ASISTA NEWSLETTER

May 30, 2010

Dear Readers:

This edition of the ASISTA Newsletter includes a Q&A with VSC from April of this year, as well as the second of a two-part article on U Visa applicants with criminal histories by ASISTA consultants Annie Benson and Jonathan Moore of the Washington Defender's Immigration Project.

Our Updates section includes information on the two draft memos from CIS that affect U Visas, and several other recent events with practice pointers and summaries. Finally, our FAQ features a questions on VAWA cancellation of removal and adjustment.

We hope you find this information helpful. As always, feel free to visit our website at any time at www.asistahelp.org for this and other newsletters, as well as information that you may find helpful as you advocate for immigrant survivors. Remember, we always welcome technical assistance questions from OVW Grantees and ASISTA Members on issues you face in individual cases.

From the Co-Directors,

Gail Pendleton & Sonia Parras-Konrad

INSIDE THIS ISSUE:

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Q&A With Vermont Service Center

April 6, 2010

Analysis and notes by Gail Pendleton

ASISTA's Co-Directors participated in meetings and trainings with CIS VAWA/U personnel several times over the past few months. The answers to a set of questions submitted on behalf of the field to CIS by ASISTA appear at the end of this article. Here are some brief updates:

Contacting VSC

CIS established two email addresses just for VAWA and U cases. The phone hotline still works, but has been reaching voicemail capacity lately. Please use only one method of communication, not both. Do not attach large numbers of documents, since that may clog the system; enough information to find the file and flag key issues should suffice.

When asking about derivatives, include information on the principal , since that's how they'll find the file. If your issue raises policy concerns, please continue to contact Gail Pendleton, who shares such concerns with VSC and CIS Headquarters leadership.

- **VSC number = 802-527-4888**
- **VAWA = hotlinefollowupI360.vsc@dhs.gov**
- **Us & Ts = hotlinefollowupI918I914.vsc@dhs.gov**

Contacting VSC Practice Pointer

Include your email address in your G-28s and other documents containing your contact information, so VSC can add your address to a "safe address" email list.

Supplementing Cases

CIS asked that you not send supplemental information before you get an RFE. Anything you submit that isn't in response to a communication from them will probably get lost. If you wish to supplement before receiving an RFE, use the contact info above to ensure it is attached to the correct file. Always place a copy of the last communication from VSC on top of any new documents you are sending.

U VIsas

CIS reported that they more than13,000 U principal applications pending and therefore expect to exceed the 10,000 annual visa allocation this fall. They expect the bona fide work authorization guidance to be out by then, however, and intend one way or another to continue to adjudicate U visas beyond the 10,000 limit granting work authorization to those they deem eligible for a visa once the new year begins.

Derivatives

The recent extensions memo addresses one of the major problems facing U derivatives (This memo is available on the asista website at http://www.asistahelp.org/documents/resources/Extension_Memo_39BF9A9D67AEB.pdf) CIS seems to be indicating that derivatives who age

out before CIS decides their case (but not before they filed the U) may be ineligible. Although they will expedite these cases (see below), we believe the derivative's age should freeze at time of filing. Please let us know if you have derivatives who may be in trouble if CIS adopts a date based on their adjudication date.

Expediting U Cases

In addition to those in the prima facie system, CIS will expedite:

* Derivatives who were under 21 at time of fiiing but are in danger of aging out before CIS decides their case; and

I* Us that were filed in 2007 or 2008. Under the "first-in-first-out" they should have been adjudicated by now and should definitely be done before the cap is met.

Dangers of Travel

It's important that clients understand the risks of traveling, even when they have approved U visas. Here are some of the current problems you should explain to any client who wishes to travel:

* Consulates are not well-educated about how to process U visas so you may have to wait weeks to get back in while we get CIS to explain it to them;

* Just by leaving the US you may trigger new bars to entry and we'll have to get those waived by the Vermont Service Center while you're abroad; If you are going to travel, make sure you have previously prepared a package with a request for the bars to re-entry. Contac the VSC once you have left the country to ensure the waiver is approved and that you are going to be able to re-enter without problems.

* If you've committed any crimes since you got the U visa, you will probably not get back in unless we get a new waiver for it first;

* It is very likely that you will have to pay consulate processing fees unless your U visa approval is valid for multiple entries.

* If you stay out of the US for 3 months or more you will lose your right to apply for lawful permanent residence (a green card). Your U visa will run out after 4 years and will then have no legal status based on the U.

Prima Facie Criteria

There are three:

* Detention
* Final orders; and
* Extreme emergent circumstances

Prima Facie Practice Pointer

Remember that this system was created to stop ICE from removing people. It should, therefore, be combined with stays where necessary (we do not recommend filing stays if you are not in detention or removal). You should expect to file the full application within two weeks, since VSC will want to expedite its decision.

Indirect v. Direct Victims

CIS stressed that "proximate harm" is the key to showing that someone is a direct victim. Some people we may be framing as indirect or bystander victims may meet the proximate harm test, so consider using this approach with close family members and others harmed by another's victimization.

Certification Practice Pointer

Ask law enforcement to use colored ink (not black) for the signature; that way concerns about originals should not arise. For instance, some people fax forms to law enforcement, which means the form law enforcement signs has the fax number, etc on it generated by the fax. Unless law enforcement uses colored ink, CIS can't tell if the form law enforcement signed was an original or a faxed copy of the original.

Inadmissibility Waivers

CIS stressed that the personal affidavit is crucial, especially in cases with multiple grounds. In cases involving criminal inadmissibility, they suggested evidence such as parenting classes, chemical rehabilitation, and any other classes to better themselves.

Inadmissibility Waiver Practice Pointer (What's the Public Interest)

How would you explain to strangers at a cocktail party why they should be happy about your client living in their community. For clients with multiple grounds, serious immigration violations or criminal issues, try to show the client's

* Recognition that what he or she did was wrong and contrition for any harm to others that resulted;
* Rehabilitation if possible or where that's difficult, e.g., in detention, other attempts at self-help and improvement; and
* A plan for avoiding getting into the kinds of situations that got the client into trouble before.

For detailed advice, see the article on this at the Asista website at http://www.asistahelp.org/documents/resources/Overcoming_Inadmissibility_08B108ABFD17D.pdf

U and T Adjustments

CIS has approved 343 U adjustments, no denials. They've granted 177 T adjustments, 7 denials. They believe they are current, so if you have an adjustment filed more than 9 months ago, contact them.

U Adjustment Practice Pointer

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VSC Stakeholder Meeting
April 6, 2010
VAWA, U & (some) T Questions

I. Processing Updates

A. Current Assignments

1. How many adjudicators are assigned to VAWA self-petitions?

Currently a sufficient number of officers are assigned to the VAWA Unit so that we have been able to reduce the backlog and stay current to the point where we are working cases receipted in February 2010. Most individuals are trained in more than one form type which provides for flexibility and allows the resources to flow efficiently as needed.

2. To Us? Same answer as I-360s except we are working cases receipted in December 2009.

3. To Ts? Same answer as Us.

4. Who does adjustment considerations in Us and Ts?

Officers on the VAWA team who have been trained in the T&U based I-485s.

5. Who reviews motions to reconsider?

Officers trained to work motions and appeals review this case work. Any denial of a motion receives supervisory review as we currently have a 100% supervisory review for denials.

6. Who does prima facie (PF) reviews for U cases?

This is a duty performed by officers on a rotating basis.

B. Fixing Problems

1. What is this the best way to bring legal standard issues to your attention (e.g., we think an adjudicator is using the wrong

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standard in an NOID or RFE—see examples sent separately to Tom Pearl)

If and when appropriate these issues can be brought to the attention of Tom Pearl. However, in many instances, the issue can be addressed when responding to the RFE. Tom Pearl should only be contacted in extreme circumstances or when there appears to be a pattern of inappropriate language or application of the law which could be indicative of an overarching training issue.

The most common problems are:
(a) Adjudicators equating non-physical forms of domestic abuse with "a deteriorating marriage." This seems like a DV 101 training issue that you may need to do individually, since there's only so much you can learn in a one-day training.

See answer above.

(b) Adjudicators sending out RFEs for evidence that was already abundantly provided, which seems to happen every time there is an influx of new adjudicators. We will work to ensure the field frames their claims and organizes their documents clearly, but we assume it's helpful for you to know if particular adjudicators are having trouble understanding the evidence's relevance.

See answer above.

(c) Ignoring or not understanding the "any credible evidence" standard. This seems to happen most with good faith marriage, where some adjudicators appear to be requiring traditional "primary" evidence, which many victims of DV can't provide. We will flag these for you and are in the process of writing a memo on good faith marriage case law, marriage fraud case law, and the any credible evidence standard, which we hope will be helpful for everyone.

See answer above.

2. Is FIFO (first-in, first-out) the system you are using for Us? If so, on what filing date are adjudicators now working?

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Every attempt is being made to touch the oldest I-918s first. However, if an RFE is issued, or there is another cause for the petition to be delayed, the final decision will not be rendered until the delay is resolved.

We ask because we have heard of cases filed in 2007 that are still pending with no outstanding RFEs and are wondering if this fits with the FIFO system dates. If not, do you want to know about old cases that appear to be languishing and, if so, what is an "old" date for purposes of flagging it for you?

YES. If you have specific cases that you believe are outside of the normal processing times (I918s filed in 2007 that have not yet been issued an RFE would qualify) then you should let the VSC know so that these cases can be found and worked as soon as possible.

3. FBI checks

(a) How long are FBI checks taking, generally?

FBI NDOB checks are clearing within 30-60 days. However, there do seem to be some checks that take considerably longer based on the internal workings of the FBI database. The VSC has a system in place to periodically scrape the records for which an FBI check has not yet cleared and rerun the record in an attempt to hasten the process.

(b) If a check in a specific case is taking more than 6 months, does this indicate some problem with the case? Is there anything a practitioner can do to light a fire under the FBI in such cases?

As stated above, VSC has a system in place to reinitiate a check if it does not appear to be clearing.

4. Apparently there has been some back-up lately in the 802 number voicemail system. For making case inquiries on cases past their processing time, etc., can authorized representatives fax inquiries to the VAWA/U Unit? If so, what number should they use?

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Faxes can be sent to 802.527.4859; however, case inquiries should not be made via fax. There are multiple ISO (1s) assigned to the phone every day and they have been successful in keeping the capacity open. In addition, the VAWA Unit is in the process of setting up direct email addresses for inquiries and will be forming a database to verify incoming email addresses to ensure that they correspond to the safe address on a G28.

5. Biometrics (verbatim from practitioner)
(a) When will VSC start issuing biometrics notices indicating that it is for a Form I-918? Our local ASC has been hassling our clients when they go in for biometrics for both a pending I-765 (for interim relief) and for the I-918, saying that it is not necessary to get biometrics done again. ASC does not understand what the X999 is for.

VSC does not anticipate that the ASC appointment notices will list Form I-918 any time in the near future. If there are particular ASC sites that could benefit from additional training or guidance in relation to the current processes, VSC could reach out directly.

(b) In another case, I received a second biometrics notice for a mother and two sons to have biometrics done again, even though they just had them done in April 2009. In response to my inquiry, VSC said simply that biometrics must be repeated after 15 months, but it has been only 11 months and these clients have to pay over $1000 to fly from their remote island home to have biometrics done. Is there any way VSC can re-process biometrics previously taken to avoid this hardship?

On a case-by-case basis this is sometimes possible. In this instance it would be appropriate to contact the VSC in order to see if the fingerprints could be refreshed. Unfortunately, it doesn't always work. If it had only been 11 months since the fingerprints had been taken, it does seem unnecessary to have them redone. It is possible that during the initial appointment only one thing or the other was processed (10-print or biometric images) in which case the other would be required prior to approval.

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C. Prima Facie & Expedited Consideration Requests

1. What is the best way for practitioners to bring cases needing PF review to your attention?

The new email addresses that have been created should be used for this purpose. These addresses will be made public in the near future. Going forward Tom Pearl's address should only be used in emergency situations.

2. What cases will you entertain for PF review? (E.g., detainees, other imminent removal, anything else?)

In general, only cases for individuals that are currently in detention or have a final order of removal will be reviewed for a PF determination on a pending I-918 petition. However, each request made will be considered.

3. Is there a different system for requesting expedited consideration?

Email to Tom Pearl. All cases that receive a positive PF determination will be expedited.

4. If so, how do people request that and what cases are prioritized for that?

In general, the VAWA Unit considers expedite requests will be reviewed based on existing criteria, including individuals who are detained at government expense or have a final order of removal, or on humanitarian grounds. If requesting an expedite, an email or fax can be sent and should include all relevant information relating to the case (A-number, receipt number, name of applicant/petitioner) and a detailed explanation for the basis of the request.

More on this, verbatim from practitioner:

5. What is an appropriate length of time to wait once we've made a request to expedite....6 months, 9 months, 1 year?

Once the request has been made, the VSC will provide a response within a reasonable time frame as to whether the

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adjudication will be expedited. The length of the adjudication will vary depending on the evidence of record.

6. When we make a request to expedite, does the VSC always contact ICE in DC, or is that only when Thomas Pearl is emailed directly?

VSC notifies the ICE office having jurisdiction over the removal proceedings through email.

7. How can we find out if ICE in DC has issued an automatic stay of removal? (I didn't know that ICE in DC issued stays of removal in response to being contacted by Thomas Pearl. However, in a case about 6 months ago, I contacted Thomas Pearl to request a U visa expedite, filed a Motion to Stay Removal for my client with local ICE DRO, and was told by local ICE-DRO that ICE in DC had already issued a stay of removal.)

This is a question better directed to ICE. It is ICE's decision whether to issue a stay of removal, and VSC is not a party to the process.

From me

8. Is this the standard stay procedure in these cases?

USCIS has no say in the stay procedure as ICE retains full discretion with regard to detention and removal. Our finding is advisory only.

D. New Assignments?

1. Any progress on assigning all VAWA self-petition adjustments to the VSC VAWA unit?

Being discussed at HQ level.

Background: The new 601 form indicates that VSC will adjudicate inadmissibility waivers for self-petitioners, which is a good start. At the last meeting there seemed to be agreement that vesting VSC with all VAWA adjustment determinations made sense.

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2. Since the 601 form says to file inadmissibility waivers for VAWA adjusters with VSC, will you be adjudicating those requests and then forwarding to the local office (assuming you're not now adjudicating adjustment)? If not, what does the filing-with-you mean?

I-601s filed at the VSC will be forwarded to the District Office to be matched with the corresponding I-485 when applicable. If an I-485 has not yet been filed, or if the I-601 is being filed independent of an I-485, it will be adjudicated at the VSC by the VAWA Unit.

3. Is there any progress on the consolidation of filing all I-751 abuse waivers with the VSC regardless of the applicant's place of residence?

Not that we are aware of.

4. Is there any chance that VSC will be given jurisdiction over applicants who qualify under the NACARA provisions of VAWA? The rumors we are hearing are that the Asylum Offices are saying that only the Immigration Judges have jurisdiction so that clients who are not in proceedings are unable to apply.

Not that we are aware of.

E. Case Numbers

What are the latest numbers you can give us on approvals and denials in:

Through the end of February 2010 for FY 2010

1. **VAWA self-petitions?**
   5,299 approvals
   1,225 denials
2. **U visas**
   Principals - 5,914 approvals 2,043 denials
   Derivatives – 5,507 approvals 1,187 denials
3. **T visas**
   Principals – 126 approvals 41 denials
   Derivatives – 164 approvals 20 denials

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4. **U adjustment**
   343 approvals
   9 denials
5. **T adjustment**
   177 approvals
   7 denials
6. **Do you have any information on the basis for denials?**
   No.

II. **"New" Law Guidance**
(Dates Congress passed the relevant laws)
Please provide progress reports on:

A. **EADs for H Derivatives (2005)**
1. **Any progress on this?**
The VSC is holding adjudication until updated regulations or a policy memo is issued by HQ.

2. **How many people have filed so far under this category?**
The VSC is holding less than 10 I-765 applications that were filed by spouses of A, E, G & H nonimmigrants.

3. **If someone wants to "get in line" to be adjudicated once there is guidance, what should she file?**
An Application for Employment Authorization (Form I-765) indicating that the applicant is filing as the spouse of an A, E(iii), G or H pursuant to new legislation in VAWA 2005.

B. **Self-petitioning elder abuse categories (2005)**
Ditto on the Qs: any progress on guidance, has anyone filed, what should people file if they want to get in line?
See also issue of time accrual towards LPR given 5-year delay in implementation, noted below.
The issue is with HQ awaiting regulation or memo guidance. The VSC is currently holding approximately 25 petitions that were

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filed under this provision Anyone seeking a benefit under this provision should file an I-360 and indicate that the basis of filing "Elder Abuse."

C. VAWA 21 - 25 Category (2005)

1. Is there now guidance on this?

These are being RFE'd and worked at the VSC and the evidence relating to the delay in filing is being reviewed on a case by case basis. All denials are reviewed by a supervisor.

2. If so, could we see it, so practitioners know what you are looking for? If not, and you are adjudicating them as noted below, what are you looking for in these cases, i.e., any practice pointers for the field?

The self-petitioner should submit a thorough explanation, and supporting evidence if available, to link the delay of filing to the abuse.

3. Is there any remedy contemplated for the lack of time accrual towards LPR due to the delay in implementation (see notes from last meeting below)?

Those policy determinations are not made at VSC.

Notes from last VSC meeting:
From us: We encourage the new guidance to recognize and address time accrued towards lawful permanent residence for those in the elder abuse and over-21 categories. Minimally, the time towards LPR should accrue from the date the application was filed (assuming it is ultimately approved).

October 9, 2008 Update from CIS via email to Gail Pendleton
VSC is now adjudicating the filings from self-petitioning children who were over the age of 21 but under the age of 25 year at the time of filing. It is anticipated any self-petition falling into that category will receive a request for evidence.

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D. Aged-out U derivatives (law changed in 2000 but not specific to age outs; 2008 confusing)

1. Any updates from last discussion?

There are ongoing discussions. The issue is receiving attention at the headquarters level.

Discussion from previous stakeholder Q & A:
As you know, the eligibility requirements for derivatives changed after 2000 (no extreme hardship/certification requirement). Due to the lag in implementing regulations for the new law, however, some derivatives newly eligible (most notably those outside the US who could not meet the certification requirement) aged out before the regulations were issued. The Aytes memo of March 27, 2008 is a little confusing on this: In the "Purpose" section it seems to tie age to date of derivative filing; in (f)(4)(iv) it can be read that the family member's age at the principal's time of filing controls.
Suggestion: Given the delay in implementing the law, we encourage the agency to apply the broader age-freeze date: the date the principal filed freezes the date for derivatives (where relevant), regardless of when the derivative filed.

Policy guidance for this issue has been drafted and is in the clearance process.
October 9, 2008 Update from CIS via email to Gail Pendleton
VSC is still working with HQ on guidance for this issue. Filings that fall into the age-out categories are being held pending guidance.

E. U Derivatives needing extensions (see III.A. below for details)

1. Have you gotten guidance on this?

The VSC is holding adjudication until updated regulations or a policy memo is issued by HQ. The issue is under review.

III. U Questions

A. Derivatives and the Three-Year Accrual Problem

1. What should U derivatives do if their principal's U grant was before their own grant, so that they will not accrue the

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necessary 3 years for adjustment at the same time as the principal?

The VSC is holding adjudication until updated regulations or a policy memo is issued by HQ. We believe that the I-539 is the form that will be utilized to extend the nonimmigrant status. Discussions concerning the extension of status issue are ongoing.

(I think they are supposed to file I-539s until they accrue the 3 years, but please confirm, amend or expand on this).

2. If a derivative needs to file an extension of stay on form I-539 in order to become adjustment eligible, can they concurrently file form I-765 to renew their work permit?

There is no provision at this time to concurrently file for the I-765 and the I-539.

3. A number of people have reported filing I-539 applications for extension, but all are pending. Are they just in process or are they being held pending guidance?

They are being held pending guidance.

B. What date controls for U derivative age? (this may be similar or the same as the guidance question in the previous section)

Currently, the date that the principal petitioner files is the date that will be used to calculate the derivative's age for determining eligibility. However, there are ongoing discussions concerning various age-out issues. VSC is holding some cases pending policy guidance.

1. Has there been any clarification on the age-out rules for children of U visa applicants who never had interim relief?

No – waiting on further guidance.

2. Do those children need to be approved before turning 21

or is filing before they turn 21 sufficient?

Age is determined by the date of filing of the principal's petition. If a derivative child turns 21 while the I918A is pending, it will not impact the adjudication.

3. Similarly, if a U visa derivative is abroad, does s/he need to enter the United States before turning 21?

No.

C. Adjusting U derivatives and aging out

1. From a practitioner: How are AOS applications being handled where derivative U-3 visa holder was under 21 at the time U-3 was approved, but is over 21 at the time AOS is filed?

Eligibility based on age is judged by the date of the filing of the I918 petition. Turning 21 prior to application for adjustment of status will have no bearing on eligibility for adjustment.

2. My question: Once a derivative gets a U visa, isn't the connection to the principal for adjustment purposes severed?

In general, yes. However, a revocation of the principal's I-918 may have an adverse impact on the derivative's I-918A.

Aren't they their own petitioners now and age at adjustment should be irrelevant, since the derivative's eligibility to adjust is no longer dependent on the relationship with the principal?

Yes, age is irrelevant at time of adjustment of status.

Shouldn't the age only matter if the derivative never had a U visa herself and is now seeking to adjust with the principal?

Yes, age would still be a consideration if the derivative principal was filing an I-929 for the qualifying family member at the time of the principal's adjustment.

D. Crimes & Law Enforcement Certifications

1. Could you share with the field a summary of the law enforcement certification survey you did?

VSC's validation study is not yet complete. In general, the findings thus far have not revealed any systemic fraud.

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2. What kinds of victimless crimes have qualified for Us (perjury, obstruction of justice, etc.)?

VSC has seen individuals filing with claims under each of the specifically enumerated crimes in the statute.

E. Relationship with perpetrator

Some U case victims may still be living with their perpetrators (often due to economic reasons) while their cases are pending. Does VSC view this unfavorably?

No. It is understood in the context of domestic violence that it is often impossible for a victim to live independently for a variety of factors, economic being one. This may be a ground to expedite an I-918 filing because it is currently a reason to expedite a pending VAWA I-360 petition.

F. U adjustment

1. Do you agree that the following analysis means U visa holders who had J visas at one time and are now seeking adjustment are not required to comply with the two-year foreign residency requirement?

8 CFR 245.24(l) says□□

"Inapplicability of 8 CFR 245.1 and 245.2. The provisions of 8 CFR 245.1 and 245.2 do not apply to aliens seeking adjustment of status under section 245(m) of the Act."□□

8 CFR 245.1(c)(2) says

(c) *Ineligible aliens.* The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

(2) ... any alien who has or had the status of an exchange visitor under section 101(a)(15)(J) of the Act and who is subject to the foreign residence requirement of section 212(e) of the Act, unless the alien has complied with the foreign residence

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requirement or has been granted a waiver of that requirement, under that section.

Yes.

2. Does the 3 years continuous physical presence restart after an absence of over 90 days as it does for other forms of relief (such as naturalization and cancellation of removal)? In other words, can clients qualify for adjustment as long as they were continually physically present during the 3-year period immediately preceding their application for adjustment?

No. The statute specifically states that an alien shall be considered to have failed to maintain physical presence in the US under paragraph if the alien has departed from the US for any period in excess of 90 days or any periods in the aggregate exceeding 180 days unless the absence was necessary in order to assist in the investigation or prosecution of the qualifying criminal activity.

3. If so, would the VSC consider extending the time in U status for an applicant who needed an extension due to an absence of over 90 days?

U nonimmigrant status may only be extended beyond 4 years if it is certified by law enforcement that the alien's presence in the US is required to assist in the investigation or prosecution of the qualifying criminal activity.

4. Would you agree that since CIS has sole jurisdiction over U adjustments and that a motion to reopen an outstanding removal order is not strictly necessary (although of course a good idea where possible) in order for VSC to approve adjustment?

CIS does have sole jurisdiction over the T & U adjustment of status adjudication. The burden is on the applicant to file a motion to reopen in order to terminate or administratively close any outstanding removal orders.

5. Is VSC accepting I-485s for people whose I-918s are

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pending (where they have had U interim status for more than 4 years)? If so, will filing an I-485 speed up the process for adjudicating the underlying I-918?

The supplemental language included in the T&U AOS regulations indicates that an individual that has accumulated 4 years in interim relief may file an I-485 application while their I-918 is still pending. Filing the I-485 will not speed up the adjudication of the underlying I-918. Additionally, if the I-918 is denied, the I-485 will also be automatically denied.

A Practice Guide for Representing U Visa Applicants With Criminal Convictions or Criminal History

By Ann Benson & Jonathan Moore[1]

Editors' Note: Due to the length of this article, it has been divided into two parts. This is the second of these parts. The first installment was published in the XXXXX ASISTA Newsletter. The entire Guide is also available on our website at www.asistahelp.org

INA § 212(d)(14) Waivers of Inadmissibility for U-visa applicants

A. Scope of the Waiver

The discretionary waiver of inadmissibility for U-visa applicants is potentially one of the broadest possible in the Immigration and Naturalization Act (INA).

> 8 USC § 1182(d)(14), INA § 212(d)(14) The Secretary of Homeland Security shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U). The Secretary of Homeland Security, in the Secretary of Homeland Security's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(U), if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

In that passage "subsection a" is a reference to 8 USC § 1182(a), INA § 212(a) which are all the statutory grounds of inadmissibility. The only unwaivable ground is at "paragraph (3)(E)."[2]

B. Regulatory Language

Regulations pertaining to "the exercise of discretion relating to U nonimmigrant status" are at 8 CFR § 212.17. Several key points are:

- "There is no appeal of a decision to deny a waiver. However, nothing in this paragraph is intended to prevent an applicant from re- filing a request for a waiver of ground of inadmissibility in appropriate cases."[3] and
- DHS may "at any time, may revoke a waiver previously authorized under section 212(d)" and "[u]nder no circumstances will the alien or any party acting

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[1] Ann Benson and Jonathan Moore staff the Washington Defenders Immigration Project in Seattle, WA. They also serve as consultants to the ASISTA network. Additionally, the collaborate with Kathy Brady and Angie Junck of the Immigrant Legal Resource Center, authors of Defending Immigrants in the Ninth Circuit (DINC), a comprehensive manual on the immigration consequences of crimes available from the ILRC at www.ilrc.org. Portions of these materials were adapted from the DINC manual and used here with permission.

[2] INA § 212(a)(3)(E), covers "Participants in Nazi Persecution, Genocide, or the Commission of Any Act of Torture or Extrajudicial Killing"

[3] 8 CFR § 212.17 (b)(3)

on his or her behalf have a right to appeal from a decision to revoke a waiver."[4] and

- "In the case of applicants inadmissible on criminal or related grounds, in exercising its discretion USCIS will consider the number and severity of the offenses of which the applicant has been convicted. In cases involving violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the Act, USCIS will only exercise favorable discretion in extraordinary circumstances.[5]

C. Applying for a Section 212(d)(14) Waiver for Criminal Conduct

You should address the applicant's crime-related issues in both your cover letter to USCIS and in the applicant's declaration. USCIS has listed the I-192 in the interim regulations as initial evidence to be filed concurrently with Form I-918.

The cover letter should give all the possible reasons why a grant of a Uvisa and, if necessary, of a waiver of inadmissibility for her criminal conduct would be in the public interest and national interest. It should provide any nonfrivolous legal arguments and reasoning as to why specific conduct or criminal dispositions listed on the I-918 and other I-192 do not trigger specific inadmissibility grounds. But it should include any possible grounds triggered by that conduct or those convictions, "in the alternative," if CIS disagrees with your reasoning that they do not fit the ground. And it should develop every possible positive factor that could support a positive exercise of discretion.

Even though the I-192 is submitted together with the I-918, you should make it a complete separate application, with its own copies of all relevant documents, such as criminal judgments; a declaration covering every incident, act or conviction that may need to be waived; and a separate cover letter and legal memo if necessary.

You do not have to concede that a conviction squarely fits into the inadmissibility ground. Exposing the adjudicators to cogent, well-supported reasoning about why certain convictions may not trigger inadmissibility grounds may help to accustom them to accepting and understanding legal arguments generally. You can say that you think it does not fit, and "here's why." In case USCIS, however, comes to believe that it does trigger an inadmissibility ground, give the reasons why the waiver should be granted.

Whether or not you think a conviction fits into a criminal inadmissibility ground you want to present all the positive discretionary factors that support a grant, since the CIS adjudicator can disagree with you about whether or not a crime "involves turpitude" but still decide that it would be both in the public interest to grant a waiver and that it deserves a positive exercise of discretion. The standard for the section 212(d)(14) waiver is that it be "in the national or public interest" to grant it, and DHS can grant it in the exercise of discretion. The regulatory preamble discussing waivers of inadmissibility notes that waiver grants are discretionary and

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[4] 8 CFR § 212.17 (b)(3)(c)

[5] 8 CFR § 212.17 (b)(2)

involve balancing adverse with social and humane factors, citing to the 212(h) case *Matter of Mendez-Morales*.[6]

Arguing that an offense does not make a person legally inadmissible, however, is no reason to seem less-than-forthcoming or evasive about an applicant's criminal history.

D. Heightened Discretion Standard for "Violent or Dangerous Crimes"

In the case of U-visa applicants who are inadmissible on criminal grounds, the interim regulations state that discretionary waivers for those convicted of "violent and dangerous crimes" will only be granted "in extraordinary circumstances,"[7] and that waiver denials are both revocable[8] and administratively unappealable.[9] Immigration counsel can argue that limitation on discretion was meant to be applied only to the type of lethally dangerous offenses discussed in *Matter of Jean*, a case involving a homicide of an infant.[10]

The history of this heightened standard for the exercise of discretion is that this language was first promulgated by the Attorney General (AG) in denying a discretionary section 209(c) refugee waiver, in a case called *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002). In overturning the BIA, the AG in Jean evaluated a waiver application by a person who "confessed to beating and shaking a nineteen-month-old child to death" and whose confession "was corroborated by a coroner's report documenting a wide-ranging collection of extraordinarily severe injuries."[11]

Another case the AG used as a baseline in Jean, was the offense treated by the BIA in an earlier decision, *Matter of H-N-*.[12] The Attorney General noted that he disagreed with the grant of a section 209(c) refugee waiver in that case, based on the equities of US citizen children and a permanent resident spouse. The conviction in that case was for a second degree robbery that the AG described as "participation in a burglary in which one of the one of the applicant's co-conspirators shot a woman to death in front of her children."[13] Both offenses discussed were thus extremely violent, and life-endangering.

In Jean the Attorney General himself prefaced his ruling in that case by indicating his agreement with Part II of Board member Filippu's concurrence and dissent in *Matter of H-N-*. That part of the decision describes in detail a kind of home invasion where a co-conspirator shot a woman to death in the head. Board member Filippu's opinion also put significant weight on the

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[6] *Matter of Mendez-Morales,* 21 I&N Dec 296 (BIA 1996).

[7] 8 CFR § 212.17(b)(2); compare to *Matter of Jean,* 23 I&N Dec. 373 (A.G. 2002); and 8 CFR § 212.7(d) ("exceptional and extremely unusual hardship" can be an "extraordinary circumstance").

[8] 8 CFR § 212.17(c).

[9] 8 CFR § 212.17(b)(3).

[10] *Matter of Jean,* 23 I&N Dec. 373 (A.G., 2002).

[11] *Id.* at 373, 383

[12] *Matter of H-N-*, 22 I. & N. Dec. 1039 (BIA 1999)

[13] "The majority there treated the applicant's crime - participation in a burglary in which one of the applicant's co-conspirators shot a woman to death in front of her children - as a virtual afterthought." Jean 23 I. & N. Dec. 373, 382

fact that H-N- claimed to have been virtually uninvolved, and to have pleaded guilty to robbery due to bad translation and lack of explanation by her public defender. Board member Filippu found the respondent's "assertion of complete innocence" to be "inconsistent," and contradicted by other evidence.[14]

Within a year of *Jean*, DHS enacted a new regulation governing the exercise of discretion in section 212(h) waiver cases,: 8 CFR § 212.7(d).[15] That regulation provides that in cases where individuals have committed "violent or dangerous crimes," the Attorney General will not exercise his discretion to grant waivers under 8 U.S.C. § 1182(h) (known as section 212(h) relief) unless the individual can show "exceptional and extremely unusual hardship." This regulatory limit on discretion has been upheld in the Second, Fifth, and Ninth Circuits.[16]

A look at these cases shows the kinds of offense that some immigration judges have found to be "violent or dangerous." The Courts found they did not have jurisdiction to reverse such rulings, and that such guides to discretion were allowable.

- A conviction for child molestation and commission of lewd and lascivious acts upon a child under Cal.Penal Code § 288(a), (c), "based on . . .repeated molestation of his step-daughter, . . .beginning when [she] was twelve years old and continuing for approximately three and a half years. This conduct included slapping her, massaging her breasts, and fondling her genitals. Mejia pleaded guilty and served seven months in jail."[17]
- A 1983 conviction for burglary: "[h]e said he had agreed to help a man who claimed he was removing items from his own home. . . . [H]e was sentenced to two years of imprisonment and served only nine months. …. The IJ found that . . . the burglary conviction constituted a violent crime. Pursuant to § 212.7(d), the IJ found that Pimentel must establish that the denial of a visa 'would result in exceptional and extremely unusual hardship.' The IJ concluded that, although Pimentel's U.S. citizen children would suffer 'extreme hardship'

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[14] Jean 23 I. & N. Dec. 373, 382; Matter of H-N- 22 I. & N. Dec. 1039, 1052 (BIA 1999) Filippu, concurring and dissenting

[15] 8 USC § 1182(h), INA § 212(h) is the principal waiver of inadmissibility for crimes involving moral turpitude. When in removal proceedings, the parallel regulation is 8 CFR § 1212.7(d).

[16] *Mejia v. Gonzales,* 499 F.3d 991 (9th Cir. 2007); *Perez Pimentel v. Mukasey,* 530 F.3d 321 (5th Cir. 2008); *Samuels v. Chertoff,* 550 F.3d 252, (2nd Cir. 2008). *Mejia and Perez Pimentel* were cited by DHS in the 12-12-08 preamble to the U-visa adjustment of status (AOS) regulations, in support of new 8 CFR § 245.24(d)(11), about the exercise of discretion at adjustment, and whichregulation says in part that:

> "Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns." 8 CFR § 245.24(d)(11)

[17] *Mejia, supra* at 994 .

if they moved to Mexico with Pimentel, he had not shown the required 'exceptional and extremely unusual hardship.'"[18]

- Attempted robbery in the first degree under NY Penal Law §§ 110 and 160.15(2), which require the use of force, or injury, or use of a weapon, with an indeterminate sentence of up to four-and-a-half years of imprisonment.[19]

If you think this could be an issue for your client, it is important to try to establish that "violent or dangerous crimes" refers to the highest tier of lethally violent offenses against persons, using *Jean* and the offense in that case and the example cited from *Matter of H-N-* as a baseline: offenses involving homicide. Barring that, you could try to distinguish the circumstances and nature of your client's convictions from those cited in Jean and H-N- and if possible from the offenses and conduct in *Mejia, Perez-Pimental*, and *Samuel*, *supra*.

For example, a simple assault conviction for slapping someone, may fit a literal definition of "violent," but is clearly outside the type of extreme offense to which the Attorney General intended his new waiver standard to apply. Any offense relating to a controlled substance may be thought to be in some sense "dangerous," either to the user or to society, just as a DUI can be a dangerous offense. But you can argue that the history of the "violent or dangerous" standard , given above, clarifies that such offenses were not intended to come under the heightened standard.

If it would help your client, emphasize that the "violent or dangerous crime" determination requires actual examination of "the facts underlying [a] conviction," and that "[t]he determination in Jean was fact-based, not categorical."[20] Applying a heightened standard without allowing an examination of all the circumstances underlying the conviction, could turn the "violent or dangerous crime " standard into a kind of a de facto threshold which pretermits a full examination of the offense, based only on the statutory label, and this was not the intent of the regulation

In evaluating waivers for criminal convictions you may try to refer to other examples such as the definition of "exceptional circumstances" at INA § 240(e)(1) which includes (being a victim of) "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien."

In another immigration law context (employment visas), the phrase "extraordinary circumstances" has been defined as something that would "impose an extreme hardship on the petitioner or that the beneficiary's services are in the national interest, welfare, or security of the United States."[21] Duress by itself has been found to amount to an "extraordinary circumstance."[22]

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[18] *Perez Pimentel, supra* at 323 -324 .

[19] *Samuels, supra* at 254 -255

[20] *Rivas-Gomez v. Gonzales* 225 Fed. Appx. 680 (9th Cir. 2007)

[21] *Matter of Safetran* 20 I&N Dec 49 (Comm'r 1989).

[22] *Matter of G,* In Visa Petition proceedings 4 I&N Dec. 57 (BIA 1950).

If a section 212(d)(14) waiver has been denied because an offense was deemed "violent or dangerous," then because 8 C.F.R. § 212.17(b)(3) permits a new application, you may want to consider whether a second application is worthwhile. If there are additional equities that you did not present that could show exceptional and extremely unusual hardship and other extraordinary factors, or a valid argument that the offense was not "violent or dangerous" that was not made, the regulations allow such a second attempt.

III. Additional Resources

ASISTA Consultants

In light of the complexities in trying to understand the immigration consequences of crimes, the ASISTA team includes Annie Benson and Jonathan Moore, two nationally recognized experts in the area of immigration law and crimes. Annie and Jonathan staff the Washington Defender Association's Immigration Project and are available to provide individual technical assistance to you on your case.

Written Materials

Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws, 10th Edition, by Kathy Brady with Norton Tooby, Michael K. Mehr and Angie Junck,"[23] is a comprehensive and valuable treatise that has detailed discussions of every crime-related immigration issue, and is useful to practitioners outside the Ninth Circuit

Immigration Law and Crimes, Kesselbrenner and Rosenberg, National Immigration Project of the National Lawyers Guild, Thomson – West. This is the leading national treatise on the topic, http://west.thomson.com/productdetail/2570/13514773/productdetail.aspx#

Immigration Law and Procedure, Charles Gordon, Stanley Mailman, and Stephen Yale Loehr, (Matthew Bender) the main over-all, complete multi-volume treatise.

Kurzban's Immigration Law Sourcebook, 11th Edition by Ira J. Kurzban, a really useful, one-volume sourcebook on immigration law.

Online Resources

The Defending Immigrants Partnership (DIP) - DIP provides a wealth of resources to understand the immigration consequences of crimes. It has launched a free online resource for criminal defenders at http://www.defendingimmigrants.org.

Law Office of Norton Tooby publishes a comprehensive digest of holdings on different criminal grounds, including a list of CIMT decisions at a valuable, but paid membership site. http://criminalandimmigrationlaw.com/~crimwcom/index.php

[23] Available from the Immigrant Legal Resource Center, at http://www.ilrc.org/pub_output.php?id=1

The Immigration Advocates Network (IAN) is a free national online network that supports legal advocates working on behalf of immigrants' rights. http:// www.immigrationadvocates.org/ IAN has materials, power-points, webinars, and training materials or crime –related issues. Such as http://www.immigrationadvocates.org/library/folder.180704-Introduction_and_Summary_of_Immigration_Consequences_of_Crimes

The Immigrant Legal Resource Center in the Bay Area provides technical assistance and information on criminal –immigration issues and has a number of free online resources http:// www.ilrc.org/criminal.php

National Immigration Project is a national membership organization of lawyers, law students, legal workers, and jailhouse lawyers working to defend and expand the rights of all immigrants in the United States. They have on-line resources and provide technical assistance http:// www.nationalimmigrationproject.org/CrimPage/CrimPage.html

Practice Updates

CIS Updates from Memphis Conference

ASISTA Co-Director Gail Pendleton and Sally Kinoshita from the Immigrant Legal Resource Center moderated four panels at the Federal Bar Association Immigration Law Section conference in Memphis with Laura Dawkins (CIS person who writes the U and VAWA regs and policy guidance), Daniel Renaud (Vermont Service Center Director) and Chay Sengkhounmany and Dawn Gerhart (two great Tennessee attorneys). Below some notes from the panels.

General Vermont Service Center Issues

Vermont will *not* refer denied U or VAWA cases to proceedings – but will place people in proceedings if requested

Tom Pearl will be launching a cross team RFE review in June, cases will be reviewed twice before they go out the door to make sure RFEs make sense; putting in one additional quality control step

Cover letter with road map and index are helpful

Tabs to locate supporting documents should be attached at bottom only; but are not necessary

New policy guidance will have a public comment period

Field Ops now has someone specifically assigned to VAWA (not able to identify that person yet) and is identifying external points of contact in each region in the country to contact for problems with adjustment; VSC sends people to Orlando to do district level training.

I-751s only go to Vermont if they're in that jurisdiction

Michael Paul does 751s at VSC

Daniel Renaud will find out what's going in VT and CA that so many people are being sent for interviews

VAWA Issues

CIS is currently considering whether stepparents and in-laws will count as abused parents under VAWA

GMC – CIS is looking to lessen burden of police clearance letters and clarify amount of time necessary to show GMC

No ICE review for deferred action

For ideas on proving abuser's US citizenship status look at 8 CFR 204.1(g)(2)

Will Vermont adjudicate the I-485 for VAWAs? The problems that have been seen in the field are a minor consideration in the decision whether to send adjustments to Vermont; they want the issues to get better at the district because some may get sent back there for an interview anyway; for the foreseeable future VAWA adjustments will continue to be adjudicated at the district and even if they do eventually move to VSC, a portion of them will still be adjudicated at the district

I-360 re-adjudication memo will be re-issued under CIS since it originally came out as an INS memo

Form I-601 says to file waivers with Vermont to request a fee waiver; VSC will do processing part but not the adjudication part

Reinstatement – use 5/19/2009 memo and 212(a)(9)(C) waiver; file I-601 to cure the waiver with evidence of abuse connection; then file I-212 to cure the prior removal with advance permission from DHS to reenter; file both with VSC then local office will adjudicate; if problems, contact Laura, Colleen or Field Ops POC when we know it; cc Gail Pendleton on these issues so we know what is happening at the local level

Two recent BIA decisions have said you have to show physical violence to show abuse (including extreme cruelty) and if you don't access police or hospitals you don't qualify; amicus briefs are being filed for 2nd and 9th Circuit; most circuits think extreme cruelty is discretionary; Hernandez (9th Circuit) correctly says it's facts applied to law, not discretion – let Gail know as these cases are happening; best cases are where there is a good record on the domestic violence issues and a good DV person has testified

NACARA, HRIFA, and Cuban adjustment – provisions are complex; for the last two weeks someone at CIS has been working specifically on this for the new VAWA regs; VSC has adjudicated the DV piece of this but not sure what happened; thinks the NACARA, HRIFA, and Cuban adjustment part then kicked in; hope that before the regs there will be an interim guidance; hard to implement because imbedded in the NACARA, HRIFA, and Cuban adjustment process

U Issues

8400 approved as of 5/8/2010; anticipate hitting cap of 10,000 per year late June, early July

Adjudicated to some extent every case filed prior to calendar year 2010

Once cap reached, will be adjudicate until point of approval; the cap will reset, making another 10,000 U Visas available in the first

week of Oct; about 6200 principals are pending (about 8-9 months of work), with about 4000-5000 more derivatives

When they reach the cap, still file – it's not like the H cap

Bona fide pending EADs policy guidance will be out before the cap runs out

Harassment, terror threats, violation of restraining order, strangulations can qualify as a category of DV, not a similar activity

AUSA love witness tampering, perjury, etc. – witnesses in RICO cases where they're being threatened; there is no direct victim; the victim is the justice system; victim has to show direct and proximate harm and to avoid or frustrate efforts to prosecute the perpetrator; OR furtherance of manipulation

Substantial harm: have to show cause and effect between the crime and the harm

Prima facie system: ICE can remove someone with a pending I-918; CIS will share data with ICE and automatically do a PFD within 24-48 hours; can be released from detention

Age outs can be expedited; look for expedite criteria memo; let VSC know ASAP, even let them know when you're about to file; guidance on age outs will come out; relationship needs to exist at the time of filing and adjudication; the memo will address delays due to no I-192 fee waiver before

Need to trigger inadmissibility ground (ie UP) before can ask for waiver; can ask for expedite

Do letters from employers help or hurt with inadmissibility waivers? Help more than they hurt

Donna Kane (VSC) wants emails of law enforcement agencies to train who want to participate on webinars; HQ will be conducting a survey of LEAs on their cert process and hope to develop a model LEA protocol; they are also doing trainings and writing articles for LEAs on the certification process

When can you file an EAD for deferred action if after the cap? Haven't figured that out yet; hoping to get guidance out before the cap is reached that would implement bona fide, pending EADs

"Culpable for qualifying criminal activity" was meant to apply to crimes which were directly related; ie some who gets shot in a gang-related shoot out

CSPA is only relevant to immigrant visas so not relevant to U visas

For ideas of showing someone is a victim, look to AG guidelines for victim witness definitions; They seemed to be suggesting that a lot of people we are framing as "indirect" and "bystander" victims can be framed as "direct" victims by focusing on "proximate harm."

Revocation of U: automatic if LEA contacts USCIS and says victim not helpful; if for cause, then USCIS will send notice of intent to revoke and U holder can respond

Dan Renaud said you CAN do FOIAs for beneficiaries of I-130s; apparently they keep two separate files.

Laura Dawkins reminded people that 204(c) & (g) apply and go to the "immigrant visa available" requirement.

It sounds like the only thing consulates should be doing on Us is I-193s for those lacking passports, but it's not clear they should be doing that, even. For problems with DOS – contact Scott Whelan (202) 272-1470 or (202) 272-8137

Dan Renaud said they should not be requesting juvenile reports, so let them know about cases where they are.

USCIS Issues Draft Memos on the implementation of the Trafficking Victim Protection Reauthorization Act of 2008 and Extension of U Nonimmigrant Status for Derivative Family Members Using the Application to Extend/ Change Nonimmigrant Status (Form I-539)

On May 17, 2010, USCIS Issued a draft memos regarding the implementation of the Trafficking Victim Protection Reauthorization Act of 2008 (TVPRA) and Extension of U Nonimmigrant Status for Derivative Family Members Using the Application to Extend/ Change Nonimmigrant Status (Form I-539). ASISTA and the Family Violence Prevention Fund recently submitted the following comments on two new guidance memoranda from CIS on U and T visas. You can find the proposed guidance on our website at http://www.asistahelp.org/index.cfm?nodeID=23546&audienceID=1.

Please find below the comments/suggestions of ASISTA Immigration Assistance and the Family Violence Prevention Fund concerning two recently released memoranda providing guidance on U and T visas. ASISTA and the Family Violence Prevention Fund, along with the Immigrant Women's Program of Legal Momentum, run the National Network to End Violence Against Women, which worked with Congress to create the U visa. We continue to work with the field and with CIS to ensure its accurate implementation. We appreciate the opportunity to provide our input on these two implementing memoranda.

I. Extension of U Nonimmigrant Status for Derivative Family Members

We applaud CIS for agreeing to extend status for U derivatives who are otherwise unable to accrue the necessary 3 years of status to adjust to lawful permanent residence. We respectfully suggest the following amendments:

1) Make clear that CIS will grant concurrent extensions of work authorization and back-date those grants as necessary to ensure U visa holders do not lose employment or otherwise suffer from the expiration of prior work authorization.

The guidance could insert, for instance: "and accompanying work authorization" at the end of the first sentence under (2).

We also suggest language at the end of section (2) that reflects the memorandum's directive on page 2, such as:

"Since this guidance is retroactive to December 23, 2008, CIS may back-date such grants as necessary to avoid hardship to U derivatives whose status has expired."

2) Although the AFM amendments do not include the explanation's list of documents a

derivative must file along with the I-539, we suggest CIS make clear that, if CIS already has information on the principal, the derivative's relationship with the principal, etc. (see page 2 under "Implementation"), derivatives need not supply that information. Requiring that derivatives resubmit all this information adds hardship to those already suffering because their status has expired. Instead, we suggest that CIS use the standard it articulated in the recent TVPRA memo for T visa applicants at new AFM 23.5(n)(1)(D):

"If an applicant wants to rely on evidence previously submitted. . ., the applicant need not resubmit that evidence but can instead point to any evidence already contained in her DHS file."

3) Make clear that fee waivers are available for extensions of stay. Although presumably covered by the language concerning fees and fee waivers in the TVPRA memo, this memo does not mention fee waivers at all. We suggest inserting "fee waiver if necessary" after "filing fee," in the first full sentence under "Implementation" on page 2 of the memorandum.

4) Do not limit possible extensions to 4 years. The statute specifically allows DHS to extend status beyond 4 years in certain circumstances:

INA sec. 214(p)(6), DURATION OF STATUS (emphasis supplied)

. . . .

> The Secretary of Homeland Security **may extend, beyond the 4-year period authorized under this section,** the authorized period of status of an alien as a nonimmigrant under section 101(a)(15)(U) if the Secretary determines that an extension of such period is warranted due to exceptional circumstances. Such alien's nonimmigrant status shall be extended beyond the 4-year period authorized under this section if the alien is eligible for relief under section 245(m) and is unable to obtain such relief because regulations have not been issued to implement such section and shall be extended during the pendency of an application for adjustment of status under section 245(m) .

We therefore suggest deleting, in the first sentence of new section (2) the phrase "for an aggregate period not to exceed 4 years." This, we believe, would leave the decision about which cases meet the standards for extensions beyond 4 years to the discretion of CIS on a case-by-case basis.

5) Specifically mention that this guidance applies to those who accrued time in interim relief but who need extensions to achieve the 3 years necessary for adjustment.

II. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions

We commend CIS for its guidance on the TVPRA. We have two suggestions, both regarding stays and the prima facie process:

1) Under the amendments to Chapter 39.1 U Nonimmigrant, subsection (c)(1)(B),

concerning stays, we encourage CIS to explicitly acknowledge that CIS has jurisdiction to grant stays under 8 C.F.R. 241.6(a), especially since that section at (c)(1)(B) states that applicants shall file stays along with their U petitions.

There will be situations in which obtaining a stay from ICE will cause hardship to U applicants, either because it is geographically difficult to file with ICE or because doing so will unnecessarily expose the applicant to detention and removal by ICE. The reason the National Network to End Violence Against Women asked Congress to mandate prima facie determinations in the Wilberforce Act was because ICE was detaining and deporting U visa holders and applicants despite knowledge that they had legitimate applications pending. Although we applaud ICE's efforts to stop this practice undermining the law, individual ICE offices continue to detain and attempt to remove U applicants, deterring U applicants with final orders from seeking the relief Congress intended. It is, therefore, imperative that CIS exercise its authority to grant stays in appropriate situations. Since the guidance says stays must be filed with the U application, we recommend that VSC exercise this authority. If CIS/VSC does not choose to exercise its authority, then requiring that a stay must be filed concurrently with the U application is not appropriate.

2) In addition, we object to the requirement that those seeking stays file inadmissibility waivers at the same time as they file the stays and U applications with CIS. Under current prima facie practice, CIS makes prima facie decisions based on the U application, requiring that an inadmissibility waiver soon follow to ensure expedited consideration. It does not, however, require that a full application be filed before making a prima facie determination. This is an appropriate practice given the emergent nature of such requests. Requiring full applications for prima facie determinations contradicts prior CIS practice and standards in the VAWA self-petitioning system and undermines the purpose of the prima facie system: to immediately stop ICE attempts to deport crime victims Congress intended to protect.

ICE announces Comment Period for New Detainee Locator System

DHS has published a plan to allow for a searchable online database to locate ICE Detainees. The comment period for this will end June 2, 2010, and the system is planned to move forward that same day.

The benefits to this would be ease for attorneys and advocates to find clients, and family to find their detained family members, and, hopefully, for a bit more accountability for ICE.

The downside to this would be potential privacy concerns.

The Federal Register announcement is available at http://edocket.access.gpo.gov/2010/pdf/2010-10286.pdf

Padilla v. Kentucky, 130 S. Ct. 1473 (2010)

In this landmark decision, the US Supreme Court found that a permanent resident had the

right to competent advise regarding the impact on his immigration status. Not only did the court find that giving incorrect advise constitutes ineffective assistance of counsel in violation of the 6th Amendment, but that there is an affirmative duty for criminal defense counsel to advise on as "we find it 'most difficult' to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult."

ASISTA FAQ's

Q: I am working with a client who is in removal proceedings and would be eligible for cancellation of removal. However, she was recently arrested on a theft related charge. How can I deal with this? If she pleads guilty or is convicted will she still be eligible for cancellation?

A: Assuming she can't get an I-360, (for some reason *other than* that she can't get a §204(a)(1)(C) waiver because no connection of crime to the abuse):

Under VAWA Cancellation INA 240A(b)(2), she needs three years of good moral character (GMC) immediately preceding the application (no "stop-time rule" for the date of the crime or issuance of an NTA).

The applicant also needs to not be inadmissible or deportable under the criminal removal grounds; and specifically-- and in addition to the GMC aggravated felony bar--- "ha[ve] not been convicted of an aggravated felony."
INA § 240A(b)(2)(C) is the subsection you are looking for, I think:

(C) Good Moral Character. Notwithstanding section 101(f), ***an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character*** *under subparagraph (A)(iii) or section 244(a)(3) (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.*

As I read it, § 240A(b)(2)(C) can waive the good moral character requirement of §240A(b)(2)(A)(iii): "the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C)."

But it *doesn't* say it can waive any of the requirements of §240A(b)(2)(A**)(iv),** which has the separate inadmissibility, deportability, and aggravated felony bars. So even if it's connected to the abuse, the way the statute reads an aggravated felony conviction— or anything

that makes you inadmissible or deportable under the crime-related grounds of removal listed—is an absolute bar to VAWA Cancellation.

Now, §240A(b)(2)(A)(iv), does say that the bar is "the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a), **subject to paragraph (5**), and **has not been convicted of an aggravated felony**."

Paragraph 5 of §240A(b) says: *5) Application of Domestic Violence Waiver Authority. The authority provided under section 237(a)(7) may apply under paragraphs (1)(B), (1)(C), and (2)(A)(iv) in a cancellation of removal and adjustment of status proceeding.*

Section § 237(a)(7) is the waiver of the domestic violence deportation ground (§237(a)(2)(E)(i)) at least with respect to crimes of DV and stalking, if the person is not the primary perpetrator of violence, or there was no injury, and a connection to the abuse and a few other things that seem like factual issues.

This doesn't seem relevant unless the person were: a) actually here after admission; and b) actually charged with being specifically removable under the DV deportation ground. It doesn't seem like it could apply to a theft offense.

So theft could be waived as a GMC bar to a self-petition under 204(a)(1)(C), if there were a connection to the abuse, because it's a crime involving moral turpitude (CIMT) and there is a waiver available at adjustment for a CIMT (§212(h)). But VAWA cancellation has an additional statutory bar that the 240A(b)(2)(C) is pretty helpless against. It could waive the 180 days in jail for conviction, false testimony, or gambling offenses GMC bars, & that's about it. Kind of a lame waiver. **An aggravated felony conviction seems to flatly bar VAWA cancellation.**

Also about the crime:
If it's an aggravated felony theft offense, people in Washington are often able to get sentence modifications on gross misdemeanors to reduce a sentence from 365 to 364. Just a thought. Also, an offense is not an an aggravated felony 'theft offense' under 8 USC § 1101(a)(43)(G) if is for theft of services or theft of labor. A "theft offense" requires a taking of property. Some state statutes cover both, and if the record of conviction is unclear you have an argument it's not an AF.

As far as it being a crime involving moral turpitude (CIMT), it would be at least worth investigating if the statute under which the client was convicted requires intent to permanently deprive as an element of a theft conviction. If it's one of the states where intent to permanently deprive is *not* required then there is at least the argument that theft is not automatically a CIMT. That could open the door to either trying to show that only a temporary taking was intended, or—more likely—that there were sympathetic factors around the theft that somehow render it inherently vile base and depraved and reprehensible and motivated by an evil

intent. (Like if she stole baby formula because she had no money).

Q: I have a client who filed for legal permanent residence under a VAWA application. Her VAWA application was approved and we went to her adjustment of status interview on Monday. Her application is complete but she needs to file a I-601 form (waiver of grounds of inadmissibility). My question concerns the declaration stating that her two minor US citizen children (13 yrs and 6yrs) would suffer "extreme hardship" if their mother is not admitted to this country. I've collected letters of support from their friends (all adults), which I'm attaching to the I-601 form. Would a declaration from a minor child be allowed and if so, would it have to be in their own words or prepared by an attorney (capturing all aspects of the hardship including family unity, education, cultural issues, etc)?

A: You asked if a declaration by a minor child in support of an I-601 would be accepted in an adjustment case. A minor may not be able to make a formal "declaration", but I don't see why a simple letter wouldn't be acceptable. Letters from minors have certainly been submitted in a variety of types of immigration cases, but typically, a minor child is not capable of making an enforceable declaration ("under pains and penalty of perjury..."). Not to mention you probably wouldn't want a child to perceive herself as the "reason" for any particular outcome (i.e., effect on child if mom is denied, etc.).

If you decide to submit a letter from a minor child, the letter is probably more effective in his own words. This type of evidence should be in the voice of the person writing it. This makes it much more credible. The attorney should point out in their roadmap how the each piece of evidence, including the statements made in the letter, speak to the various legal aspects of establishing each element.

Additionally, here is a link to the USCIS 2009 manual on waiver determinations: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f6141765543f6d1a/?vgnextoid=c3990952c80c1210VgnVCM1000004718190aRCRD&vgnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD

ANNOUNCEMENTS

New ASISTA Website Launch

ASISTA recently launched our new website! We hope that the new site is easier for everyone to use. We will be continuing to review and add content. If you have questions or suggestions, please contact us at questions@asistahelp.org.

Check it out at www.asistahelp.org

NEW RESOURCE AVAILABLE

The Asian & Pacific Islander Institute on Domestic Violence of the APIA Health Forum established the Interpretation Technical Assistance & Resource Center (ITARC) would like to introduce the new *Resource Guide for Advocates & Attorneys on Interpretation Services for Domestic Violence Victims.* This Guide can be found at http://www.apiahf.org/images/stories/Documents/publications_database/dv_InterpretationResourceGuide-APIIDV-2010.pdf

Language access protocols that implement the provision of spoken and sign language interpretation services by professional, culturally competent interpreters are critical to ensuring equal access to safety and justice. Interpreters fulfill a critical duty: to provide individuals with limited English proficiency or who are deaf, deaf-blind, or hard of hearing the same level of access as English-speakers.

The Asian & Pacific Islander Institute on Domestic Violence of the APIA Health Forum established the Interpretation Technical Assistance & Resource Center (ITARC) to inform the field and offer training and technical assistance on interpretation and language access.

The result is the enclosed *Resource Guide for Advocates & Attorneys on Interpretation Services for Domestic Violence Victims*, funded by the Office on Violence Against Women, Grant No. 2004-WT-AX-K060. There are several sections and Tip Sheets that address:

- Interpretation,
- Language access rights and laws,
- Knowledge, skills, abilities, and codes of conduct for interpreters,
- Understanding how bilingual speakers and interpreters differ,
- Interpretation services,
- Tip Sheets on working with interpreters, and
- Interpretation for deaf victims with limited English proficiency.

We hope you will find the *Resource Guide* useful for developing a language access plan at your agency and working with interpreters. Please feel free to contact Cannon Han, chan@apiahf.org or Chic Dabby, cdabby@apiahf.org at APIA Health Forum 415-568-3326 for any questions or comments about it, and if you would like to inquire about technical assistance, training or consultation from the Interpretation Technical Assistance & Resource Center.

OVW Grantees:

Join us for Free Webinars

Each Month on the 3rd Wednesday

2:00 PM - 3:30 PM EST

Each month, Asista will be holding a free webinar for OVW grantees, sponsored by the US Department of Justice Office on Violence Against Women.

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

Do you have an article or idea for a future ASISTA newsletter?

Contact us at questions@asistahelp.org