

**U Cap Update from USCIS & Additional Updates from VSC Stakeholder
Teleconference
December 11, 2013¹**

NOTE: This is just an initial advisory. Please keep your eyes open for updates, which we will send out on the VAWA Update list serve and will be available at www.asistahelp.org

I. U Visa Cap For FY14 Reached

According to a USCIS [press release](#), USCIS has approved the statutory maximum of 10,000 petitions for U visas for fiscal year 2014. This is the fifth year in a row that the cap has been met since USCIS began issuing U visas in 2008.

A. Process Post-Cap

- USCIS will continue reviewing pending U visa applications in the order in which they were received and will place those eligible for U visa status on a wait list.
- USCIS will send a notice to waitlisted applicants and their qualified family members letting them know that they have been found eligible for the U visa and deferred action and should apply for a work permit on that basis.
 - ASISTA Note: Applicants in Arizona should ask for parole, not deferred action, as the basis for their EADs. Arizona is denying driver's licenses to those with EADs based on deferred action. We are working with VSC on fixing this problem for VAWA self-petitioners, so let us know when/if you need to make this request for U conditional approvals.
- USCIS will resume issuing U visas on October 1, 2014, the first day of the fiscal year 2015, when an additional 10,000 U visas will become available under the current cap.
- Those on the wait list should be the first to receive those U visas when they become available.
- Once the new U visas are available in October of 2014, clients who are on the waitlist should not have to submit any additional documentation to convert their conditional grant to a U visa application. VSC will do it automatically.

¹ Cecelia Friedman Levin, ASISTA Staff Attorney, prepared this advisory with assistance from Gail Pendleton, ASISTA Co-Director. It includes notes from the Vermont Service Center (VSC) Stakeholder teleconference held on December 11, 2013. These notes are ***not intended to be exhaustive*** of all the content discussed during the teleconference; however, they include important information, especially regarding USCIS reaching the U visa cap and other updates and changes. Representing USCIS during the teleconference was Scott Whelan, from USCIS Office of Policy and Strategy; Danielle Scott from USCIS Office of Public Engagement; Lisa LaRoe, Vermont Service Center, and other subject matter experts at the Office of Policy and Strategy and from the Vermont Service Center. ASISTA would like to thank Jessica Farb from the Immigration Center for Women and Children and Rosie Hidalgo from Casa de Esperanza: National Latin@ Network for Healthy Families and Communities for their assistance compiling these notes.

- ASISTA Practice Pointer: Petitioners and qualifying family members must continue to meet eligibility requirements at the time the U visa is issued. So as in current practice, if inadmissibility issues arise after the conditional approval/deferred action is granted, make sure you address them with VSC before VSC makes the final decision on issuing the U.

B. Effect on Accrual of Continuous Presence for Adjustment

USCIS stated that the time that applicants with conditional approvals spend in deferred action status **will not count** towards the accrual of continuous presence necessary for U visa holders to apply for legal permanent resident status. Rather, the accrual of continuous presence will start once the applicant receives actual U visa status. In response to a comment that those with interim U visa status could count their time with deferred action toward the accrual of continuous presence, USCIS stated that they would look further into this, but they believe the treatment of deferred action for those with interim relief was a result of different circumstances. **For now, applicants with deferred action based upon conditional approval because the cap have been met will not be able to count their time with deferred action toward the accrual of continuous presence necessary for adjustment.**

- ASISTA Note: The interim relief problem was caused by the agency; the cap problem is caused by the statute. We are exploring ways to expand the number of U visas or recapture those unused during the interim relief period. Please respond to any action alerts on this issue; we will need your help convincing Congress and/or the Administration to fix the underlying problem (insufficient number of visas).

C. Effects on Consular Processing

In response to a question about how this impacts derivatives abroad, in particular with the granting of parole as indicated in 8 CFR 214.14(d)(2), USCIS stated they have been discussing parole with Counsel and hopefully will have information about that in the near future.

D. Effects for Applicants in Removal Proceedings

During the teleconference, a question was asked whether U visa applicants in removal proceedings would be eligible for deferred action status should their applications be conditionally approved now that the cap has been met. USCIS responded that as far as they are aware, there is nothing that would preclude them from granting deferred action to someone in removal proceedings.

- ASISTA Practice Pointer: In this regard, the issuance of deferred action seems to be more in line with DACA than with approved VAWA self-petitioners, where CIS seems to believe it lacks jurisdiction to grant deferred action, perhaps because EOIR has jurisdiction over VAWA adjustments but lacks jurisdiction over U relief.

E. Additional Information on U visa Cap

The reasons the cap has been met so soon are (1) USCIS' addition of new staff and (2) an increased number of U visa applications. Their goal is a 6-month processing time for the all T/U/VAWA applications by mid-2014.

To prevent a chilling effect, USCIS will announce the process explained here on their website and will address it in upcoming trainings with law enforcement, encouraging law enforcement to "continue business as usual." They will encourage them to continue certifying even though the cap has been met for this year.

II. Other Highlights and Updates from Stakeholder Call

A. Overview of T, U, and VAWA Relief:

During this training, subject matter experts from the USCIS Vermont Service Center and Office of Policy and Strategy provided an overview of the T and U visa, and the Violence Against Women Act (VAWA). Below is some important information from the U visa presentation.

- About 75% of U visas are based in domestic violence or domestic violence/sexual assault crimes.
- ALL forms and declarations (in addition to Supplement Bs) should have original signatures in blue ink. No photocopies or faxes will be accepted.
 - ASISTA Practice Pointer: If you can't get signatures from law enforcement in not-blue ink, advocates can consider including the name and phone number of the certifier in their cover letter so USCIS can call them to confirm it is their signature. Just providing this information may allay CIS fraud concerns.
- Showing Continued Cooperation at time of Adjustment: U visa holders have an ongoing cooperation requirement, even after the U visa has been issued. They cannot reasonably refuse to cooperate and should make themselves available if needed. Scott mentioned three options to show continued assistance.
 - Provide short typed letter from law enforcement agency on their letterhead saying the that client "has not unreasonably refused to cooperate."
 - The law enforcement agency can complete new I-918 Supplement B.
 - Provide law enforcement with copy of old I-918 Supplement and provide a new signature and date.
- ASISTA Practice Pointer: **As per the regulations**, if clients are not able to obtain these documents, they should include a declaration about what attempts they made to secure them and demonstrate that they have not unreasonably refused to cooperate with law enforcement after their U visa has been issued,

because the case is over, they have not been asked for any further help or they have provided help (give details and document). Note: We believe CIS' interpretation of the statute is ultra vires (wrong). The statute places the burden on the government, not the applicant, to show the applicant has unreasonably refused to cooperate. If you receive RFEs or denials on this basis, therefore, let us know so we can help challenge them.

- Revocation of U visa: Law enforcement agencies can withdraw or disavow certification at any time if the client is unreasonably refusing to cooperate. It is within the law enforcement agencies' discretion to decide if or when they want to decertify. They have to provide VSC with the name, date of birth of the applicant and the reason for the disavowment. VSC will then issue a notice of revocation to the U visa holder in accordance with 8 CFR 214.14(h)(2) within 30 days of the date of the notice.

B. Notes from Question and Answer Session

1. Fraud in foreign labor contracting: A question was asked regarding under what circumstances fraud in foreign labor contracting qualifies an applicant for a U visa. Oftentimes clients are victims of fraud before reaching the United States. USCIS replied that in order to qualify for U visa status, an individual must be a victim of a crime that occurred in the U.S. or violated US law. U visa holders can apply from outside the United States, but under VAWA 2013, U visa applicants must meet the federal definition of fraud in foreign labor contracting found in 18 USC Section 1351.
2. Next friends in U visa cases: In response to a question about what USCIS was looking for when a next friend helped law enforcement, USCIS stated that generally a next friend can step forward to provide information about the crime for someone who is incompetent or incapacitated. The next friend is not eligible themselves for the U visa benefit, they just provide information for the victim. The next friend does not have to be designated as a "next friend" by any particular authority, rather this could be anyone who provides information to law enforcement for an incapacitated or incompetent victim.
3. Expediting U visa cases when applicants are in removal: In response to a question about how to expedite U visa cases for clients in removal, USCIS stated that ICE can make request to VSC to expedite processing or to request a prima facie determination. As a representative, you can request to expedite a case based on humanitarian grounds, but that is done on a case-by-case basis and is not guaranteed. There is no automatic process to expedite cases if a person is in removal.
4. Obtaining status for spouses of U visa holders who marry after approval. In response to a question about whether U-1 visa holders who marry after approval may apply for a U visa for their spouse, USCIS stated that the relationship between spouse and primary victim had to be established at time of application so they may not be eligible. The 929 process is designed so that primary U visa holders applying for their green card can apply for qualified family members who never had U status. This is a completely separate process from U visa.

- ASISTA Practice-Pointer: If U-1 visa holders marry after the approval of their U visa, then they may apply for their spouse near the time of their adjustment under the 929 process. Remember that inadmissibility is NOT an eligibility requirement for adjustment, so all inadmissibility issues must be addressed in the general discretion context. See [previous advisory](#) on strategies for this where we included the regs details on how to deal with inadmissibility at adjustment.
5. Robbery as Qualifying Crime for U visa: USCIS stated that robbery itself is not a qualifying crime. However, someone who was assaulted or beaten during the robbery may qualify for other reasons. If LEA can sign off on certification that this is substantially similar, that person may be eligible for U visa. The officers will then determine if crime is substantially similar to one of our crimes, that person may be eligible.
- ASISTA Practice Pointer: In our experience reviewing RFEs and denials, it is extremely difficult to successfully argue “similar” crimes. (Before you try it, review the regulations; they require that the elements be essentially the same.) It is MUCH better to argue the crime fits in a “category” of crimes. For robbery, this is usually felonious assault. For instance, in California, all the elements of robbery fit within the elements of felonious assault. If that is not true in your jurisdiction, you may show that the facts of the case meet the elements of the state or federal felonious assault definition. See [previous advisory](#) for more information.
6. USCIS Training of Law Enforcement on U visa issues: An advocate reported that her local state attorney’s office is considering substantial abuse requirement in issuing Supplement Bs and asked if there was any way for this office to be retrained. USCIS responded that the advocate can send that specific information to the public engagement mailbox at t-u-vawatraining@uscis.dhs.gov.
7. Bona Fide Determinations in U visa cases: In response to a question about work authorization for bona fide U applications, they mentioned that with the new resources (staff) at VSC, they will be working faster to get work authorization to folks who are on the waitlist as conditional approvals. UCSIC has not established a bona fide determination process because that may slow down adjudication times and delay issuing EADs to folks who are eligible. They are discussing this internally and assessing whether both can be done, but for now the process is the waitlist.
- ASISTA note: Although we helped write the “bona fide” language, it has become clear that it is too high a standard, requiring close to a full determination. We are NOT prioritizing its implementation; in fact, we think it should probably be taken out of the statute because it has proven so unhelpful. We believe everyone’s energy is better spent on speeding up adjudications and expanding the number of visas.

8. Clarifying USCIS position on Derivative U visa Adjustment: An advocate stated that there is new information on the USCIS website that states that U visa derivatives cannot adjust until the U-1 principal has filed for adjustment, and asked for clarification given that there is guidance stating that U derivatives can apply independently for adjustment of status. USCIS stated that U derivatives can apply for adjustment of status by themselves in practice as long as they are in status and are in the US. The advocate was told to email USCIS on this issue to clarify this point on the website.
9. Re-filing U visas on the basis of the same crime. An advocate stated that her client had a U visa that expired and has re-filed on the basis of the same crime. The advocate was under the assumption that once the U visa expired, they could reapply on the same basis, and asked that if not, would an extension of status (based on exceptional circumstances) be more appropriate? USCIS stated if someone has been previously approved for U based on criminal activity and the U expires, then they will not be eligible to apply again based on same crime. Continually applying based on one criminal act is not how the process works. If client already had 4 years of status, and they wish to extend U visa status to apply for adjustment, then there are very few limited circumstances to apply for that extension. However, if that extension is approved, they can apply for adjustment of status at that point if eligible.
10. U visa holders who travel abroad for more than 90 days. An advocate asked whether USCIS had made progress on the issue of U visa holders who travel abroad and get stuck outside for more than 90 days. Could the absence be excused with extenuating circumstances, and can the U visa holders restart the 3 years continuous presence on return? USCIS indicated that they have debated this issue internally and cannot speak with certainty as to what direction this issue is taking. If a U visa holder travels abroad over 90 days, then the adjustment of status is in jeopardy. This problem does not, however, preclude the U visa holder from processing back in, and CIS recommends doing this.. The advocate was also encouraged by USCIS to send any follow-up questions to t-u-vawatraining@uscis.dhs.gov