

## Overcoming Inadmissibility for U Visa Applicants By Gail Pendleton<sup>1</sup>

A U visa applicant can apply for a waiver of all grounds of inadmissibility except for those who are Nazis or perpetrators of genocide, torture, or extrajudicial killing.<sup>2</sup> The standard for the waiver is that it is “in the national or public interest: to grant it.”<sup>3</sup> This is a new standard, and the regulations provide no guidance on its contours, but the self-petitioning and trafficking experience may help. The VAWA unit has final discretion, of course, to determine your client does not merit the waiver, so you show why they should exercise discretion in favor of your client.

Regarding admitting inadmissibility, the CIS U personnel counsel:

[I]t’s better to acknowledge and explain as much as possible to not appear evasive. It’s better to include and explain as much as possible upfront so your client will appear more credible. Err on the side of caution and disclose upfront.<sup>4</sup>

This is the lesson we have learned from the self-petitioning experience as well. If the agency discovers problematic issues later that you did not flag in the beginning, your client may be found to lack credibility. With U visas, that means they may be deported.

### Potential Strategies

These suggestions are a work in progress, and you should let us know if you find other strategies that work. For now, we strongly encourage you to provide both general arguments and individualized arguments. CIS has stated, the waiver application

could come in the form of a statement explaining grounds for granting the waiver, reasons and circumstances for needing it. This will be adjudicated on a case-by-case basis and can include details of the victimization<sup>5</sup>

#### *General arguments*

*Being undocumented should not be a reason for denial*

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<sup>1</sup> The author thanks Sonia Parras-Konrad and Joanne Picray for their help with this article, and Sally Kinoshita for her work preparing and finalizing the *Questions with CIS on U Visas*, an invaluable tool all practitioners should have at hand (available on [www.asistaonline.org](http://www.asistaonline.org))

<sup>2</sup> INA § 212(d)(14).

<sup>3</sup> INA § 212(d)(14).

<sup>4</sup> *Questions for CIS re U Visas* (November, 2007) at page 4, available on [www.asistaonline.org](http://www.asistaonline.org).

<sup>5</sup> *Id.* at page 5.

- Many U applicants will trigger inadmissibility for being “present without admission or parole”<sup>6</sup> or for unlawful presence<sup>7</sup> and other inadmissibility issues arising from being undocumented.<sup>8</sup>
- Congress targeted the most vulnerable victims of crimes, especially the undocumented, because they are the most afraid to access justice for fear of removal.<sup>9</sup>
- Denying U visas because applicants are undocumented undermines the purpose of the U visa because victims will not be willing to report crimes for fear of deportation.
- It is therefore generally in the national and public interest to grant waivers to those whose inadmissibility is directly connected to being undocumented.

Public safety is furthered by not deporting victims of crime

- Community policing is essential to apprehending perpetrators and keeping our society safe from criminals. When victims of crime are protected from deportation they are most likely to assist police in apprehending criminals.
- Empowering your client helps to challenge social acceptance of violence or oppression of victims

### *Individualized arguments*

Individualize your general arguments. Show how being undocumented made your client more vulnerable to crime or more fearful of accessing justice, and how her help to the criminal system furthered public safety.. If possible, get additional letters of support from law enforcement, talking about why it's in the public interest for your client to remain, e.g., ongoing helpfulness, was extremely helpful, needs services here unavailable in the homeland, etc.

In addition, use the factors for showing good moral character, extreme hardship to VAWA applicants and extreme hardship to trafficking victims to help you frame your argument. These are factors the CIS unit is accustomed to evaluating and although not exactly the same as “national or public interest,” they are similar in many ways, depending on the facts of each case.

### **Good moral character**

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<sup>6</sup> INA § 212(a)(6)(A).

<sup>7</sup> INA § 212(a)(9)(B) & (C). Although CIS indicated in its Q & A, supra note 4, that visa overstays trigger inadmissibility under 212(a)(7), they have now agreed this is not true. This does not affect the requirement that applicants supply passports or file the Form I-193.

<sup>8</sup> *E.g.*, fraud and false claims to citizenship upon entry, triggering INA § 212(a)(6)(C)

<sup>9</sup> See U Findings and Purpose, Victims of Trafficking and Violence Protection Act of 2000, [Pub. L. No. 106-386](#), div. A, § 1513, 114 Stat. 1464 (Oct. 28, 2000)

- How would you show your client's good moral character or rehabilitation, if seeking to waive criminal conduct?
- How has your client or her children contributed to the community?
- How can you document this (think clergy, children's teachers, others who can talk about how your client is helping others and her children)?
- Connect factors below with what the client is doing to enrich the applicant's community or our society generally.

### **VAWA extreme hardship factors**

One way to address these factors is to juxtapose the applicant's and applicant's children's situation and needs here against what would happen if they are returned to the home country. Here is the specific list, developed when extreme hardship was required for self-petitioners and now applied to VAWA cancellation applicants.

- (1) The nature and extent of the physical or psychological consequences of abuse;
- (2) The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);
- (3) The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);
- (4) The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;
- (5) The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and
- (6) The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's children from future abuse.<sup>10</sup>

### **Trafficking extreme hardship factors**

The trafficking extreme hardship factors, like the VAWA factors, are tailored to the experience of the applicants. Even if they don't specifically apply to

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<sup>10</sup> 8 C.F.R. § 1240.58(c). Note that the usual factors considered for extreme hardship, see 8 C.F.R. § 1240.59(b) are not generally helpful for victims of crimes. .

your client, what would a parallel consideration be for your client? Here are the trafficking factors:

- The age and personal circumstances of the applicant;
- Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country;
- The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;
- The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;
- The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;
- The likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant;
- The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the applicant; and
- The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict as demonstrated by the designation of Temporary Protected Status, under section 244 of the Act, or the granting of other relevant protections.<sup>11</sup>

If you have questions about your clients' inadmissibility, please contact Asista for help. We can help you both identify potential issues and help frame your waiver arguments.

### **Conclusion**

As with the early years of self-petitioning, establishing the parameters of many aspects of U visa eligibility will be a feedback process. We (the field) develop approaches, present them to CIS, and they provide feedback on whether it works for them. We, in turn, advocate for what we think works for victims of crimes. Although this process is challenging, it has served the interests of victims of crimes well, who may have suffered had the agency “written in stone” all the details of the eligibility requirements from the beginning. We will provide updates and practice pointers through the

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<sup>11</sup> 8 C.F.R. § 214.11(i)(1).

VAWA updates list serve and our website but, to make this process work, you must let us know what strategies you're using are working and what's not.. With your help, we work with CIS to ensure the law is implemented as Congress intended.