ASSISTING DERIVATIVES OF U VISA APPLICANTS AND VAWA SELF-PETITIONERS

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OBJECTIVES

- Identify family members eligible for derivative benefits
- Troubleshoot roadblocks that may occur for derivatives
- Strategize on issues that may arise during consular processing
- Identify ethical issues that may arise when working with principals and derivatives
U Visa Derivative Eligibility

- Relationship must:
  - Exist at filing of I-918, and
  - Continue to exist when I-918 and I-918A are adjudicated; and
  - Continue to exist at time admission of derivative

- Definition of Child (INA 101(b)(1))
  - Unmarried; and
  - Under 21 when I-918A is filed
  - Must remain unmarried through to admission in U status
Susan is considering applying for U and/or VAWA.

She has two children:
- Kevin is 2 years old, in US but born overseas
- Isabel is 19 years old, in home country and has a 1 year old son Marco.
If Susan is applying for a U visa, who is eligible to be a derivative?

- Kevin only
- Isabel and Marco only
- Kevin, Isabel, and Marco
- Kevin and Isabel only
VAWA derivative eligibility

- Children under 21 and unmarried at filing of I-360

- CSPA and VAWA provides age-out protection, with limitations

- Must remain unmarried through to admission
If Susan is applying for VAWA, which of her relatives is eligible to be a derivative?

- Kevin only
- Isabel and Marco only
- Kevin and Isabel only
- Kevin, Isabel, and Marco
Susan decides to file for a U visa, listing Kevin and Isabel as derivatives. Isabel, without consulting with you first, recently got married.

Poll question 1: Is this going to be a problem for Isabel to get U visa derivative status?
- Yes
- No
- Unsure

Poll question 2: What if Isabel got married while Susan was on the waitlist? Would this be a problem for Isabel to get U derivative status?
- Yes
- No
- Unsure

Poll question 3: What if Isabel got married after she entered with U visa status? Would this cause a problem?
- Yes
- No
- Unsure

Poll question 4: What if Isabel got married after Susan applied for VAWA? Would Isabel be eligible to consular process as Susan’s derivative?
- Yes
- No
- Unsure
What about Baby Marco?

- Grandchildren of principals ineligible for derivative status through U and VAWA
  - Either I-130 by parent once LPR OR
  - Humanitarian Parole (Form I-131)

- U derivatives overseas may be eligible for HP when principal gets on waitlist
Humanitarian Parole

- INA 212(d)(5) + consular processing
- Need to show “urgent humanitarian reasons” or “significant public benefit”
- $575 fee or fee waiver
- Affidavit of Support required
- I-94 for 1 year, subject to extension
  - May apply for re-parole
- For Isabel, argue 8 CFR 214.14(d)(2)
Timing of Derivative Submissions

**U**
- File I-918A with principal’s I-918
  - Or anytime prior to principal AOS
- Last in, last out – File early!
- Derivative can’t enter on I-918A until grant
  - Except (d)(5) parole
- Once I-918A granted, 2-6 mo consular processing
- Principal MUST NOT ADJUST until derivative is admitted

**VAWA**
- One-step: File I-824 with VAWA packet
- Two-step: File I-824 with principal’s I-485
- Derivative cannot consular process until AFTER principal has adjusted
- Consular processing can take over 1 year
- Watch out for age-outs if abuser is LPR
Age-out Issues
CSPA protects age of derivatives depending on:

- Is abuser USC or LPR?
- How long was I-360 pending?
- How old was derivative at time of filing? Now?
- Country of origin ("chargeability") of derivative

Authority:
- INA § 201(f)(4);
- INA § 203(h)(4)
When Abuser is USC

- Susan is filing for VAWA, listing Kevin and Isabel as derivatives. If abuser is US citizen, the children’s ages are frozen at the I360 filing date.

- Age-out protection continues through to admission as LPR/adjustment

- Must remain unmarried
When Abuser is LPR

- If LPR abuser, then CSPA will freeze child’s age as of the date visa became available only if:
  - Derivative’s CSPA age is under 21 AND
  - Derivative has “sought to acquire” permanent residence within 1 year of the visa’s becoming available
CSPA Age Calculation

- **CSPA age** = Age when visa number “becomes available” minus the number days I-360 was pending

- “Becomes available”:
  - I-360 is approved AND
  - Priority date (F2A) is current

  **NOTE:** If priority date is current when I-360 is granted, then I-360 approval date is when visa became available
Sought to Acquire

- Age will freeze IF derivative seeks to acquire permanent residence within 1 year of visa’s becoming available.

- “Seek to acquire” = file I-824; I-485; or DS-260.

- Watch out for priority date retrogression.
Case example

- Susan files for VAWA as an abused spouse of an LPR, filing for Isabel and Kevin as derivatives on January 1, 2017.

- When Susan files the I-360, Isabel is 19 years old, and 2 months.
CSPA age calculation example

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Isabel’s Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2017</td>
<td>I-360 filed</td>
<td>19 years, 2 mo</td>
</tr>
<tr>
<td>April 1, 2018</td>
<td>I-360 approved, F2A not current.</td>
<td>20 years, 5 mo</td>
</tr>
<tr>
<td>January 1, 2019</td>
<td>F2A becomes current</td>
<td>21 years, 2 mo</td>
</tr>
</tbody>
</table>

- I-360 pending 455 days (1 year, 3 mo)
- CSPA Age = 21 yrs and 2 mo – 1 yr and 3 mo = 19 yrs and 11 mo
- If derivative seeks to acquire within 1 year of January 2019, her age will freeze at 19 yrs and 11 mo
Let’s say Isabel was a bit older

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Older Isabel’s Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2017</td>
<td>I-360 filed</td>
<td>20 years and 10 mo</td>
</tr>
<tr>
<td>April 1, 2018</td>
<td>I-360 approved, F2A not current</td>
<td>22 years and 1 mo</td>
</tr>
<tr>
<td>January 1, 2019</td>
<td>F2A becomes current</td>
<td>22 years and 10 mo</td>
</tr>
</tbody>
</table>

- I-360 pending 455 days (1 year, 3 mo)
- CSPA Age = 22 yrs and 10 mo – 1 yr and 3 mo = 21 yrs and 7 mo
- Older Isabel has aged out. Now what?
What if derivative has aged out?

- If derivative has aged out, then category shifts from F2A to F2B
- Derivative is considered self-petitioner
  - No Affidavit of Support required
  - Does not have to submit own I-360
  - Retain priority date of parent’s self-petition (January 1, 2017)
- If overseas: Consular process when F2B becomes current
- If in US: Deferred action and EAD until F2B is current
Troubleshooting issues with USCIS and DOS
Inadmissibility

- Common immigration grounds:
  - Prior removals, including expedited
  - Unlawful presence
  - Lack of passport
  - Unlawful entry

- Common criminal issues:
  - CIMTs
  - Drugs
Waivers

- File I-192 for inadmissibility whether in US or overseas
- Specify exact ground of inadmissibility that applies!
- If consular officer finds additional grounds, will need to file new I192 with USCIS
- Discretion, discretion, discretion
Proving the relationship

- **Parent/child:**
  - Missing/incorrect BC info
  - No BC
  - DNA test
  - Evidence of ongoing relationship

- **Spouse:**
  - Termination of prior marriages

- **Undisclosed children/spouse/siblings/parents** – how to remedy?
What if minor child’s other parent won’t authorize passport or travel?

- Seek waiver of passport requirement (I-193)
- DOS will issue DS-232
- Present at CBP entry point after obtaining visa
- OR Seek full custody
  - Time-consuming, logistically complex
  - Depends on home country legal framework
- Practice pointer: Look up home country laws on age of majority for travel (e.g., Honduras)
I-929 for Us

- Either consular processing or in-US
- Eligibility:
  - Principal under 21: spouse, unmarried children under 21, parents
  - Principal over 21: Spouse and children under 21 and unmarried
  - After-acquired spouse and children included
- Qualifying family member has NEVER held U nonimmigrant status
- No age-out protection
I-929 Requirements

• Principal has U visa based LPR status or application for adjustment pending
• Principal or family member will suffer extreme hardship if not allowed to remain in or enter the US
• Show that discretion should be exercised in favor of family member
• Authority: INA 245(m); 8 CFR 245.24
After the Derivative Arrives

- **U**
  - File I-765 (a)(20)
  - AOS after 3 years continuous physical presence
  - May need I-539
  - What if derivative EWI’d?

- **VAWA**
  - If not done already, pay ELIS fee for green card
  - What if derivative EWI’d?
U Derivative EWI post-grant

Practice pointer: If derivatives are overseas, advise not to EWI

If this happens:
- File I-192 to waive EWI and any other grounds
- File I-765 under (a)(20)
- Request amended I918A approval notice
- Potential RFE or NOID or denial
- Check principal for smuggling issues
Practice pointer: If derivatives overseas, advise derivatives and principal not to EWI.

If principal has adjusted and derivative is immediate relative or priority date is current, file I-485.

Should not need to waive EWI under INA 245(a).

Check principal for smuggling issues – may have new deportability ground.
Ethical considerations when working with principals and derivatives
While Susan is on the U visa waitlist, she arranges for Isabel to EWI.

Susan and Isabel tell you that Isabel is in the US and you agree to represent Isabel for her I-192

Later, Isabel tells you:
- Susan is forcing Isabel to provide unpaid childcare to Kevin and threatened to get her deported if she refused
- Isabel doesn’t want you to tell Susan what she has disclosed
Ethical Issues

- Conflict of interest (Rule 1.7)
- Confidentiality (Rule 1.6) and Privilege
- Communication (Rule 1.4)
- Clients with diminished capacity (Rule 1.14)
Conflict of Interest (ABA Model Rule 1.7)

- “...a lawyer **shall not** represent a client if the representation involves a concurrent conflict of interest.”:
  - The representation of one client will be directly adverse to another client; or
  - Significant risk that representation will be materially limited by lawyer’s responsibilities to another client

- In some cases, conflict may be waived
Confidentiality (1.6) and Privilege

- No secrets between joint clients on matters relevant to the joint representation (Rule 1.7, comment 31)
- Privilege does not attach to communications between one client and attorney if joint representation (Rule 1.7, comment 30)
Communication (1.4)

- A lawyer **shall**:  
  - Promptly inform client of any decision or circumstance where client’s informed consent is needed;  
  - Reasonably consult with client about means by which client’s objectives are to be accomplished;  
  - Explain a matter to the extent reasonably necessary to permit the client to make informed decisions
Diminished Capacity (Rule 1.14)

- What about minor clients (like Kevin and Marco)?
- “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client”
- May take “reasonably necessary protective action, including consulting with individuals that have the ability to take action to protect the client”
Thank you!

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