

Prepared by Gail Pendleton on behalf of the
National Network to End Violence against Immigrant Women

Advance Questions/Discussion Topics for VSC Meeting
August 20, 2009
(with brief updates as of October 9, 2009 on a few questions)

Note: CIS/VSC Responses are indicated by *Italics*

General Question

What are the numbers and assignments for the VAWA unit personnel (i.e., how many doing self-petitions, Us, Ts)?

U Visas

1. Expediting Group Two Cases

We appreciate the agency's attempt to categorize and prioritize U applicants by the groups noted in Ms. Velarde's response to Gail's email (see separate document). We also realize taking time to triage the cases into these groups takes time away from swiftly adjudicating as many cases as possible before the deadline for the annual cap. Unfortunately, however, the field reports that some Group Three cases are being adjudicated swiftly while other Group Two cases languish.

Suggested solution: We tell the field to contact you if they have Group Two cases that have received nothing but a receipt. This way the Group Two cases get the attention they need and you don't have to revamp the system while attempting to adjudicate as many cases as possible by the deadline. We are open to other suggestions, but this seems the best way to make everyone happy, including the U applicants who have been waiting the longest without work authorization.

2. 10,000 Cap

How is meeting the cap going? Is there no way short of legislation to allocate numbers from prior (unused) years to, for instance, interim relief applicants? That way you could focus on Group 2, then Group 3, and later allocate Group 1 to the year in which their interim relief was originally approved. If you could do this, would this subtract enough numbers from this year to solve the problem? If we need legislative language, what should it say?

October 9, 2008 Update from CIS via email to Gail Pendleton
I-918 Approvals in FY 2009 – 6,055
I-918A Approvals in FY 2009 – 4,659

3. Medical Exams for Adjustment

We disagree with the recent FAQs response that medical exams for U adjusters are statutorily required; in fact, we believe the opposite is true. Please see the attached memo on this. While we do not need to discuss this in detail at the meeting, let's set up a timeframe for a final resolution on this on your end. We believe there may be U adjusters who will litigate this issue

if not resolved administratively.

Current regulations do not specify that U adjusters are exempt from medical exams. The broader adjustment regulations do require them. USCIS counsel is working on clarifying this issue. However, no timeframe for resolution is available. Meanwhile, we are requesting medical exams in accordance with the broader regulations, but we are not denying any U-adjustment cases that do not comply.

*October 9, 2008 Update from CIS via email to Gail Pendleton
VSC is still working with HQ on guidance on this issue. Those applications submitted with documentation of a medical exam will be adjudicated; those without the documentation will be held pending guidance.*

4. Bona Fide Standard

What is CIS contemplating for the content of the bona fide standard? We realize this is a work in progress.

The Bona Fide standards have not been set. We do know they will be different from the standards for Interim Relief. For example it is expected that a properly filed U Nonimmigrant Status Certification (Form I-918, Supplement B) will be required for the Bona Fide determination.

*October 9, 2008 Update from CIS via email to Gail Pendleton
VSC is still working with HQ on guidance for what the bona fide determination will entail and what the standard will be. As soon as the guidance is finalized, information will be made available to the public.*

5. Derivative Issues (this may more appropriately go in the "few cases" category) There are a variety of derivative issues, which together may add up to a significant number of cases, but there are probably few cases in each category.

A. Derivatives who filed after Principal & Adjustment Conundrum

The regulations seem to dictate that derivatives who filed after the principal receive visas for only the time afforded the principal. Since derivatives must accrue three years before they can adjust, this will preclude adjustment for some of these late-filed derivatives because (a) their principals must adjust before the derivative has accrued three years and (b) the derivative adjustment provision appears to apply only to those who did not receive U visas. The statute does not seem to contain the regulation's link between derivative and principal visa time assignment.

Suggestion: While we await a regulatory solution to this, do you have any suggestions for derivatives in this Catch-22 situation? Could you, for instance, nunc pro tunc grant the derivative status back to the principal's grant, based on humanitarian grounds?

Policy guidance for this issue has been drafted and is in the clearance process.

B. Aged-Out Derivatives

As you know, the eligibility requirements for derivatives changed after 2000 (no extreme hardship/certification requirement). Due to the lag in implementing regulations for the new law, however, some derivatives newly eligible (most notably those outside the US who could not meet the certification requirement) aged out before the regulations were issued. The Aytes memo of March 27, 2008 is a little confusing on this: In the "Purpose" section it seems to tie age to date of derivative filing; in (f)(4)(iv) it can be read that the family member's age at the principal's time of filing controls.

Suggestion: Given the delay in implementing the law, we encourage the agency to apply the broader age-freeze date: the date the principal filed freezes the date for derivatives (where relevant), regardless of when the derivative filed.

Policy guidance for this issue has been drafted and is in the clearance process.

October 9, 2008 Update from CIS via email to Gail Pendleton

VSC is still working with HQ on guidance for this issue. Filings that fall into the age-out categories are being held pending guidance.

6. Indirect Victim Review

Could you briefly review for us who qualifies as indirect victims: parents of children, what other family members in what situations?

We don't look beyond the published regulations on this. In order to file for U-1 status, the victim listed on the law enforcement certification must be the same person as the principal on the Petition for U Nonimmigrant Status (Form I-918). Specifically, we look to 8 CFR 214.14(a)(14) and pertinent subparagraphs.

7. Pointers on Standards?

What are you looking at for **substantial abuse**? Any practice pointers for the field? Same questions for **national/public interest** waivers.

RE: Substantial abuse

We suggest submitting as much detailed documentation as possible to support a claim of substantial victimization including any available police reports, medical reports, court documents, etc. Also, please remember that a personal statement is required under the regulations for all principals. Providing a detailed statement regarding the victimization is both required and helpful for the adjudication. Specifically look to 8 CFR 214.14(b)(1) and (c)(2)(iii).

RE: National/public interest waivers

National Public Interest waivers are not subject to the same level of discretion as some other eligibility requirements. They may be recommended by any of our trained officers,

but require review by our most seasoned officers prior to approval. They are decided on a case by case basis, considering the totality of factors, including the victim's age and circumstances.

8. U Adjustments

Are you doing these yet? Other than the medical issue, any practice pointers for the field?

We are currently working the U Adjustments. Approximately 50 have been approved, but quite a few more are on hold awaiting resolution of the medical waiver issue. Applicants must have been in U status for three years in order to file for adjustment based on U status. We have been proactively monitoring our databases to anticipate the adjustment caseload. At this time, we believe we have trained a sufficient number of officers to meet the anticipated filings.

U Esoteric/Small Number of Cases Questions (so perhaps not for meeting)

9. Prima Facie review update

How many cases (ballpark) are you getting for PF review? Any pointers for the field?

We are working the Prima Facie reviews. Over 300 have been approved. Among the 100 or so denials, most have been for lack of relationship documentation.

10. LPRS seeking Us

Our understanding is that LPRs seeking Us should contact Tom Pearl to work out each case on an individual basis. We had told the field that conceding removability would help if there were truly no meaningful defense, but the result of that, in at least one case, was ICE immediately tried to remove the U applicant and the applicant had to go to federal court to stop the removal.

Suggestion: We encourage you use a less risky approach, such as the old form (407?) allowing for admin withdrawal of LPR, or exercising concurrent jurisdiction with ICE until you make a decision on the U.

Continue to contact Tom Pearl about these cases. They will be considered on a case-by-case basis.

11. Educating State RMVs

Apparently the Florida RMV is interviewing Us and VAWAs on domestic violence before they will issue driver's licenses, even though they have the approval notices from you. Would you be willing to answer direct questions from local RMVs concerned with fraud? We realize you already do this with ICE and with some local law enforcement agents. Would you be willing to answer questions from other state agencies? A more work-intensive approach: Issue a memo that says people with Us, those with prima facie decisions on Us and (anticipating the bona fide standard), those with bona fide determinations are in the PRUCOL category: The agency knows they are here and does not intend to remove them. This would be helpful in the public benefits

context as well.

Discussing specific cases with motor vehicle or public benefit agencies would be a violation of Section 384, which only makes exceptions for law enforcement. However, we can entertain general questions about our programs. Interested parties can contact Tom Pearl.

VAWA Self-Petitioning

1. 21 - 25 Category (and other categories from '05)

We assume the guidance-in-progress referenced in the FAQ will also address aged out children covered by the 21-25 exception in VAWA '05. We are now collecting those cases to highlight the need for swift guidance on this issue. While we realize the agency may have lacked the resources to implement the law in a timely fashion, the victims Congress intended to help should not suffer because of the failure to implement the law for four years.

The "21 to 25" cases have been segregated for adjudication when guidance is received, which we expect to be soon. We have not had as many H or G filings, so they have not received as much attention.

October 9, 2008 Update from CIS via email to Gail Pendleton

VSC is now adjudicating the filings from self-petitioning children who were over the age of 21 but under the age of 25 year at the time of filing. It is anticipated any self-petition falling into that category will receive a request for evidence. The EADs for H-derivatives are still being held pending guidance from HQ.

Suggestions: (1) If the ETA on the new guidance is not within the next three months, could VSC make decisions that at least allowed these applicants to work? (2) In addition to swift work authorization, another key problem is the lack of time accrued towards lawful permanent residence due to the delay in implementing the law. We encourage the new guidance to recognize and address time accrued towards lawful permanent residence for those in the elder abuse and over-21 categories. Minimally, the time towards LPR should accrue from the date the application was filed (assuming it is ultimately approved).

2. Pointers on Standards?

A. What problems are you seeing with **good faith marriage** proof? What causes problems? How can people answer such problems?

We generally like to see as much documentation of the relationship as possible, to include joint accounts, insurance, shared property, children etc. If these types of evidence are not available, an explanation should be provided to show why they are not available, and what efforts may have been undertaken to procure them. We also value affidavits that contain details about the nature of the relationship and how it evolved.

Problems arise when we see major inconsistencies in the record, or when the marriage occurred while the petitioner was in proceedings. Wherever possible, these issues should be addressed with the original submission.

Entry as a K1 does not necessarily prove good faith. However, we will examine the underlying I-129F when available for supporting evidence of the relationship.

As with other requirements, eligibility is generally not established with any single piece of evidence. Rather, we look at the total picture presented by the record.

B. We were seeing RFEs on the **prima facie** standard that seemed to go beyond the "statement of facts that, if supported, would lead to approval" standard we had been operating under for many years. Is that still the standard?

The PFD RFE serves multiple purposes. It provides timely feedback to those petitioners who do not meet the PFD requirements up-front, and allows them another chance. It also encourages them to supplement their initial submission with additional evidence that may help with the subsequent adjudication of the I-360.

Our standard has not changed, and the same group of officers has been conducting the PFD reviews for some time. Also, the PFD RFE is a standard letter with check-off boxes for each eligibility requirement. There is no allowance for additional case-specific text. As with other issues, you may contact the VAWA hot line if you feel that PFD was denied inappropriately.

C. We were seeing RFEs on **corroborating declarations** that required personal witnessing of domestic violence. This is not the standard the agency used for many years, applying a more flexible analysis based on the "any credible evidence" standard and the general allowance of hearsay for immigration evidence. Were these an aberration and has that been fixed?

Our standards have not changed. If you feel that an RFE is inappropriate, you may contact the VAWA hot line to request a supervisor review. Examples of RFE(s) using terms such as "eyewitness" have been brought to the attention of supervision and are being addressed with individual officers. However, it should be specifically noted that practitioners often erroneously point out the "any credible evidence" standard to USCIS as referenced in 8 CFR 103.2(b)(2)(iii). In referencing this standard the last sentence of the applicable paragraph is often excluded. "The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of USCIS." Consequently, it is possible that a piece of evidence may be deemed to be "credible" yet still insufficient in weight to establish the required eligibility criteria.

3. Credibility Rehabilitation Pointers?

What raises credibility concerns? How can people rehabilitate impugned credibility?

VAWA officer training includes extensive discussions about the credible evidence standard, including what factors may raise concerns about credibility. One such factor may be inconsistency. Minor inconsistencies in reporting by victims may be expected. However, material inconsistencies and outright contradictions may raise flags.

It is also noted that the victim's statement in his or her own words is often accorded more credibility than a statement prepared by others and merely signed by the victim. This is especially true when the statement uses language that appears to be beyond the victim's stated level of education or language fluency, or when the statement appears to be purposefully vague. A thorough and detailed statement in the victim's own words, though sometimes hard to follow, is almost always more compelling.

Questions we can discuss when we have more time or via email

4. Adjustments at VSC?

We realize you are extremely busy, but...there had been discussion while back about implementing Congress' apparent will (see precatory language in VAWA 05) that VSC do all self-petitioner adjustments. Any progress on that?

We are aware that VAWA adjustments are a special challenge in many of the district offices. Some of the larger offices are able to train and assign officers specifically for this work, but then those officers may move on. Others are not able to support VAWA specialists at all. The result may be inappropriate treatment of victims, and possibly outright violations of Section 384. When we become aware of 384 violations, we do work through the appropriate command channels to respond to them. The regional offices also do some educational outreach to the field, and headquarters is also involved in that effort.

Mr. Aytes has stated that he is in favor of the adjudication being moved to VSC.

5. I-212s

We were glad to see that VSC has jurisdiction to adjudicate I-212s and that you are thinking about whether to do it or not. To move this along, shall we suggest that practitioners with such cases present them to you? Does VSC or CIS HQ have authority to make statements about the impact of I-212 grants on reinstatement of removal? Would you like a memo from us on why we think self-petitioners may overcome the (apparently) insurmountable problems for others facing reinstatement?

The VSC does adjudicate 212 waivers, but not in the VAWA unit. If you file VAWA-related waivers, clearly identify them as such and they will be forwarded to the VAWA unit for safe address review. At that point we can coordinate with the waiver team.

Final Question

The Wilbeorce bill required CIS to provide various statistics and updates to Congress. Have you done that yet? Could you share it with the field when it's done?

The VSC has provided the requested information to Service Center Operations at headquarters. We don't know when it will eventually be received by Congress.

Direct Questions/Discussion Topics from Attendees

EAD applications for Bona Fide Us

No eligibility category has been assigned. At this time, some are filing the I-765 with the c14 category indicated. This way they will be forwarded to the VAWA unit for safe address review.

T Adjustments filed early: “Closed Investigation”

Adjustment applications for T Visa holders may be submitted prior to the normal 3-year period when the relating criminal investigation has been closed. In such cases, submit a verifying letter from DOJ.

Concurrent I-751 and I-918

How do you handle cases where an I-751 and I-918 are both pending?

We generally try to adjudicate the I-751 first. If you have case-specific issues, reach out to Tom Pearl.

Separate case identifiers for U derivatives

U derivatives receive the same case identifiers (ie receipt numbers) as the corresponding principal filers. Any change expected?

This continues to be a problem associated with our current data base system. A fix is not anticipated in the near future.

I-539s for U’s

Policy guidance for this issue has been drafted and is in the clearance process.

Mental Health issues for T/U Adjustment Applicants

There has been concern that applicants whose victimization has resulted in psychological problems may be deemed inadmissible on mental health grounds. On the other hand, such problems often play a role in establishing the victimization or extreme hardship requirements. Are there suggestions for pre-empting or contesting requests for mental health exams in such cases?

Although we are certainly aware of this issue, it has not been a problem with either the T or the U applications.

PFD on U Application

Can the attorneys be notified directly when an applicant is granted PFD on a U-Visa application?

PFD for the U-Visa is an internal matter within between USCIS and ICE. As such, a formal notice to the attorney can not be generated. Tom Pearl has followed up with attorneys, in cases where they were already included in the discussion. It is also noted that ICE has

been especially helpful in following up with the field offices. Removals have been delayed as a result of this process.

Requests for PFD review for those cases with a final removal order or those that are in detention generally lead to expedited review of the I-918.

Employment Authorization of VAWA applicants

Can employment authorization be granted to VAWA self-petitioners whose I-360 remains pending, if they have been granted PFD?

There is no provision in law for employment authorization based on a pending I-360, even when PFD has been granted. However, self-petitioners who are able to file a concurrent I-485 may receive employment authorization based on the pending I-485.

Bystanders as Victims

Are there situations where bystanders can be considered victims if they were not present during the qualifying crime, and are not eligible family members? Might such an applicant qualify, for example, if he or she is assisting in the victim's recovery?

Such instances would have to be considered on a case by case basis, taking into account the totality of the evidence. The supplemental language to the regulation states that such cases would be rare. Again, we also refer to the specific language at 8 CFR 214.14(a)(14) which generally defines a "victim" as "an alien who has suffered direct and proximate harm".

NTAs

Does the Vermont Service Center initiate Notices to Appear upon denial of their victim-based casework?

VSC does not generally initiate proceedings in connection with any of our victim-based filings.

Interim Relief / I-918 not filed

VSC will begin terminating deferred action in 2010 for those aliens who received interim relief but did not file the I-918 or have an I-918A filed on their behalf by Dec. 31, 2009.

Verification of Abuser's status for I-360

Can the VSC verify the status of alleged abusers prior to filing the I-360?

No, this would generate Privacy Act concerns. We will, however, make a diligent search of USCIS records based on identifying information submitted in support of the I-360.

LEA Certifications from Family Court

Certifications are reviewed on a case-by-case basis. Regulations allow for a variety of entities

to sign the certifications. Certifications signed by entities other than police officers or prosecutors may raise questions when the form is adjudicated. Submitting additional evidence to support the petition, including information about the certifying entity, can be helpful and may reduce the need for VSC to issue a request for additional evidence. Specifically refer to 8 CFR 214.14(a)(2).

Passport issues for U applicants

U petitioners and derivatives must submit a passport or border crossing card that is valid at the time of the petition's filing. In lieu of such documents, the Application for Advance Permission to Enter as a Nonimmigrant Pursuant to Section 212(d)(3) of the Immigration and Nationality Act (Form I-192) may be submitted to waive this requirement.

VAWA validity dates

Can a VAWA validity date for an abused child be based on a prior I-130 filed by the biological mother, when the step-father was the abuser? In a case at hand, the petitioning mother is now incapacitated and can not pursue the I-130.

For purposes of the I-360, the I-130 can affect the validity date only if it was filed by the actual abuser. However, it is noted that INA Section 245(i) contains a "grandfather" provision that could be beneficial at adjustment.

Public Benefits = Public Charge?

There is concern that if an applicant has received public benefits he or she may be deemed inadmissible as a public charge under Section 212.

There is a public charge exemption built into the T Visa provisions. While this is not the case for the U Visa program, we do have broad discretion in granting waivers.

Retroactive Validity Dates

Validity dates for current U Visas may be retroactive for those applicants who were previously granted Interim Relief while awaiting final regulations for the U Visa program. Will similar retroactivity be accorded at time of adjustment, or naturalization?

There is no provision in law for retroactive validity dates at adjustment or naturalization.