

REPRESENTING SURVIVORS OF CRIMES OF VIOLENCE BEFORE OR AFTER AND ENFORCEMENT ACTION

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The following outline has been developed to provide basic guidance on interviewing skills and questions needed to assess potential eligibility for U visa.

Advocates working with survivors at risk of removal should share this outline with clients and legal representatives to develop team strategies in the event the survivor is arrested by immigration.

INTRODUCTION TO U VISA ELIGIBILITY AND DERIVATIVES

1. Created by the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000.
2. Goal – to encourage undocumented crime victims to come forward and cooperate with law enforcement. It enhances the criminal system’s ability to investigate and prosecute crimes while protecting immigrant survivors with potential immigration relief.
3. Applicable law: Immigration and Nationality Act (INA) Sections:

§ 101(a)(15)(U) – definition and requirements
§ 214(p) – numerical limitation, petitioning procedure
§ 245(m) – adjustment of status

Code of Federal Regulations 8 CFR § 214

4. Eligible applicants:

Principals: 8 CFR 214.14(a)(14) *Direct victims* – victim “directly and proximately harmed by qualifying criminal activity.” *Indirect victims*- In certain circumstances, individuals other than the victim can apply for a U visa. For example, where the victim is an alien child under 16, the parent, legal guardian, or other family member, may apply for principal U visa status. *Innocent bystander*.

Derivatives: can apply whether in the U.S. or abroad; if abroad, the visa will be forwarded to a U.S. embassy/consulate abroad and the derivative can use the visa to travel to the U.S. If principal applicant is under 21 the following relatives may qualify: principal’s spouse, children, unmarried siblings under 18 (on filing date of principal’s petition), and parents. If principal applicant is over

21, the following relatives may qualify: principal's spouse and children. (Form I-918, Supplement A, or I-929 if derivative at time or after adjustment of status based on U visa).

5. Requirements: (INA § 101(a)(15)(u))

- “[t]he alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity...”
- “the alien (*or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien*) possesses information concerning criminal activity...”
- “the alien (*or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien*) has been helpful, is being helpful, or is likely to be helpful” to Federal, State, or local authorities in the investigation or prosecution of the crime...”
- “the criminal activity... violated the laws of the United States or occurred in the United States...”

6. Qualifying crimes under the statute

Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes

“or any similar activity” also encompassed by statute for related, non-enumerated crimes.

7. Who can certify?

Police officers, prosecutor, judge, department of human services, EEOC, State or Federal Agency Employee with criminal investigative capacity. Advocates should work with anyone and agency with criminal investigative capacity. The Vermont Service Center may ultimately determine whether the certifier is qualified to certify.

INTERVIEWING SKILLS; NOT MISSING THE CHANCE!

It is crucial to screen and interview detainees in all circumstances as it may be the only remedy available at the moment. The person you are working with may not have been the direct victim of a crime but her qualifying relatives may have been victimized in the USA.

Go beyond the history of victimization for your client. Ask about relatives, children or whether she witnessed a crime against another person and collaborated

in the investigation of that crime. Your client may be eligible for a U visa remedy as a derivative or indirect victim.

TOP TEN STRATEGIES TO PREPARE FOR THE INTERVIEW

If you are responding to a client in detention, it is very likely your client is going to be stressed about the possibility of being removed. The premises or client meeting rooms may not be the most inviting place to disclose intimate details of victimization. In addition, special challenges arise when working particularly with children, youth or survivors of sexual assault.

Also, if you are not the legal representative, it is important that you work with a local lawyer that can include your name in the list of authorized visitors on behalf of the legal office if the attorney will be working on the case. In the alternative, you can request permission from the Sheriff's office for your agency to be allowed in the jail as a "professional visitor."

IF this is your first meeting with the survivor- and because time is of essence- it is important that you are prepared to break the ice, gain the trust of your client and obtain the details of the history of trauma in record time. Here are some considerations to start working through this situation:

1. An assault is a life-changing event for the victim. Don't underestimate this and do not assume a particular assault was "not that bad." Dismissing little details of victimization may make you miss the big picture. Often victims of sexual assault may disclose little information because of gaps in memory, distrust and/or minimization of her victimization as a coping mechanism. Multiple victimization issues and triggers may invoke flashbacks or memories of past abuse.
2. Keep the little info or details and come back to it at a later time. Do not rush her through it as she may re-live her experience and break down.
3. Don't take a victim's response to you personally. Anger, frustration, and hostility are all common responses to the experience of being assaulted and, remember your client may be more anxious about stopping the removal than disclosing information to you.
4. Be aware of the interviewee's perception of the power you hold during an interview. You may be seen as the offender's ally or the government messenger. Above all if you are working *pro bono* or at an NGO, there may be confusion of roles. Why would anyone want to help her now? You can balance the power by offering choices your client, sitting across from and not above the victim, and letting her lead the discussion.
5. Use active listening skills like paraphrasing and open ended questions. In the context of detention, be prepared to draw pictures, flow charts, mimic, and ask her to explain to you what she understood. Do not lose your patience if your client has not understood a word you said or cannot repeat or even paraphrase.

As stated, she may be in such a survival mode that she may be hearing you speak and nodding her head but not really listening.

6. Safety should be the paramount concern as you offer your services. If your client does not feel safe it is going to be very challenging to represent her. If you're concerned about the victim's safety, say so, but don't presume to know what's best for any victim.
7. Let the victim control the pace of the interview. Don't rush or belabor questions the victim is not ready to answer. Validate her feelings and be supportive without patronizing.
8. It is as important that you do not lose the ability to guide your client and that you do not allow her to be abusive towards you. It's important to validate his or her emotions but not at the expense of your safety or emotional well-being.
9. Don't minimize a victim's experience. It doesn't matter how much time has elapsed, or whether the assault was not particularly violent. Remain open and non-judgmental. Each person's experience and feelings are different.

Other considerations:

- Is the setting completely private?
- Is your interaction audible to anyone else?
- Are doors closed?
- Who is present and why?
- What is the purpose of your inquiries?
- Be specific about legal remedies as it pertains to the case.
- Allow for questions and expect some confusion.
- Tell her confusion is normal (normalize)

AT THE BEGINNING OF YOUR INTERVIEW

Setting clear expectations of what you can or cannot do to work with her and addressing safety issues are paramount in your successful representation. Here are some tips to consider in order to set the stage before you ask the difficult questions:

1. Be clear about the purpose of your intake, how the information will be used, and who will have access to it.
2. Explain your role, including what the victim can realistically expect from you.
3. Answer, to the best of your ability, whatever questions the victim may have, and be clear and realistic about your availability to discuss things further. It is crucial that you connect with advocate groups regardless of their background or experience in working with immigrants. All sexual assault advocates are trained to assist survivors with traumatic events. All states have coalitions of

domestic violence and sexual assault with several program members across the state. The centers can provide counseling and support. This is not your role. Do not create confusion of roles. You are not her advocate, you are her lawyer. That is why you should partner and keep contact for referrals. If you cross this boundary you may get frustrated and harm your representation and your client.

4. Tell the victim exactly how you can help and be sure you can do what you say you can do. Don't make promises you can't keep. Connect the victim with the support she needs. If this is a first contact, provide information about local rape crisis services. If this is a follow-up contact, inquire if he or she has been in touch with rape crisis or other support services or if s/he needs additional referrals. Ensure that the victim has a safety plan in place or is working with an advocate to develop one.
5. You may be moved by her experience. Take care of yourself. You can suffer from vicarious traumatization and this may affect your representation of this and future cases. Fight the urge to do anything and everything for a victim. Make referrals to victim advocates or other professionals who are in position to provide support and respond to victim needs.

Inform your client that telling her story may make her feel in fear, uneasiness, shame or mistrust, but normalize these feelings and reiterate your role and goal so that you are able to acquire a thorough history.

SCREENING SURVIVORS FOR POTENTIAL ELIGIBILITY

You may provide referrals as an advocate from the domestic violence shelter, sexual assault program or crime victim assistance. These are going to be fairly straightforward cases in which you will be providing the legal representative in advance information about the criminal activity and your client's victimization.

However, a lawyer may ask you to assist with a client that is in detention or with someone in proceedings. Asking the right questions in different ways may surface enough information for you to continue exploring and investigating.

Often times victims do not disclose ANY information until you met several times. While my advice is not to have to meet several times with every person in detention and to continue asking the same questions, it is my strong recommendation that each time you meet with your client and as you gain her confidence you re-ask questions regarding a potential history of victimization. You will be surprised to see how many women take more than three meetings to start talking about anything at all.

A person can be victimized in a variety of places and situations. There may be a tendency to ask about what happened at home or in the street, at the border etc. However, immigrants are easy prey in the work place. Based on this, your questions should address any and all potential places so as to trigger memories and details.

General questions to obtain information pertaining to crimes of violence in general:

- Has anyone ever hurt you?
- Who hurt you and for how long?
- How old were you?
- Did you ever tell anyone you were being hurt?
- Who did you tell?
- Did you ever report to the police, court, the department of child protection, anyone from any agency that you were being hurt?
- Did anything happen after you reported?
- Have you ever hurt yourself? How do you hurt yourself and how often?
- Have you ever received any counseling, therapy, medical or support services as a result of someone hurting you or after you made a report?
- If you were hurt in your home country, did that have anything to do with your decision to come to the U.S.?
- How would you say victimization has affected you?
- Closing assessment; Is there anything else you would like to add that I might have missed or that you think is relevant?

If your client has been apprehended by ICE during a raid in the workplace do not forget to ask the following questions to find out about potential labor exploitation. Felonious assaults, extortion, indentured servitude, and crimes of this nature: Questions related to potential trafficking or abuse at the workplace:

- How did you come to the USA?
- Did you know that you could get a job here? How?
- Did anyone help you to come to the USA or get the job?
- Do you owe anything to anyone? If so, to whom? Why?
- Questions about the job itself
 - How many hours did you work?
 - Were you free to decide whether to do overtime?
 - Did you get paid for overtime?
 - Did anything happen if you refused to work overtime?
 - What was the average length of a shift?
 - How many shifts did you do back to back?
 - Did they take any money from your paycheck?
 - Did you inquire into it? What happened?
 - Were you forced to buy papers, change papers to work every so often?
 - If this happened, did you lose your benefits (seniority, vacation etc)?
 - Were you able to take vacation/earn vacation?
 - Were you free to leave your job? If so, why didn't you leave your job? (In the Postville cases, supervisors made employees believe that they were protected against immigration because the plant was paying ICE not to arrest employees. If they were to go anywhere else, they would be at the mercy of immigration.)

The EEOC is a recognized certifier. It is not uncommon for immigrant women to be victimized by supervisors and coworkers in the form of sexual harassment amounting to sexual assault (unlawful touch or fear or apprehension of an unlawful touch). The following question may reveal some of this victimization:

- How did your supervisor treat you?
- Was any supervisor that mistreated your peers? How?
- Did any of it ever happen to you?
- Did you complain about it to human resources, other supervisors or peers?
- Did you see supervisors or co-workers flirting with your co-workers, inviting them to go out, calling them names?
- Did this happen to you ever? Did you tell anyone about it? Did anyone see it?
- Did any of your supervisors/co-workers ever ask you out or invite you to go to lunch, call you outside of work, invite you to give you a ride home before or after work?
- What happened if you said no? (potential punishment/retaliation)
- Did your supervisor/co-worker ever touch you in an offensive way or in any manner?
- How many times did it happen? Did anyone see it?

SCREEN EVERYWHERE AND CONNECT TO EVERYONE

One of the main public policy reasons for the U visa remedy is the ability of law enforcement to investigate crimes while protecting the immigrant victims from removal.

A lot of victims may not have disclosed the crime because of fear of retaliation, deportation and concerns about the role of law enforcement. Therefore, you may find situations in which your client has been the victim of a crime but has never talked about it to anyone. Depending of the crime, when it happened, where the alleged perpetrator is etc, you may be able to “trigger” an investigation. You must outweigh the benefits of a potential U visa with safety, whether your client is in control and ready to help in the investigation and the likelihood of law enforcement or other qualified agency investigating the crime.

Do not miss a chance to screen for this potential remedy and educate others about it. The following are some ideas of places where you can present information. You can also download brochures regarding U visas from CIS website and ask your local service providers to help you copy and distribute them.

- Community clinics
- Immigration detention centers
- Representation of non-immigration matters
- Raids
 - Large
 - Small scale (neighborhoods, trap-meetings, work, etc)
- CIS/ICE/EOIR may encounter victims

- At the port of entry
- Between ports of entry
- In detention
- In removal proceedings
- During appointments of orders of supervision
- During AOS interviews
- During their own investigations

If given an opportunity, ask your local domestic violence, sexual assault or trafficking coalitions or programs to train their staff, give them information, and connect with them for victim-referral

Other service providers you should partner with and network:

- Family & criminal court personal
- Juvenile court
- Department of Human Services
- EEOC and labor attorneys and personal
- Workforce development
- Crime victim assistance services
- Coalitions of advocates against domestic violence, sexual assault & trafficking

STRATEGIES FOR APPLICANTS IN PROCEEDINGS OR WITH FINAL ORDERS OF REMOVAL, EXCLUSION OR DEPORTATION

If your client is in removal proceedings please share these potential best options with her legal representative. Just because there is an immigration lawyer working on her case does not mean that he/she is familiar with all potential remedies or strategies for survivors. As an advocate you will also be very instrumental in persuading immigration to grant special considerations in your client's case. Her best options are as follows:

1. Persuade ICE not to file NTA- PRIMA FACIE PROCEDURE
2. Persuade OCC-ICE not to file the NTA with EOIR
3. Request joint motion to terminate proceedings to OCC-ICE
4. Request motion to terminate proceedings to the EOIR
5. Request continuance of case until approval of I-918 application

In any of the above strategies, the likelihood of success depends on whether you have already filed the U visa or whether you are showing that there is a great likelihood the U visa application will be eventually approved.

U VISA APPLICANTS IN REMOVAL PROCEEDINGS; TIPS FOR LEGAL REPRESENTATIVES.

If your client is a U visa applicant, the first step is to persuade ICE from filing an NTA or if one is already filed with the Office of Chief Counsel, constant their office to persuade them from filing the NTA with the EOIR using their prosecutorial discretion.

Whether to join conditional termination request, close cases, prosecute or continue is a matter of discretion and it varies from jurisdiction to jurisdiction.

However, even if ICE and the OCC-ICE have internal policies regarding whether and when to prosecute U visas, it is imperative to continue these requests. No interest is being served by keeping a case active and open having multiple hearings only to continue until finally closing the case. ICE-OCC has the power to re-file the NTA in the event the U visa is denied. Therefore, cases should be conditionally terminated when a U visa is pending until resolution of the U visa.

Meet with your local ICE & OCC-ICE before you have a case. Bring in advocates to support your position as well as other allies.

If you have screened for remedies and your client qualifies for a U visa, file a skeletal application as soon as possible. This may give your client's U visa case more credibility in moving forward through the system and with immigration court.

Your skeletal application should have more than anything the I-918B. This shows VSC, ICE and EOIR that you have "support" from law enforcement and strengthen your possibilities of having your case continued or closed.

There is a memorandum to the field issued for guidance when the regulations were not yet published that states no one should be removed without first availing himself to the U visa remedy." Although the regulations are published, there is nothing that overrides this memorandum. Use it in making your case for continuance, stay of removal or closing proceeding. Policy Memo ERDIR 70/6.2-P from Scott Blackman dated May 23, 2002

The principal alien of a qualifying family member who is in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a, or in exclusion or deportation proceedings initiated under former sections 236 or 242 of the Act, 8 U.S.C. 1226 and 1252 (as in effect prior to April 1, 1997), and who is seeking U nonimmigrant status, must file a Form I- 918, Supplement A directly with USCIS.

REQUESTING CONTINUANCE OF CASE IN PROCEEDINGS

Although the regulations are clear as to the fact that the judge may continue a removal case for good cause shown, there is no clarity as to what constitutes “good cause.”

“[t]he Immigration Judge may grant a motion for continuance for good cause shown.” 8 C.F.R. § 1003.29 (2008); *see also* 8 C.F.R. § 1240.6 (2008) (providing that the Immigration Judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the DHS).

In *Matter of Hashimi* and other cases, the BIA set forth considerations and guidance to continue cases. *Matter of Hashimi*, 24 I&N Dec. 785 (BIA 2009).

“An alien’s unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition should generally be granted if approval of the visa petition would render him prima facie eligible for adjustment of status.”

“Proceedings, a variety of factors may be considered, including, but not limited to: (1) the Department of Homeland Security’s response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors.

REQUESTING TO TERMINATE CASE

Prior to the commencement of proceedings, DHS may cancel an Order To Show Cause (OSC), a Notice to Appear (NTA), or terminate proceedings for the reasons set forth in 8 C.F.R. § 242.7 (1997) [OSC] or in 8 C.F.R. § 239.2(a) and (b)(1997) . Proceedings are commenced when the charging document is filed with the Immigration Court.

After the commencement of the hearing, only an Immigration Judge may terminate proceedings upon the request or motion of either party. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *see also* 8 C.F.R. § 1239.2(c).

On June 17, 2011 ICE Director John Morton, issued a memorandum providing guidance to the Office of Chief Counsels regarding when to exercise prosecutorial discretion. This memorandum contains special provisions and guidance for immigrant survivors of crimes of violence.

In addition, ICE counsel may agree to file, at the request of the qualifying family member, a joint motion to terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals, whichever is

appropriate, while the petition for U nonimmigrant status is being adjudicated by USCIS.

Upon VSC's final denial of a petition for a petitioner who was in removal proceedings that were terminated pursuant to 8 CFR 214.14(c)(1)(i), DHS may file a new Notice to Appear (see section 239 of the Act, 8 U.S.C. 1229) to place the individual in proceedings again.

CASES ADMINISTRATIVELY CLOSED

Administrative Closure results in a pending, but "sleeping case." File Motion to re-calendar if a petition is approved. Once re-calendar or even before, ask OCC to join you on a motion to terminate proceedings.

If this is not resolved, the U visa approval will not be enough to allow applicant to eventually adjust status to that of lawful permanent resident.

STAY OF REMOVAL

May be needed when client has been ordered deported or removed from the United States and you wish to obtain a stay of deportation or removal under the provisions of 8 CFR 241.6.

During a Q&A session conducted by ASISTA, a Vermont Service Center representative stated that I-246 were needed for I-918 applicants with expedited removals:

Q: Are Stays of Removal needed for folks who are applying for a U visa but have an expedited removal (removal that happened at the border)?

A: Yes, file an I-246 with the EOIR or local head of detention unit or preferably both. ICE warns that mere filing of an I-918 will probably not stay a removal and an I-918 approval will be required. The stay should be filed on an I-246 which can be downloaded from www.forms.gov.

To file or not to file....

The stay of removal is discretionary, practitioners and immigration advocates are cautioned against filing the request when the U visa applicant has not been detained because it may be denied resulting in alerting ICE of the presence of the applicant in violation of a prior final order of removal.

As a matter of practice, it is advisable however to have the I-246 with fees, copies of notice of receipts from VSC etc ready to go in case it is needed.

A petitioner who is subject to an order of exclusion, deportation, or removal issued by an immigration judge or the Board 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.

An applicant who is the subject of a final order of removal, deportation, or exclusion is not precluded from filing a petition for U-2, U-3, U-4, or U-5 nonimmigrant status directly with USCIS.

The filing of a petition for U-2, U-3, U-4, or U-5 nonimmigrant status has no effect on ICE's authority to execute a final order, although the alien may file a request for a stay of removal pursuant to 8 CFR 241.6(a) and 8 CFR 1241.6(a). If the alien is in detention pending execution of the final order, the time during which a stay is in effect will extend the period of detention (under the standards of 8 CFR 241.4) reasonably necessary to bring about the alien's removal.

Prima facie system

Advocates with U nonimmigrant cases in detention or removal can either email Ellen Gallagher (Ellen.gallagher@dhs.gov) or call the hotline at 802- 527-4888 to get PF determination.

Practitioners have voiced confusion on the listservs and elsewhere about the PF process for U nonimmigrant cases because attorneys and representatives have not received copies of PF determinations from VSC. So far, only ICE has received the PF determinations. If you want to be notified of the PF process contact Tom Pearl directly or Gail Pendleton.

For petitioner who are subject to an order of removal, deportation, or exclusion and whose order has been stayed, VSC's denial of the petition will result in the stay being lifted automatically as of the date the denial becomes administratively final.

ADMINISTRATIVE ORDERS OF REMOVAL

If VSC determines that the petitioner has met the requirements for U-1 nonimmigrant status, VSC will approve Form I-918. If the applicant was subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS' approval of Form I-918.

The same process is applied to qualifying relatives.

Remember that this only applies to removals by ICE and not EOIR and that you need to get the case reopened with the EOIR via motion to reopen.

REINSTATEMENT ISSUES

The system has not come up with a way to formally “cancel” prior orders. Because of the problems related above, advocates are concerned that the system has not come up with a way of formally curing reinstatement of removal under INA Section 241 a 5.

While we are working on this we encourage you to lay the foundation of curing the reinstatement issues at the inadmissibility stage when you file an I-912 waiver. Our view is that you do this by curing the inadmissibility issue at the initial phase, you have cured the predicate elements under INA Section 241 a 5

TROUBLESHOOTING AND WORKING WITH CERTIFIERS AND ALLIES

Questions

EXAMPLE REGARDING AN INNITIAL CONVERSATION WITH A POTENTIAL SURVIVOR

My name is Sonia Parras. I am a lawyer that works for immigrants and with immigrants. A lawyer like me is someone that helps immigrants that the government wants to take out of the country or has arrested to get them out of the country. My specialty is working for and with victims of crimes of violence like abuse at home, victims that have been forced to do something sexual that they did not want or felt embarrassed about doing ir at work, at home or in general.

I am here today to ask you a few questions to see if you may be able to ask the judge to let you stay here. I do not work for the government or la migra. In helping other immigrants in your situation I have heard a lot of bad things. A lot of times, immigrants are afraid to talk about people that hurt them because they think they will get in trouble or get their families in trouble. In this country, even if you do not have good papers, the law helps and protect those who are being hurt.

I would like to ask you a lot of questions in general but some about your experience in this country and whether anyone has ever hurt you or threatened you. Do not worry about talking about it with me. Everything you tell me is like a secret and I will not be able to do anything with the information you are giving me unless you give me permission. You may not feel like telling me everything today but if you have something else you would like to tell me, I am going to leave me number with you.

The reason why I am going to ask you these questions is because there are special remedies under immigration law for people that have been hurt by others or whose family members have been hurt by others and have talked to the police or other people about it. I would like to see if I can help you as much as possible including with these particular protections. Do you have questions about who I am, what I am going to do now and why?