

January 10, 2013

Alejandro Mayorkas
Director
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington DC, 20529

RE: PM-602-077
Age-Out Protection for Derivative U Nonimmigrant Status Holders: Pending Petitions,
Initial Approvals, and Extension of Status

Dear Director Mayorkas:

The undersigned, which represent 76 national, regional, state and local organizations, and individuals, respectfully submit the following comments regarding the Policy Memorandum, PM-602-077, Age-Out Protection for Derivative U Nonimmigrant Status Holders: Pending Petitions, Initial Approvals, and Extension of Status (“U visa Age-Out Guidance” or “Guidance”) for your consideration.

As legal service providers, immigration attorneys, and victim advocates, we welcome the issuance of the U visa Age-Out Guidance as this policy will provide much needed security for the immigrant crime victims and their families that we serve. We are encouraged by USCIS’ statement that the preservation of family unity is a benefit to law enforcement as the principal would be more likely to cooperate knowing their family members are in status. We believe the benefit of the U visa Age-Out Guidance runs deeper, as the preservation of family unity is essential for victims to begin the healing process and rebuild their lives. Given that victims often rely on the emotional, psychological and economic support of their family members, especially their children, this Guidance provides much needed stability and promise to U visa holders.

We applaud USCIS’ approach to fixing the age-out problem for U derivatives granted status but who age out before attaining the three years necessary to apply for lawful permanent residence. We discuss why we agree with USCIS’ approach on this issue at the end of this comment. We are very concerned that several key categories of derivatives are not sufficiently helped by this guidance, however, and therefore suggest some significant improvements to the document and to the pending regulations to further protect victims.

To summarize: Although the U visa-Age Out Guidance provides important protections for U visa derivatives who age out after the approval of the principal’s application,

- 1 The U visa Age-Out Guidance and the new regulations should dictate that the age (and other relevant aspects of derivative status) are established at time the U-1 principal files;

- 2 The U visa Age-Out Guidance should provide additional protections to applicants who turn 21 while the principal's U visa application is pending;
- 3 USCIS must address and fix problems for U derivatives who age-out while abroad.

We note that the problems facing U derivatives occur in a context of egregious delay in implementing the law. It took USCIS seven years to issue U visa regulations. As experience with the 10,000 cap reveals, had the regulations been issued in a timely fashion, thousands of other victims of crimes might have availed themselves of the relief intended by Congress. Moreover, during the interim relief period, no derivatives abroad could enter the US to gain status. In this context, we suggest that it behooves USCIS to apply as liberal an interpretation as possible, not to erect further barriers to meeting the goals of an ameliorative law.

1. Fixing Derivative Status at Time of Principal Filing Is the Best Way to Fulfill the Statutory Language and Congressional Intent, as Demonstrated by CIS Past Practice

We note that the USCIS cites the regulations, not the statute, for requiring ongoing “child” status for U derivatives through adjudication of their application.¹ While we understand that guidance may not supersede regulations, we believe the regulations violate the statute, if USCIS is correct in their interpretation. We support, therefore, USCIS’ plan to revise the regulations and request that, in doing so, you ensure the new regulations comport with Congressional intent and USCIS past practice during the interim relief period and the first year of the regulations’ implementation.

The regulations cited by the memorandum most gravely digress from the language and intent of the statute by placing control of whether derivatives gain status solely in the hands of USCIS.² If USCIS acts timely on an application, a derivative may be granted status for the full 4 years; if USCIS fails to act before the child turns 21, that same derivative is no longer eligible for status and may be subject to removal. As the Guidance states concerning approved U-3 derivatives who later age out, “the failure to maintain U derivative nonimmigrant status was due to extraordinary circumstances *beyond the control of the derivative U nonimmigrant*.”³ This is as true for U derivatives who age-out *before* USCIS has adjudicated their claims as it is for those who age out after USCIS has approved them. Such arbitrary results undermine the purpose of the law and are not supported by the statute or past USCIS practice.

Nothing in the U statute explicitly requires that derivatives remain children as defined by INA § 101(b)(1) until USCIS adjudicates a claim. Indeed, during the seven-year “interim relief” period prior to the regulations’ issuance, USCIS fixed derivative status at time of principal filing.⁴ This

¹ See 8 CFR § 214.14(f)(4)

² *Id.*

³ U-visa Age-Out Guidance at p. 3 (emphasis supplied).

⁴ Michael Aytes, Assoc. Director, Domestic Operations, to Field Leadership, File No. HQORPM AD08-12, HQ 70/8, *New Classification for Victims of Criminal Activity—Eligibility for “U” Nonimmigrant Status, Revisions to*

approach recognized that harm from aging out or other changes in status should result *only from acts in the petitioner's control*, not from USCIS' inability to adjudicate claims in a timely fashion. As noted above, derivatives abroad could not receive status, so *for seven years* no U victims could bring in their children, even if their own interim relief applications were approved.

Amendments to the statute made by Congress in 2005 do not justify USCIS' change in practice, since at the time Congress amended the law in 2005, *USCIS was measuring derivative status at time of principal's U visa filing.*⁵ If USCIS had issued regulations in a timely fashion, as it did for trafficking victims, Congress would have known in 2005 that it needed to fix the law. Instead, Congress, and victims applying for status, believed they could reasonably rely on USCIS practice at the time. The agency's later reversal of that practice compounds the harm done by its failure to implement the law for seven years.

Children (and their parents) have no control over getting older; thus, USCIS' speed in reviewing claims now determines whether U-3 children will be considered eligible for status or deemed removable. This inherently arbitrary result undermines the goal of the law. Often the reason victims of domestic violence, for instance, ultimately report the crimes against them is to protect their children. If a victim can't know that children will at least be considered for status if he or she files while they are still children, the U application becomes much less helpful to them and to law enforcement. Congress cannot have intended a "crapshoot" for this vulnerable population. By failing to provide predictable protection for victims' children, the current policy discourages victims from accessing safety and justice, undermining the U visa's usefulness as a tool for law enforcement.

Recommendations

(1) USCIS, through this Guidance and regulations, should base its determination of U-3 derivative status on the date of the U-1 principal's filing and not on the date of adjudication or the date of entry of the U-3 derivative.

(2) USCIS should swiftly issue regulations on this issue remedying the problems caused by USCIS' delay in implementing the law and by its subsequent change in derivative policy.

2. The U visa Age-Out Guidance should provide additional protections to applicants who turn 21 while the principal's U visa Application is Pending

We are concerned about the Guidance's policy to grant deferred action status to U-3 derivatives who age-out while the principal U-1's application is pending for a variety of reasons: a) inconsistencies in granting deferred action; b) confusion over what USCIS will consider to be

Adjudicator's Field Manual (*AFM*) Chapter 39 (*AFM Update AD08-12*), at 1 (Mar. 27, 2008) [hereinafter "Aytes Memo"].

⁵ See Aytes memo, *supra*.

“adverse factors” in granting deferred action; c) adjustment issues for both the U-1 principal and the derivative; and d) concern regarding the Guidance’s language regarding deferred action and removal proceedings. We believe that if USCIS determined the age of U-3 derivative status at the date that the U-1 application was filed, many of these concerns would be addressed. However, given the current policy outlined in the Guidance, we address these concerns, as well as our recommendations to address them, in turn.

A. The issuance of deferred action status to derivatives that age-out while the U-1 application is pending should be consistent and fair.

As mentioned above, the Guidance acknowledges that USCIS is developing regulations to provide protection for U-3 derivatives who age-out of eligibility after turning 21 years of age while their I-918 Supplement A petition is pending. DHS’s precatory language to the proposed memorandum states, “Until such regulations are promulgated, USCIS will review such petitions on an individualized case-by-case basis predicated on the exercise of prosecutorial discretion to determine if deferred action is warranted.”⁶ We believe that, if USCIS determines that a derivative has submitted prima facie evidence of his or her eligibility for derivative U nonimmigrant status, the case should automatically be granted deferred action status and employment authorization until regulations are developed to protect qualifying U-3 derivatives.

Currently, there are no guidelines on how USCIS will perform the case-by-case review. In the past, we have submitted requests for deferred action status for U-3 derivatives who have aged out and have obtained inconsistent results: some were granted deferred action and others received no decision at all. The current process is confusing, unpredictable and unfair, harming victims of crimes and their families. As noted above, it is not the fault of the applicant that the processing times are extremely long and USCIS did not make a decision on a timely-filed application prior to the derivative turning 21 years of age.

CASE EXAMPLE: Applicant’s mother was principal U Visa applicant. She filed Form I-918 in May 2011. She concurrently filed two Forms I-918 Supplement A to include her daughter and son as derivatives on the application. The daughter turned 21 in July 2012, over one year after the U Visa application was filed. The mother and son’s cases were subsequently approved and they were granted U status for four years. Because the daughter aged-out, her case remains pending and she has still not received a favorable response to her deferred action request (even though she seemingly has no adverse factors that would prevent her from being granted deferred action).

⁶ Guidance at 2.

This derivative and her family are being punished by the lengthy processing times for U visas. The daughter's case should have been approved for four years because she was under 21 when the I-918 Supplement A was filed, over a year before USCIS finally adjudicated the U request. Alternatively, she should have been granted deferred action.

Recommendation

(1) If USCIS cannot yet make a decision on a pending I-918A Petition because it is awaiting regulations, the derivative petitioner should automatically be granted deferred action status and employment authorization after submitting prima facie evidence of eligibility.

B. If USCIS insists on denying deferred action to eligible U derivatives, it must clarify what is meant by adverse factors.

The U Visa Age-Out Guidance indicates, "Absent adverse factors, deferred action should be reviewed following established USCIS guidelines. Deferred action should not be permitted in any petition that includes adverse factors, such as where the petitioner is clearly ineligible for derivative U nonimmigrant status, has an aggravated criminal history, or otherwise poses a threat to public safety or national security."⁷ We object to USCIS denying deferred action to otherwise eligible U derivatives, especially without any notice of what factors are considered "adverse" or the opportunity to see and rebut derogatory evidence.

Though many U Visa applicants have inadmissibility issues, this does not preclude them from U eligibility. Prior immigration violations alone, for instance, rarely pose a problem for U approval and should not, therefore, be sufficient reason to deny a request for deferred action. If an applicant is prima facie eligible for a waiver under INA §212(d)(14), she should be deemed prima facie eligible for U Status. We note that although aggravated felonies are neither independent grounds of inadmissibility, nor bars to U status, USCIS states that it will categorically deny deferred action to anyone with an aggravated felony. Were USCIS to unilaterally deny U status on this basis, it would violate the law (had Congress intended aggravated felonies to be bars to status, it would have said so in the statute). Such per se denials in this unusual deferred action situation similarly violate the law. If an aggravated felony can be captured as an inadmissibility ground (such as a crime of moral turpitude), the (d)(14) waiver arguments should be considered in determining prima facie eligibility.

Finally, if USCIS denies an applicant's request for deferred action, it must provide a reason for the denial. Any applicant should have the opportunity to dispute any negative discretionary factors and argue in favor of her deferred action request.

⁷ Guidance at 2.

As noted before, had USCIS issued regulations in a timely fashion, or at least continued the practice it applied to derivatives for the lengthy period before it issued regulations, aging out would not have been an issue for these derivatives and there would be no special deferred action system for handling their cases. This is an ameliorative law: USCIS should eliminate the legal limbo for derivatives by, minimally, granting them deferred action and work authorization.

CASE EXAMPLE

In the example above, the derivative daughter aged out by turning 21 in July 2012, over one year after the U Visa application was filed, requested deferred action as a U Visa age-out case in August 2012 but received no final decision. She has not received any additional response indicating why her deferred action status has not been granted. Additionally, she has no prior criminal history and entered the United States at approximately 10 years of age. If USCIS cannot adjudicate her U Visa application without a change in regulations, there appears to be no reason why she should not be granted deferred action while she awaits final adjudication.

Recommendations

- (1) If USCIS will not automatically grant deferred action to derivatives who have aged-out while their I-918A Petition is pending, then USCIS must clarify what are “adverse factors” that prevent an applicant from being granted deferred action status, so applicants know what to address in their prima facie arguments.
- (2) If USCIS denies an applicant’s deferred action request, it must (a) provide notice of the negative factors or derogatory information on which it is basing the denial and (b) provide an opportunity to respond with arguments in favor of the deferred action request.

C. The U visa Age-Out Guidance should clarify adjustment of status procedures for U-1 principals who have derivatives with deferred action status, as well as clarify what time will count towards adjustment of status for derivatives affected by the proposed pending regulations

There are several issues related to derivative status and adjustment for both principals and derivatives.

i) U-1 principal adjustment with derivatives who have aged out after U-3 approval

U-1 principals can adjust under INA § 245(m) if their children age-out **after** the U-3 approval without impact on the child’s ability to adjust. This is true even if such derivatives’ U-3 status subsequently expired as the U visa Age-Out Guidance’s policy states that upon approval of a

U-3 derivative's I-539 application, derivatives who have aged-out after their U-3 status expired would be granted the remaining time of the four-year period of U nonimmigrant status.⁸

Recommendations

(1) To avoid confusion we suggest USCIS cite back to previous policy statements and reiterate this policy in the Guidance: U-1 principals can adjust under INA § 245(m) if their children age-out *after* the U-3 approval without impact on the child's ability to adjust.

ii)U-1 principals whose derivatives never received U-3 status

Under current practice, once the U-1 principal adjusts, derivatives who never received U-3 status, including those with deferred action, become ineligible for U visas.⁹ This means that approved U-1 principals should avoid adjusting status until all their eligible children have gotten U-3 status. In these cases, U-1 principals should request an extension of their own U status until their derivative's Supplement A applications are adjudicated.¹⁰ We assume this practice will continue, but USCIS should make this clear.

iii)Derivatives with deferred action status and their ability to adjust under 245(m)

Compounding this problem, it is unclear whether the time a derivative spends in deferred action status will be counted towards continuous presence necessary for adjustment.¹¹ Without guidance or regulation regarding these derivatives, they run the risk of being in deferred action status for an indefinite period of time, which causes further instability and confusion for victims and their families. For this reason, we urge USCIS to back-date the grant of U-3 status.

As noted above, there is established precedent for back-dating time in status. 8 CFR § 214(b)(6) states, "petitioners who were granted U interim relief as defined in paragraph (a)(13) of this section and whose Form I-918 is approved will be accorded U-1 nonimmigrant status as of the date that a request for U interim relief was initially approved."¹² The Aytes Memo ensured that this provision under the regulations specifically applied to derivatives with interim relief.¹³ Thus, those derivatives with deferred action under interim relief were granted U-1 status back to their initial interim relief approval date. Such an approach conforms with the ameliorative purpose of

⁸ The Guidance provides additional time for derivatives who aged-out long before this Guidance was issued. For these U-3 derivatives, USCIS may grant the remaining time available in U nonimmigrant status, to equal four years, as well as an additional time from expiration of the four-year period up to one year from the date of approval of the I-539 application.

⁹ 8 CFR § 245.24(b)(2)

¹⁰ USCIS. Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator's Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-2 (April 11, 2011).

¹¹ 8 CFR § 245.24(b)

¹² 8 CFR § 214(b)(6)

¹³ Aytes Memo *supra* n. 3

the law, especially since the ongoing harm derivatives and their families have suffered was through no fault or control of their own.

CASE EXAMPLE 1: A U-1 principal will be eligible to adjust status in March 2013. However, her 21 year old derivative son aged-out of his U-3 status in January 2013, before he was able to acquire enough physical presence to adjust under INA § 245(m). Per USCIS suggestion, he has only an I-539 pending with USCIS, which we presume USCIS will now adjudicate under the guidance. The principal is hesitant to adjust without explicit assurance that doing so will have no adverse consequences to her out-of-status U-3 derivative son.

CASE EXAMPLE 2: The principal U visa applicant was granted U-1 status from July 2012 until July 2016. Her derivative daughter aged-out while her I-918A Petition was pending. The U-1 principal will be eligible for adjustment of status after three years in U status on July 2015. However, if USCIS does not adjudicate the derivative daughter's I-918A Petition by then, the principal U-1 applicant cannot adjust status without harming the derivative's eligibility for status. The principal should be advised to continue filing for extensions until her derivative's status is finally granted or denied.

CASE EXAMPLE 3: The principal U visa applicant is eligible to adjust, but her daughter aged out while the derivative's Supplement A application was pending. USCIS granted the daughter deferred action a year ago. Presumably under the guidance, she will continue to receive deferred action until USCIS issues regulations. During that period the principal must continue to extend status to avoid precluding her daughter from getting U-3 status under the new regulations. Moreover, unless USCIS counts the time the daughter has spent in deferred action waiting for USCIS to resolve this problem, the daughter must wait another three years to apply for adjustment after USCIS finally grants her U-3 status.

Recommendations

(1) The Guidance should include specific language and instructions for principal U-1 applicants regarding the effects of their adjustment of status on their derivatives (whether with deferred action or with expired U-3 status). The Guidance should refer to previous USCIS memoranda to ensure that U-1 principals do not unknowingly adjust and potentially cut off any benefit for their children. These procedures should be also included in in the I-485 adjustment of status instructions.

(2) The new USCIS regulations on age-out issues should grant U-3 status as of the date the U-1 principal's application was approved, if the U derivative case was filed at the same time as the principal. If the derivative application was filed later, the grant should be back-dated to the time the derivative filed the deferred action request or I-539.

D. The Guidance should be consistent with other Department of Homeland Security policies regarding U visa applicants in removal proceedings.

The Guidance states, "deferred action does not preclude USCIS, U.S. Immigration and Customs Enforcement, or other federal entities from initiating or conducting removal or deportation proceedings at any time against the derivative petitioner."¹⁴ This apparent delegation of removal authority despite a grant of deferred action violates both CIS practice in this area and the 7th Circuit's decision in *Fornalik v. Perryman*, 223 F.3d 523 (7th Cir. 2000). In *Fornalik* the Court remanded the case of a VAWA self-petitioner derivative to the Board of Immigration Appeals to enforce Vermont Service Center's deferred action grant, overriding the Chicago office's attempt to deport him, stating, "No Act of Congress requires us to permit this type of inconsistent treatment and we will not."

As noted in VSC's deferred action grant to Fornalik, the VSC VAWA unit may terminate or rescind the grant of deferred action. No other part of the agency should be allowed to negate or undermine VSC's determinations in victims of crimes cases by removing victims to whom VSC has granted deferred action. In the context of deferred action for those affected by the annual cap, the U interim regulations specifically mention termination, 8 CFR § 214.14(d)(3), and the introduction to those regulations provides examples where this might happen: conviction of a subsequent crime or failure to disclose a material fact in the original petition.¹⁵ It is imperative that VSC retain control over termination of deferred action, providing a check against attempts by other parts of DHS to remove victims despite repeated agency memoranda emphasizing that removing victims of crimes is a low priority.¹⁶

¹⁴ Guidance at 2.

¹⁵ Department of Homeland Security, New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed Reg. 53,014 at 53,027 (Sept. 17, 2007).

¹⁶ INS Memorandum, "Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum v#2 – 'T' and 'U' Nonimmigrant Visas" (Aug. 30, 2001); Peter S. Vincent, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal*, Memorandum for OPLA Attorneys (September 25, 2009); John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, Memorandum for All Field Office Directors, All Special Agents in Charge, & All Chief Counsel (June 17, 2011).; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, Memorandum for All Field Office Directors, All Special Agents in Charge, & All Chief Counsel (June 17, 2011).

Recommendations

(1) Derivatives who obtain deferred action status because they age-out while the I-918A Petition is pending with USCIS should not be at risk of being removed or having removal proceedings initiated against them unless and until VSC terminates such status. For this interim period, petitioners should be given notice and an opportunity to respond to the derogatory information serving as the basis for such termination.

(2) We also suggest that the U visa Age-Out Guidance reference and reiterate the language of other DHS documents regarding the exercise of prosecutorial discretion in U visa cases, including those derivatives with deferred action status.

3. The U visa Age-Out Guidance Should Provide Meaningful Resolution to the Age-out Issue for Derivatives Abroad

While the U visa Age-Out Guidance addresses derivative children in the United States, it does not provide any additional clarification for those children who are living abroad. Rather than issuing the Guidance with further clarification for USCIS and/or the Department of State (“State”), USCIS instead places all responsibility on the derivative applicant to “schem[e] an appointment with the U.S. Embassy or Consulate to apply for his or her U visa and of entering the United States in U nonimmigrant status before reaching 21 years of age.”

The Guidance provides for differential treatment of applicants who turn 21, based solely on whether they are currently in the United States or abroad: children who age out after filing but are in the US have a chance of gaining status; those who age out while abroad are per se ineligible because they cannot receive deferred action. While USCIS is working on the pending regulations, it should expedite applications by derivatives abroad and establish a swift and clear humanitarian parole process for bringing in those who present prima facie cases but who have aged out due to no fault of their own.

As noted above, the Guidance articulates a standard for allowing extensions of status for derivatives turning 21 in the United States, stating that, “the failure to maintain the derivative U nonimmigrant status was due to extraordinary circumstances beyond the control of the derivative nonimmigrant.”¹⁷ We suggest that a similar standard apply at the consular level, excusing the failure of a derivative child to enter the U.S. prior to that child’s 21st birthday due to USCIS or State delay in adjudicating or processing their claims. A generous and simple humanitarian parole process could serve as the out-of-country equivalent to deferred action.

USCIS should take the lead in working with State to implement the law as Congress intended and in a way that conforms with within-country practice, not leave its application to the sole

¹⁷ Guidance at 3.

discretion of that agency. We have seen many instances of USCIS working with State to resolve policy problems and individual cases; USCIS should continue to instruct and influence State in implementing these vital fixes for U derivative problems. In line with USCIS's original interpretation of a derivative child's age, State also initially issued U Nonimmigrant visas for travel to U Nonimmigrants granted status by USCIS, regardless of age. Shortly following the new interpretation by USCIS in the summer of 2010, State updated the FAM¹⁸ on October 18, 2010 to qualify the definition of which family members to admit. USCIS should now work to ensure State as swiftly rectifies the problems created by the change in policy.

CASE EXAMPLE: A U-1 principal was the victim of domestic violence for years by her Mexican-national spouse, both in Mexico and in the U.S. She applied for the U visa in early 2011 and included her daughter and son, who were 20 years old and 15 years old, respectively, at the time of filing and living in Mexico. Both of the U-1 principal's children are sources of emotional support for their mother, even from afar. Upon approval of her case, the derivative daughter had turned 21 years old, so only her son was approved as a derivative and the daughter's case remains pending at USCIS. Today, the U-1 principal lives with her son in the US., while her daughter remains in Mexico, separated from her mother and brother.

Recommendations

(1) USCIS and State should treat derivatives abroad the same way they treat derivatives in the US. Children living abroad should not face a higher barrier than those already in the US, including additional delays posed by State and consulate delays in processing. The extra element of "admission" in the regulations, which is not a part of process for those in the U.S., results in additional harm to derivatives abroad, is inconsistent with the goals and ameliorative nature of the law, and should be corrected in this Guidance. For all the reasons stated here and above, the age of the child is considered at the time of filing, not at the time of adjudication of the U visa application and/or admission to the U.S.

(2) USCIS should communicate with State to correct the information that State is providing to posts and to expeditiously update the Foreign Affairs Manual ("FAM") to reflect the changes made by the Guidance and our suggested improvements.

(3) USCIS should work closely with State to ensure that derivative children with an approved Form I-918A for the full four years, (i.e. those who are granted from now on, without age restrictions) are also granted the full four years for a U Nonimmigrant Visa for travel. State expeditiously updated the FAM when USCIS changed its policy to the detriment of derivatives; we encourage USCIS to now ensure State swiftly fixes the Manual and its practices again, so this

¹⁸ 9 FAM 41.85 N11.

group of U Nonimmigrants is not prejudiced in the ability to travel initially or during the four years of status.

(4) While new regulations resolving age-out issues are pending, USCIS should grant expedited review of cases for derivative children abroad. We strongly recommend that the expedite criteria be updated to specifically provide for expediting of applications where a derivative child abroad is at risk of aging out.

(5) Where expediting grant and processing is not possible, we ask USCIS to provide clear, simple, and generous instructions for granting aged-out derivative children abroad the out-of-country equivalent of deferred action: humanitarian parole. Included in the category for humanitarian parole should be those abroad who either (a) filed before the derivative child turned 21 years old and subsequently aged-out abroad or (b) received approval of the I-918A but could not consular process and enter the U.S. before turning 21 years old (i.e. many only have days or weeks to consular process after the approval notice is issued). The Guidance should also indicate that USCIS will coordinate efforts with State to allow for simple processing at the border of these humanitarian parole cases. The humanitarian parole process should be available to all applicants in this situation, both prior to and after the implementation of this Guidance.

4. The U visa Age-Out Guidance provides U-3 derivatives who age out after the approval of the principal's application a meaningful process to extend their status and preserve continuous presence.

Prior to the issuance of the U visa Age-Out Guidance, aged-out U-3 derivatives were unable to obtain or maintain their employment authorization and their families' welfare suffered because their status has expired. As the U Visa Age-Out Guidance states, under the prior policy, a derivative child lost not only his or her lawful U nonimmigrant status, but also could possibly not accrue the requisite three years of continuous physical presence in the United States necessary for eligibility to adjust status under INA § 245(m). Simply put, USCIS' previous practice of granting U-3 status until the derivative's 21st birthday had serious and detrimental consequences for victims and their families.

For these reasons, the U visa Age-Out Guidance's provisions regarding late-filed extensions for previously granted derivatives who aged-out while in U status is a welcome and significant change in policy. We commend USCIS for their recognition that for those "derivative U nonimmigrants who aged out of derivative eligibility prior to implementation of the age-out policy described above, the failure to maintain the derivative U nonimmigrant status was due to extraordinary circumstances beyond the control of the derivative U nonimmigrant." Indeed, these U-3 aged-out beneficiaries have been harmed through no fault of their own. There are three components of this policy that are especially beneficial for these U-3 derivatives who have aged-out while in U visa status.

A. U visa Age-Out Guidance permits derivatives to file a Form I-539: Application to Extend/Change Nonimmigrant Status (“I-539 applications”) after the expiration of their U-3 status. This is crucially important for U-3 derivatives whose status has expired and who may regain the benefit of their status to accrue sufficient continuous presence. U-3 derivatives who have yet to file an I-539 application will now have an opportunity to do so.

B. The U visa Age-Out Guidance specifies that USCIS will now grant full four-year statutory period for U nonimmigrant status to derivatives who are under 21 years of age at the time of approval, but who will turn 21 years of age during the four-year statutory period. This immediate change in policy is hugely important and will provide future derivative beneficiaries with much needed stability and protection.

C. Lastly, the U visa Age-Out Guidance states that upon approval of a U-3’s I-539 application, derivatives would be granted the remaining time of the four-year period of U nonimmigrant status. Furthermore, it is notable that USCIS’ recognized that it would be necessary to provide additional time for derivatives who aged-out long before this Guidance was issued. For these U-3 derivatives, USCIS may grant the remaining time available in U nonimmigrant status, to equal four years, as well as an additional time from expiration of the four-year period up to one year from the date of approval of the I-539 application. This is extremely helpful for derivatives to start to accrue the necessary continuous presence in order to adjust status under INA § 245(m).

In addition, the Guidance provides that if a derivative child had previously received an initial grant of U nonimmigrant status for a period of less than four years, is still currently in U nonimmigrant status, and has yet to turn 21 years of age, USCIS will extend derivative status up to a total of not more than four years, regardless of whether the derivative child would age-out during this extended time period by filing an I-539 application. The Guidance states that the derivative child should request this extension using Form I-539, but does not specify a time period for when the Form I-539 may be filed. It remains unclear whether those derivative petitioners who received an initial grant for a period of less than four years should (a) request to extend their status by filing Form I-539 immediately to remedy this shortfall or (b) wait to do so within the six month window before the expiration date. Allowing the transition for the entire group to occur sooner rather than later will prevent late filings and will allow USCIS to flag those in limbo.

Recommendations

(1) We urge USCIS to begin adjudication of the previously filed I-539 applications from aged-out U-3 derivatives and would like confirmation that those who previously submitted I-539 applications will not need to file new extension requests.

(2) We suggest USCIS include language in the Guidance that states that derivative children currently in U-3 status may file Form I-539 to acquire the full time on their U visa immediately rather than waiting until 90 days before the status expires.

Conclusion

For the reasons above, we urge you to issue final guidance that provides protection for *all* aged- out derivatives: both in the U.S. and abroad, those who aged out while the U-1s principal application was pending and those who aged-out after its approval. We appreciate the work USCIS has done on this issue, and are committing to working with USCIS to work towards policies that protect victims and their families.

Thank you for consideration of these comments.

Sincerely

National Organizations

Americans for Immigrant Justice
ASISTA Immigration Assistance
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Immigrant Legal Resource Center (ILRC)
Mil Mujeres
National Clearinghouse for the Defense of Battered Women
National Coalition Against Domestic Violence (NCADV)
National Coalition of Anti-Violence Programs (NCAVP)
National Immigrant Justice Center
National Immigrant Women's Advocacy Project (NIWAP), American University, Washington
College of Law
National Network to End Domestic Violence (NNEDV)
National Resource Center on Domestic Violence
Tahirih Justice Center
Victim Rights Law Center
Women of Color Network

Regional Organizations

Lutheran Social Services of New England

State Organizations

Alabama Coalition Against Domestic Violence
Battered Women's Legal Advocacy Project-Minnesota (including Maria Gloria Fressia,
Managing Partner)
Joyce Antila Phipps, Esq., Executive Director, Casa De Esperanza, Inc.-Plainfield & Bound

Brook, NJ (including Ricardo Arias, Marcela Lopez, Craig Eugene Phinnegan Phipps, Crystal Rivera, and Jacqueline Soler)
Connecticut Legal Services, Inc.
Immigrant Law Center of Minnesota
Immigration Center for Women and Children-California
Immigration Legal Services, New Hampshire Catholic Charities, Inc.
Justice for Our Neighbors-Iowa
Justice for Our Neighbors-Nebraska
Justice for Our Neighbors-New York
Justice for Our Neighbors - Northern Illinois (including Jennifer L Ansay:Regional Attorney, Lisl Heymans-Paul: Board Chair, and Rev. Michael Mann: Acting Regional Coordinator)
Kansas Coalition Against Sexual and Domestic Violence
Kentucky Coalition for Immigrant and Refugee Rights
Maxwell Street Legal Clinic-Kentucky
South Carolina Victim Assistance Network
Isaac Harrington, Texas Civil Rights Project
The Battered Immigrant Project of Legal Aid of North Carolina
Washington State Coalition Against Domestic Violence
Worker Justice Center of New York

Local Organizations

American Friends Service Committee Immigrant Rights Program of Newark, New Jersey
Artemis Justice Center-Spring, TX
Catherine Seitz, Bay Area Legal Aid-Oakland, CA
Community Legal Services in East Palo Alto-Palo Alto, CA
CONNECT-New York, NY
East Bay Sanctuary Covenant-Berkeley, CA (including Anna Lijphart, U Visa Coordinator)
El Zócalo Immigrant Resource Center-Little Rock, AK
Immigration Legal Services, The Esperanza Center of Catholic Charities of Baltimore
Baltimore, MD
Grossman Law, LLC-Rockville, MD
Healing Abuse Working for Change-Lynn, MA (including Brina Aia, Immigration Staff Attorney)
Hispanic Interest Coalition of Alabama-Birmingham, AL (including Charlotte Alvarez, Legal Services Director)
Human Rights Initiative of Northern Texas, Inc. -Dallas, TX
Catherine Douglass, Esq, Executive Director, inMotion Inc.-New York, NY
Law Firm of Diana Velardo-The Woodlands, TX
Law Offices of Jessica Dominguez-Studio City, CA
Legal Aid of San Mateo County-Redwood City, CA
Hellen Hong, Esq., Executive Director, Los Angeles Center for Law and Justice-Los Angeles, CA
Maitri-Santa Clara, CA
Northern Manhattan Improvement Corporation-New York, NY
Public Counsel-Los Angeles, CA
Safe Horizon Immigration Law Project-New York NY

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