U relief may qualify as an “exceptional situation.”

Argument #1: The delay in issuance of U regulations constitutes an “exceptional situation.” The Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) created U relief for victims of crime helpful to law enforcement.²⁰ The agency did not issue regulations, however, until seven years later.²¹ Regardless of diligence, the victim may not have been able to apply for U relief during immigration court proceedings or the period to file a timely motion to reopen.

Argument #2: This is humanitarian relief and this court's intervention is necessary to perfect that relief (include Congressional intent arguments noted above).

Argument #3: Analyze the underlying facts of your client’s claim to U relief. For example, many U claims are based on intimate partner violence. The victim’s cooperation with law enforcement may have resulted in deportation of the abuser to the home country. The victim, if deported, may be at heightened risk of retaliation by the abuser and have no recourse to protection. This constitutes an exceptional situation.

These are just a few examples of U-specific arguments to support a motion to reopen. Please share your creative arguments in the U context with ASISTA by emailing them to ellen@nationalimmigrationproject.org.

¹⁹ United States. Dept. of Justice. Executive Office for Immigration Review. Office of the Chief Immigration Judge. Immigration Court Practice Manual, Ch. 5, Motions before the Immigration Court (February 2008), accessed August 29, 2010, and United States. Dept. of Justice. Executive Office for Immigration Review. Board of Immigration Appeals. Practice Manual, Ch. 5, Motions before the Board (July 2004), accessed August 29, 2010. Note: Please bear in mind that practice manuals are not binding authority.

²⁰ Title V of the Victims of Trafficking and Violence Prevention Act of 2000 (VTVPA), Pub. L. No. 106-386, Title V, 114 Stat. 1464 (October 28, 2000).

²¹ 72 Fed. Reg. 53013 (Sept. 17, 2007)

Motions to Reopen Generally

U applicants or holders filing a motion to reopen with EOIR are subject to the same general standards as others filing motions to reopen. This section briefly flags the issues related to filing a motion to reopen a final order (or, in the case of *in absentia* final orders,^a a motion to rescind the final order). It also refers readers to additional resources on motions to reopen.

Normal motions to reopen and motions to rescind (as opposed to the special motions to reopen Congress created for VAWA applicants)^b are limited by time and number, and must have a proper basis. Time and number limitations may vary for each basis. These bases currently include:

- No proper notice of hearing^c
- Exceptional circumstances for not appearing at hearing^d
- Not appearing at hearing because in Federal or State custody^e
- New facts or circumstances or new evidence not previously available^f
- Changed country conditions in cases of asylum, withholding, and Convention Against Torture (CAT) relief^g
- *Sua sponte* reopening by immigration judge or BIA^h (*see Plan B* above)

Time and number limitations on motions to reopen final orders and motions to rescind *in absentia* final orders often force individuals to seek alternate legal arguments to reopen a case. A non-exhaustive list of strategies includes the following:

- Ineffective assistance of counsel arguments
- Equitable tolling considerations
- Joint motions with opposing counsel (*see Plan A* above)
- Requests for *sua sponte* reopening (*see Plan B* above)

For readers seeking additional information, suggested resources include:

- Sample motions on the U section of the ASISTA website
- Kurzban Immigration Law Sourcebook, 12th Edition, Ira J. Kurzban (2010)
- The U Visa: Obtaining Status for Immigrant Victims of Crime, 2nd Edition, Sally Kinoshita, Susan Bowyer and Catherine Ward-Seitz, Immigrant Legal Resource Center (2010)
- Practice Advisory, “Rescinding An *In Absentia* Order of Removal”, Beth Werlin, American Immigration Council Legal Action Center (March 2010)
- Relevant case law, including *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009), *Matter of Beckford*, 22 I&N Dec. 1216, 1218 (BIA 2000), *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999), *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998), *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

^a. *In absentia* final orders of removal may be issued if a person does not attend a proceeding. INA § 240(b)(5)(A).

^b. INA § 240(c)(7)(C)(iv)

- ^c INA § 240(b)(5)(C)(ii)
- ^d INA § 240(b)(5)(C)(i)
- ^e INA § 240(b)(5)(C)(ii)
- ^f INA §§ 240(c)(7)(A) & (B)
- ^g INA § 240(c)(7)(C)(ii)

B. When A Final Order Issued by EOIR Has Been Executed

In general, if an individual issued a final order of removal has subsequently left the U.S., current regulations bar a person from pursuing a motion to reopen with the Board of Immigration Appeals or the Immigration Courts.²² At present, with limited exceptions, immigration judges and the BIA are powerless to adjudicate motions to correct wrongful deportations, even under the most egregious circumstances.

Crime victims may have a perceived remedy that other noncitizens do not, however. A crime victim in the U.S. who qualifies or already holds U status could leave—or be removed from—the U.S. thereby executing her EOIR-issued final order of removal. She would then need to seek an appropriate waiver from CIS using the liberal standard at INA § 212(d)(14) and, assuming the waiver is approved, request the issuance of a U nonimmigrant visa from the appropriate consulate abroad and re-enter the U.S. on that visa.²³

It would be remiss to ignore this strategy in this article. In practice, however, consular processing leaves much to be desired. Examples of problems abound, several of which appear below—this list is intended to be illustrative, not exhaustive.

- “Future” inadmissibility. By leaving or being removed from the U.S., our crime victim triggers new grounds of inadmissibility, including INA § 212(a)(9), thereby requiring an additional waiver application. USCIS’s Vermont Service Center (VSC), which retains jurisdiction over all applications and waivers related to U status, cannot “pre-waive” inadmissibility grounds for U holders who depart, although they will expedite waivers for those abroad who have triggered the unlawful presence grounds.²⁴ The waiver adjudication process necessarily causes a certain amount of delay even in the most straightforward of circumstances.

²² 8 C.F.R. §§ 1003.2(d) & 1003.23(b)(1). These regulations are the subject of litigation in multiple courts of appeal and in two petitions for certiorari before the Supreme Court. Please email Trina Realmuto at trina@nationalimmigrationproject.org for additional information about the post-departure bar to motions to reopen.

²³ Please note that consular processing procedures for a U visa may differ from consular processing procedures in other contexts.

²⁴ Office of Communications, U.S. Citizenship and Immigration Services, *Questions and Answers: Filing T, U and VAWA Petitions with USCIS* (June 30, 2009), at 5-6 (available at www.asistahelp.org).

- Delays. Delays may be extremely problematic for U holders who consular process abroad. U status recipients are required to demonstrate continuous physical presence for three years in order to qualify for adjustment of status based on the U status.²⁵ Any absence in excess of 90 days or more than 180 days in the aggregate, with extremely narrow exceptions, will make a U holder ineligible to adjust.²⁶
- Abandonment of Adjustment. If a crime victim with a final order has an application for adjustment under INA § 245(m) pending and then departs the U.S., thereby “executing” and nullifying the final order, she will have abandoned her application for adjustment of status.²⁷
- Databases. What does ‘nullify’ truly mean for the U holder? At present, ASISTA and its partners are not aware of any legal or administrative process being used to remedy the serious practical effects of a final order remaining on a person’s immigration record. For example, certain noncitizens are entered into the National Crime Information Center (NCIC) database. This database is accessible nationwide to a broad range of law enforcement for routine activities such as traffic stops. The person with a final order may, therefore, show up as an immigration violator. The retention of immigration violator information is listed in the NCIC operating manual as “unlimited.” The manual also states: **“An Immigration Violator (EW) record will remain on file indefinitely or until action is taken by the ICE to clear or cancel the record.”**²⁸ The record is only going to show that the person has an immigration “hit” not that they are in lawful immigration status.

C. Timing: When To File the Motion To Reopen

When to file a motion to reopen is a critical decision, given the risk of detention and removal by ICE. Moreover, in many U cases with final orders, the deadline for filing a motion to reopen on certain bases may have elapsed, perhaps years ago. Nevertheless, if you have reason to fear that ICE intends to detain or remove a U holder, filing a motion may not substantially increase the victims' risk of deportation. It may, instead, help prevent that result.

²⁵ INA § 245(m)(1)(A).

²⁶ INA § 245(m)(2).

²⁷ 8 C.F.R. § 245.24(j) “[...] If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.”

²⁸ Immigration Violator File (IVF) of the National Crime Information Center (NCIC) database, revised August 2004/ NCIC, accessed on <http://www.scribd.com/doc/24688920/Immigration-Violator-File-IVF-of-the-National-Crime-Information-Center-NCIC-database>, 8/29/2010 (emphasis supplied).

More on Final Orders and Motions

Review periodically the differences between a motion to rescind, a motion to reopen, and a motion to reconsider, INA §§ 240(b)(5), (c)(7) & (c)(6) respectively. Distinct statutes, regulations, and case law govern final orders and the motions that may be filed to cure them. For example, if a noncitizen did not appear at her hearing, she may have received an *in absentia* final order of removal. INA § 240(b)(5). She may have been granted voluntary departure (permission to leave on one's own in lieu of a final order) but then failed to depart properly, in which case she will have a final order of removal. 8 C.F.R. §§ 1240.26(d), 1241.1(f). Practitioners should be keenly aware of the date and type of final order that a noncitizen victim may have in her immigration case when analyzing motion options, as well as possible repercussions at adjustment. See the box on Motions to Reopen Generally, above, for resources.

i. Motion After U Adjustment to Lawful Permanent Residence

ICE counsel in many areas refuses to join in motions until Us have adjusted status to lawful permanent residence. If you ask and they refuse, what happens to the crime victim? She risks being identified as a target for detention and removal. Thus, if a noncitizen has not been identified or detained by ICE, ASISTA generally recommends waiting until a crime victim has attained lawful permanent residence to file a motion to reopen.

Furthermore, for U applicants with final orders issued by the BIA, the BIA's long-standing policy in the "arriving alien" context may implicate EOIR's approach to such motions.²⁹ In *Matter of Yauri*, the Board held, in part:

[The BIA] generally lacks authority to reopen the proceedings of aliens under final orders of exclusion, deportation, or removal who seek to pursue relief over which the Board and the Immigration Judges have no jurisdiction, especially where reopening is sought simply as a mechanism to stay the final order while the collateral matter is resolved by the agency or court having jurisdiction to do so.³⁰

²⁹ See Mary Kenney, American Immigration Council, *USCIS Adjustment of Status of 'Arriving Aliens' With An Unexecuted Final Order of Removal* (Nov. 6, 2008) (available at www.legalactioncenter.org).

³⁰ *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009) at 103.

The decision also addressed requests to reopen or remand *sua sponte*, holding that the Board will not “generally exercise its discretion to reopen proceedings sua sponte [...] to pursue adjustment of status before the USCIS.”³¹

This combination of factors means that, until ICE formally agrees to join motions before Us adjust, the safest legal posture for your client’s motion is with approved lawful permanent residence in hand.

ii. Motion Before U Adjustment to LPR Status

There are several situations in which the benefit of filing a motion may outweigh the risk of exposure to possible detention and removal.

Imminent or Existing Detention or Removal Proceedings

If the crime victim is already exposed to ICE, the risk/benefit analysis shifts dramatically. For example, for a crime victim detained by immigration enforcement, removal may be imminent and filing a motion to reopen may forestall removal. In this situation, it is also imperative to file a request with CIS for an expedited *prima facie* assessment of the application for U status and to seek a stay of removal (see box on next page).

Local ICE Practice

If ICE in your area readily agrees to joint motions prior to U adjustment, the benefits of eliminating the final order from your client's file may outweigh the risk of exposure. Check with other local U visa practitioners on the latest practice by your ICE OCC (ASISTA can help connect you with other practitioners in your area). Then pose the hypothetical to OCC to ensure their practice hasn't changed. This will be especially important for clients with significant inadmissibility problems.

Regular Motion Still Available

If an individual has been issued a final order and the deadline to file a motion to reopen (or rescind) has not expired yet, filing the motion on time will probably help your client. Assess the merits of your regular motion claims (*see* box on **Motions to Reopen Generally** above) against the benefits of resolving the final order and the risks of exposure to detention and removal. *Remember that failure to comply with a voluntary departure order may affect a victim's ability to adjust under the U, so contact the authors if you have cases in which this is a problem.*

iii. Additional Arguments for Motions Before Adjustment

In addition to the arguments suggested in Plans A and B above, consider the following additional arguments.

³¹ *Id.*

Prima Facie Assessment & Stays of Removal

Whenever a noncitizen with a final order, including a crime victim, is in ICE custody, there is a risk of removal. To minimize that risk, file the U application immediately and request an expedited *prima facie* determination from CIS (contact gailpendleton@comcast.net if you need help making the request).

If CIS determines that the U applicant is *prima facie* eligible for relief, ICE may grant a stay of removal until the application is approved or there is final administrative denial of the application after exhaustion of administrative appeals. INA § 237(d). This administrative stay may supplement or extend an automatic stay of removal that occurs with certain types of motions to reopen. ICE may also release the detained noncitizen from its custody.

If your client has a final order, the best practice is to have a stay of removal application “ready for filing”, regardless of the case posture. “Ready for filing” does NOT mean file it! For a sample request for an administrative stay of removal, consult the ASISTA website at www.asistahelp.org. For more information about the standard for a judicial stay of removal in the federal courts, see *Nken v. Holder*, 129 S. Ct. 1749 (2009).

Plan A extended: Use the statute on administrative stays for prima facie determinations.

Argument: The ICE memoranda described at Plan A, above, reference INA § 237(d), which provides for an administrative stay of removal for those who receive prima facie determinations. A stay, if granted, may remain in effect *until approval of the U status*.³² This stay language implies that a motion to reopen may be filed either before or immediately after the nonimmigrant status is granted since, otherwise, a second stay would be required after U approval to safeguard against removal prior to adjustment. Argue that issuing the initial stay and joining the motion to reopen, thereby resolving the case now, is a more efficient use of agency resources than requiring a series of stays until ICE is willing to join in the motion.

Plan C: Use *Yauri* to your advantage.

Argument: The same analysis and language regarding “reopening to terminate” that the BIA uses in *Matter of Yauri* arguably also could be applied to obtaining the U nonimmigrant status, rather than solely to adjustment of status. The Board states, in relevant part:

³² INA 237(d)(1)(A). The stay expires when there is final administrative denial after exhaustion of appeals. INA 237(d)(1)(B)

The respondent's adjustment application has been processed as envisioned under the new regulations without resorting to reopening and "staying" the removal proceedings, and she has been granted the status for which she applied with the USCIS. Given these circumstances, reopening solely for termination of the proceedings is warranted and we will grant the DHS's motion.³³

D. Motion Denied: Next Steps

A motion to reopen (rescind) a final order issued by EOIR is filed with the court having administrative control over the record of proceedings. If that court denies them motion, the crime victim may seek judicial review. She must file the petition for review with the federal circuit court of appeals within 30 days of the BIA decision. She must file in the circuit court having jurisdiction over the place where the IJ conducted the proceeding.

While the crime victim awaits appellate review of the denial of the motion to reopen, she may be detained and/or removed. Seeking a stay of removal from ICE, the IJ, the BIA, or the circuit court is critical.³⁴ Most stays of removal are discretionary, however, and a request for a stay of removal may be denied.³⁵

For more information about seeking an administrative stay from ICE in the U context, see the box, above, on **Prima Facie Assessment & Stays of Removal**. For more information about filing a petition for review, consult "How to File A Petition for Review," available through the Legal Action Center of the American Immigration Council at www.legalactioncenter.org.

E. Why Joint Motions Should be Mandatory for Approved Us

ASISTA and its national allies would like to see a consistent policy that supports the laws that Congress passed to foster a collaborative relationship between law enforcement and immigrant communities and to protect immigrant victims of crimes. For example, ASISTA supports the creation of a national policy by ICE that would provide for joint motions to reopen at any stage of the U process. CIS and ICE, sister agencies within the Department of Homeland Security, have taken significant steps to reduce removal of crime victims, but they do not always agree internally. For example, ICE prioritizes removal of "criminal aliens" and appears to ignore the special waiver Congress created for those with criminal convictions, as well as other inadmissibility issues.

³³ *Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009) at 112.

³⁴ For more information about the standard for a judicial stay of removal in the federal courts, see *Nken v. Holder*, 129 S. Ct. 1749 (2009).

³⁵ Extremely narrow exceptions exist where an "automatic" stay of removal is provided for by statute, *See e.g.*, INA § 240(b)(5)(C)(for *in absentia* order recipients, who meet certain requirements); and INA § 240(c)(7)(C)(iv) (for certain VAWA applicants who are also "qualified aliens"). Automatic stay provisions in removal proceedings differ from previous rules governing cases in deportation and exclusion proceedings.

Delaying resolving U final orders is a drain on resources and stressful for U holders, who have proven they were victims of crimes and were helpful to law enforcement. These helpful victims should not be subject to the specter of detention or deportation because local law enforcement or ICE finds an "immigration hit" in the NCIC database. Vacating the final order earlier through a motion to reopen and purging the database benefits all parties--the crime victim, local and state law enforcement, ICE, CIS, and EOIR. Approved Us would not be exposed to the risk and costs of erroneous detention and deportation, and local and state law enforcement would not waste time, resources and the important capital of their immigrant communities' trust by locking up approved Us because of a hit in the NCIC database. ICE would not waste agency time and money on detention, adjudicating stays, and legal costs for Us already vetted and approved for status by its sister agency. CIS would not spend as much supervisory time and money responding to emergency requests, and EOIR could clear these cases off its overloaded dockets.

VII. Conclusion

Victims of crimes who have a final order of removal are not barred from seeking U relief directly from DHS. Filing a motion to reopen (or rescind) to "cancel" an existing unexecuted order issued by EOIR necessitates, however, a careful risk/benefit analysis. Identify whether your clients are subject to a final order and take steps to address that order in both your U application and in immigration court when the timing is right. Unless you "cure" the order in immigration court, your client may be deported despite qualifying for, or holding, approved U status.

Recent Amicus Briefs

ASISTA co-chairs the National Network to End Violence Against Immigrant Women (NNEVAIW). Part of our work is to ensure that the laws Congress designed to protect immigrant survivors are implemented as intended. To meet that end, ASISTA worked with attorneys and other Network members to file amicus briefs on several VAWA Cancellation of Removal cases. These appeals were filed with the Administrative Appeals Office (AAO), and the 2nd, 8th and 9th Circuit Courts of Appeal. Summaries of these briefs appear below (you can find the full briefs on our website, www.asistahelp.org):

One troubling development these cases reveal is that immigration judges and the BIA need education on domestic violence and the Congressional purpose of VAWA. Please contact ASISTA now if you have a case in court, so we can ensure you have all the arguments you need.

Administrative Appeals Office (AAO)

The Network's amicus brief examined the meaning and purpose of the "any credible evidence" standard for the *kind of evidence* CIS should entertain in VAWA cases, and how that standard interplays with the "preponderance of the evidence" *burden of proof* that generally applies in VAWA (and other) cases. Practitioners often confuse the two standards and may benefit from reviewing the legal analysis, as well as how to apply law to facts under these standards.

2nd Circuit of Appeals

The IJ found that although a VAWA applicant had been the victim of shaking, pushing, and shoving "on perhaps four or five occasions," this did not constitute battery for the purposes of VAWA. The IJ also held that, in the absence of a police report or hospital report, the victim was not eligible for relief. The BIA confirmed this, emphasizing an extremely narrow interpretation of "battery or extreme cruelty" and evidence supporting the claim. The Network argues that this narrow interpretation violates the law and undermines the Congressional purpose of VAWA.

8th Circuit Court of Appeals

In this VAWA cancellation case the unmarried mother based her claim (as allowed by the statute) on abuse to the child she had in common with the lawful permanent resident father. The IJ and BIA held that extreme cruelty to the child did not exist, although the child's father beat the mother in front of the child, because there was no evidence of "actual harm" to the child. The Network's brief argued that requiring "actual harm" violates the law and its purpose. Moreover, subjecting a child to intentional acts of parental domestic violence is an act "so repulsive to society that they are, by their nature, extremely cruel" and should therefore, as a matter of law constitute "extreme cruelty," a finding the Board itself had made years ago in an unpublished decision.

9th Circuit Court of Appeals

This case is very similar to the 8th circuit case. The IJ and BIA held that there was no battery or extreme cruelty to children, even though their father beat them with a stick regularly, because no

medical treatment was needed and the oldest child testified that he loved his father. The Network argued that beating children with a stick hard enough to leave welts is battery on its face, and that loving your father doesn't mean he's not an abuser. Requiring medical records violates the "any credible evidence" standard and the statute does not require both battery and extreme cruelty, though both were present in this case.

PRACTICE UPDATES

Supreme Court Holds that Courts Have Jurisdiction to Review Motions to Reopen

Kucana v. Holder, 558 U.S. ___, 2010 U.S. LEXIS 764 (Jan. 20, 2010)

In a unanimous decision, the Supreme Court held that the courts of appeal have jurisdiction to review a Board of Immigration Appeals (BIA) decision denying a motion to reopen. The case focuses on the scope of INA § 242(a)(2)(B)(ii), the bar to judicial review of discretionary decisions. This section provides that

“no court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.”

In the underlying decision, *Kucana v. Holder*, 533 F.3d 534 (7th Cir. 2008), the Seventh Circuit had said that this provision applies to determinations declared discretionary by the Attorney General through regulation. Thus, according to the Seventh Circuit, motions to reopen, which are discretionary by regulation, are not reviewable. The Supreme Court reversed the Seventh Circuit, finding that § 242(a)(2)(B)(ii) bars review only of determinations made discretionary by statute.

The Court began its analysis by noting that a “motion to reopen is an ‘important safeguard’ intended to ‘ensure a proper and lawful disposition’ of immigration proceedings” and that there is long history of judicial review over reopening decisions. Employing tools of statutory interpretation, the Court looked to INA § 242(a)(2)(B)(ii)’s context and placement in the statute. It found that the surrounding judicial review provisions, INA § 242(a)(2)(A) (barring review over expedited removal decisions under INA § 235(b)(1)) and INA § 242(a)(2)(C) (barring review where person is removable based on specified criminal grounds) depend on statutory provisions,

not on regulations, to define their scope. The Court also found that INA § 242(a)(2)(B)(ii) must be read in conjunction with Section 242(a)(2)(B)(i), which likewise bars review over the granting of relief under specified statutory provisions (namely, waivers under sections 212(h) and 212(i), cancellation of removal, voluntary departure, and adjustment of status). Moreover, the Court found significant the character of the decisions Congress enumerated in INA § 242(a)(2)(B), which are “substantive decisions . . . made by the Executive in the immigration context as a matter of grace.” Such decisions are distinguishable from decisions on motions to reopen, which are a procedural device “serving to ensure that aliens are getting a fair chance to have their claims heard.” Finally, the Court found that had Congress intended the jurisdictional bar to apply to decisions specified as discretionary by regulation, it could have said so explicitly as it did in other places.

Next, the Court looked to the history of the motion to reopen and judicial review provisions. The Court noted that through IIRIRA Congress simultaneously codified the motion to reopen statute and numerous bars to judicial review of executive decisions. “Had Congress elected to insulate denials of motions to reopen from judicial review,” the Court said, “it could have so specified together with its codification of directions on filing motions to reopen.”

Finally, the Court found that any “lingering doubts” about Section 242(a)(2)(B)(ii) would be resolved by the presumption in favor of judicial review. There is no “clear and convincing evidence” that Congress intended to bar review over determinations made discretionary by regulation. Moreover, the Court said that under the Seventh Circuit’s construction of the statute “the Executive would have a free hand to shelter its own decisions from abuse of discretion appellate review simply by issuing a regulation declaring those decisions ‘discretionary.’ Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted.”

Read the [opinion](#).



New ICE Detainee Locator System Now Available

ICE now has available a detainee locator system on their website <https://locator.ice.gov/odls/homePage.do>. This system allows for searches of persons currently in detention or released from detention within 60 days. Searches may be done by A# or by First and Last Names, with Country of Birth. Information on persons under 18 is not available.



College Financial Aid for Immigrant Domestic Violence Survivors

The Department of Education (DOE) posted a ["Dear Colleague" letter](#), providing instructions on how to assist immigrant domestic violence survivors in securing financial aid. The letter formalizes a policy that has been in effect for a few years but was not officially publicized.

The "Dear Colleague" letter is posted on the federal government's **Information for Financial Aid Professionals (IFAP)** website. The letter's subject is [Student Aid Eligibility - Eligibility for Title IV Aid for "Battered Immigrants-Qualified Aliens" as provided for in the Violence Against Women Act](#), and it can be found at <http://ifap.ed.gov/dpcletters/GEN1007.htm>



USCIS Publishes Final Memo on Extension of U Nonimmigrant Status for Derivative Family Members

U.S. Citizenship and Immigration Services (USCIS) has published a final policy memorandum, USCIS PM 602-001, "Extension of U Nonimmigrant Status for Derivative Family Members Using the Application to Extend/Change Nonimmigrant Status (Form I-539) <http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/u-visa-i-539-derivative-extension-.pdf>," that is available on the USCIS website. PM 602-001 authorizes the Vermont Service Center to approve Forms I-539 to extend U nonimmigrant status for a derivative family member whose initial period of stay is less than four years.



USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010

USCIS has approved 10,000 petitions for U nonimmigrant status in fiscal year 2010. The "U Visa" program offers immigration protection to victims of crime. This marks the first time that USCIS has reached the statutory maximum of 10,000 U visas per fiscal year since it began issuing U visas in 2008.

USCIS granted Deferred Action and Employment Authorization Documents to qualified applicants until October 1, when could issue U Visas in the new fiscal year.



Proposed Fee Waiver Form

U.S. Citizenship and Immigration Services (USCIS) has proposed for the first time a standardized fee waiver form in an effort to provide relief for financially disadvantaged individuals seeking immigration benefits.

ASISTA submitted comments in agreement with the comments submitted by Legal Aid Foundation of Los Angeles (LAFLA), regarding the impact of this waiver on crime survivors.

To view the comments sent by ASISTA, and LAFLA, go to <http://www.asistahelp.org/index.cfm?nodeID=21011&audienceID=1&action=display&newsID=10140>.



Final Memo on TVPRA 2008

U.S. Citizenship and Immigration Services (USCIS) has published a final policy memorandum entitled *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)*. The policy memorandum 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.

For both T and U Visa applicants, this memo specifically addresses extensions of T or U status, fee waivers for *all* forms for T and U Visa applicants *through and including adjustment of status*, and the possibility (but not guarantee) of an administrative stay of removal for T or U applicants who show a prima facie case.

Additionally, for applicants for T Visas, the memo addresses physical presence requirements for persons who are in the U.S. for the purpose of participation or investigation into trafficking. It also allows for T Visas for persons who are unable to cooperate in the investigation, as well as for derivatives who face a danger of retaliation due to the investigation into trafficking.

Specific to U Visas, this memo allows for employment authorization for U Visa applicants with bona fide petitions (note that CIS has not yet implemented this provision). Additionally, the memo addresses the determination that an applicant unreasonably refused to cooperate in the investigation of the crime. This determination will now be made by USCIS who may consult the Attorney General, as opposed to the previous requirement that the determination be made by the Attorney General.

Please note that the memorandum can be viewed by visiting the [Feedback Updates](#) section at www.uscis.gov, as well as on the ASISTA website at www.asistahelp.org.



ASISTA FAQ

Q: We have some U Visa holders who are ready to adjust status, but for whom not all grounds of inadmissibility were included on the original I-192 waiver of grounds of inadmissibility. Do we need to file an additional I-192 waiver before we submit the I-485 Adjustment of Status or should we file them concurrently?

A: In general, it's better to cure all inadmissibility problems before you seek adjustment. Inadmissibility is not an eligibility requirement for adjustment but CIS has a huge amount of discretion at the adjustment phase, and your clients are better-positioned if CIS has already waived admissibility issues before they consider discretion.

If the inadmissibility issue was inadvertently not disclosed and the U was approved, or if your client has triggered a new inadmissibility ground, try to "amend" the I-192 with correct inadmissibility disclosures as soon as possible.

To avoid the amended I-192 getting lost or misfiled, send the request to amend the I-192 to the follow-up email address for the Vermont Service Center (VSC) at hotlinefollowupI918I914.vsc@dhs.gov, and make sure you include all relevant information including A# and Receipt number from the original application. If you have problems with this, contact Gail Pendleton, gailpendleton@comcast.net, who can help you navigate final approval of your amended I-192.

This is also be the best way to cure unlawful presence bars to admissibility triggered when a client leaves the United States. VSC has swiftly approved waiver applications filed by clients abroad; use the same system described above for amending the I-192.

Remember that credibility is key with VSC, therefore revealing all possible grounds as early as possible is the best practice. Rehabilitating credibility is extremely difficult. If you have questions about whether a client has, in fact, triggered a ground of inadmissibility, contact us through questions@asistahelp.org, and we'll help you analyze the facts in your case.

If you are at the adjustment phase with unwaived inadmissibility grounds, explain why you did not reveal the grounds earlier and provide the same kinds of arguments you would have for the waiver, see Pendleton article on *Overcoming Inadmissibility for U Visa Applicants* at <http://www.asistahelp.org/index.cfm?nodeID=26427&audienceID=1>

ANNOUNCEMENTS

OVW Grantees:

Join us for Free Webinars

Each Month on the 3rd Wednesday

2:00 PM - 3:30 PM EST

Each month, ASISTA holds a free webinar for OVW grantees, sponsored by the US Department of Justice Office on Violence Against Women.

December's topic:

U Visa Consular Processing, Adjustment and Avoiding Inadmissibility Issues

For more information or to ensure that you are on the invitation list, please contact us at questions@asistahelp.org.

ASISTA has Moved

ASISTA has moved to a new office. Our new address is

**ASISTA
2925 Ingersoll Ave., Ste 3
Des Moines, IA 50312**