



**Practice Tips for Representing U Visa Respondents:
An Outline of Strategies to Address ICE and EOIR Challenges¹
July 2019**

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¹ This advisory was written by Cecelia Friedman Levin, Mary Beth Kaufman, Cynthia Lucas, Gail Pendleton, and Rená Cutlip-Mason. The information contained in this advisory does not create any law or rights, nor is it intended to be legal authority or advice, but is presented for informational purposes only and not for media attribution.

NOTE: These policies and procedures are current as of July 2019. Updates will be provided, as additional changes to policies and caselaw are expected.

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I. Introduction

When Congress created the U visa program as part of the Victims of Trafficking and Violence Protection Act of 2000, it recognized that the U visa would “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status,” and “give law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions.” Congress recognized that “[p]roviding temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.”²

Despite the important goals and benefits of the U visa program, the adjudicatory landscape for U visa applicants has become more difficult and complex. Representing U visa eligible applicants subject to or in removal proceedings is especially challenging, given the administration’s emphasis on increased enforcement coupled with the significant processing delays and tougher discretionary considerations associated with U visa applications.

This practice advisory provides updates in policy and survivor-based advocacy strategies for U visa applicants at different stages of removal proceedings, including:

- U visa applicants with final or prior orders of removal or those currently detained;
- U visa applicants in removal proceedings; and
- Options for survivors if they receive unfavorable decisions in immigration court

While this advisory is largely focused on those individuals who are already subject to immigration proceedings and detention or removal, advocates should be mindful of recent U.S. Citizenship and Immigration Services (USCIS) policy changes which may impact all U visa applicants, including recent memoranda on Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs), and Notices to Appear (NTAs).³

² See section 1513(a)(2)(B), Public Law No: 106-386, 114 Stat. 1464

³ PM-602-0050.1. “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens” (June 28, 2018) (hereinafter “NTA Memo”); available at: <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> and PM-602-0163. “Issuance of Certain RFEs and NOIDs: Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)” (July 13, 2018) (hereinafter “RFE Memo”); available at:

NOTE: The authors will update this advisory should new or additional policy developments impact its content.

II. Updates in Policy, Practice, and Authority

Over the last two and a half years, there have been a myriad of changes to immigration policy, creating additional barriers for survivors to accessing immigration protections. This is due, in part, to the administration's overbroad emphasis on enforcement and the failure of the Department of Homeland Security (DHS) to follow existing guidance as it pertains to survivors. This section provides a summary of relevant policy, as well as practice tips to help advocates best utilize existing agency guidance and anticipate possible arguments.

A. New Enforcement Emphasis

On January 25, 2017, the administration dramatically shifted immigration enforcement priorities through the issuance of two executive orders regarding interior and border immigration enforcement. The interior enforcement executive order, in particular, outlines an expansion of enforcement priority categories including those who:

- have been convicted of any criminal offense;
- have been charged with any criminal offense, where the charge has not been resolved;
- have committed acts that constitute a chargeable criminal offense;
- have engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
- have abused any program related to the receipt of public benefits;
- are subject to a final order of removal but have not departed; or
- in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.⁴

This wide-ranging expansion of enforcement priorities has had an enormous impact on crime survivors and family members who may be eligible for U visa relief. Immigration and Customs Enforcement (ICE) guidance on the interior enforcement executive order clearly states that, except in limited circumstances (such as prosecutorial discretion for certain individuals who arrived in the U.S. as children), the Department “no longer will exempt classes or categories of removable aliens from potential enforcement.”⁵ While there was never an official exception for U visa applicants, there is current ICE guidance that offers crime victims and witnesses prosecutorial discretion considerations, which will be discussed in more detail later in this advisory.

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FI_NAL2.pdf

⁴ Executive Order No. 13768. “Enhancing Public Safety in the Interior of the United States.” (January 25, 2017) available at: <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf>; *See also* American Immigration Council. “Summary of Executive Order Enhancing Public Safety in the Interior of the United States.” (May 19, 2017); available at:

https://www.americanimmigrationcouncil.org/sites/default/files/research/summary_of_executive_order_enhancing_public_safety_in_the_interior_of_the_united_states.pdf

⁵ Executive Order No. 13768 at 1.

B. USCIS Enforcement-focused Guidance: NTA and RFE Memos

On July 13, 2018, USCIS issued guidance related to the issuance of RFEs and NOIDs that increases the risk of removal for certain applicants and petitioners. Adjudicators may deny an application without first issuing an RFE or NOID if required initial evidence is not submitted or if the evidence in the record does not establish eligibility (statutory denial).⁶ This policy guidance applies to all new applications filed after September 11, 2018. *If an application was filed before September 11, 2018, prior RFE guidance will apply.*

- **Practice Tip:** Practitioners should note instances where evidentiary standards for U visas do not appear to be followed or where denials do not state a concrete reason for the denial. If such instances arise, please notify ASISTA and AILA of problems you are experiencing relating to the implementation of this guidance. Given the immense case backlog, it is uncertain what the adjudicative landscape will look like for newly filed cases. That said, strong, straightforward cases should still be filed with USCIS.

Another notable development is USCIS' updated guidance, issued June 28, 2018, on NTAs.⁷ This guidance significantly expands the circumstances in which USCIS may issue NTAs. Among other changes, USCIS may now issue NTAs to individuals, including U and T visa applicants and VAWA self-petitioners, to whom USCIS issues case denials and who lack lawful immigration status. This represents a drastic change in policy that was in place for over two decades. While USCIS has always had discretion under statute to issue NTAs, the Vermont Service Center (VSC)'s longstanding practice has been to refrain from issuing NTAs in connection with denials of survivor-based filings (including VAWA self-petitions and U and T visa applications).⁸ This shift in policy means that denied U visa applicants may face removal proceedings if they cannot persuade USCIS to review their cases through appeal, reconsideration or reopening.

- To learn more about the impact of the updated NTA policy on U visa filings and advocacy strategies, consult ASISTA, AILA and ILRC's "[Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear \(NTA\) Updated Policy Guidance.](#)" You can also review [this joint advisory](#) on NTA practice and advocacy updates. This advisory contains information how practitioners can [report issuances](#) of NTAs for denied U visa cases. This is essential so we can learn more about the implementation of the NTA guidance. The American Immigration Council also recently published a [general advisory on the NTA guidance](#).
- **Practice Tip:** USCIS has significantly increased its scrutiny of U visa applications for individuals with criminal histories. Practitioners should consider whether there might be post-conviction relief available in these cases. Finally, for those practitioners who have

⁶ See RFE Memo, note 3 *supra*. USCIS defines a statutory denial as any filing where the applicant does not have a legal basis for a benefit, like a family petition for a relative that is not eligible.

⁷ See NTA Memo, note 3 *supra*.

⁸ See, e.g., DHS Q&A Session (November 2005); available at: <https://asistahelp.org/wp-content/uploads/2019/03/DHS-QA-Session-November-2005.pdf>.

not or do not represent clients in removal, it is vital to build referral systems for clients whose applications are denied.

- **Practice Tip:** In addition to considering safety planning for survivors where there is a risk of harm from an abuser or perpetrator, work with clients to develop a plan in the event they are affected by enforcement actions⁹. Some resources include:
 - [ILRC Family Preparedness Plan](#) (also [available in Spanish](#))
 - **CLINIC: [Know Your Rights: A Guide to Your Rights When Interacting with Law Enforcement](#)** (available in Spanish, Amharic, and Chinese).

C. Existing ICE Guidance Related to U Visa Petitioners

Many of the immigration enforcement challenges crime survivors now face are not novel. Indeed, prior advocate engagement with DHS on misguided enforcement practices led to the creation of policy memoranda related to ICE's procedures concerning survivors. In June 2011, ICE issued guidance regarding prosecutorial discretion for certain victims, witnesses and plaintiffs (hereinafter "Morton Memo").¹⁰ This memo contains critical procedural considerations for victims of domestic violence, sexual assault and human trafficking as well as individuals who are involved in claims regarding the protection of their rights and civil liberties. The Morton Memo instructs *all* field agents, special agents in charge, and attorneys that, "absent special circumstances or aggravating factors, *it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.*"¹¹

This memo fulfilled two important goals: (1) it complements the immigration provisions in VAWA and the TVPA, created by Congress with bipartisan support, to safeguard immigrant survivors of trafficking and domestic and sexual violence and to incentivize their cooperation with law enforcement; and (2) it addressed the enormous chilling effect on immigrant survivors who fear that reporting domestic violence, sexual assault and other crimes may lead to their own removal.

The Morton Memo instructs ICE officers, agents and attorneys to "exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice."¹² In various media articles, ICE spokespeople have indicated that this guidance remains in effect.¹³

⁹ For additional resources, see "Serving Survivors Who May be At Risk of Immigration Enforcement Actions" ASISTA (July 11, 2019) available at <https://asistahelp.org/alert-serving-survivors-at-risk-of-removal/> See also "Featured Issue: 2019 Large-Scale Enforcement Actions and Raids" AILA (July 12, 2019), available at https://www.aila.org/advo-media/issues/all/featured-issue-2019-large-scale-enforcement?utm_source=aila.org&utm_medium=Carousel%20-%20ALL

¹⁰ John Morton. "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011) (Hereinafter "Morton Memo"); available at: <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf/>.

¹¹ *Id.* [Emphasis added].

¹² *Id.*

¹³ Tyler Kingkade. "Domestic Abuse Victims Aren't Coming Forward Because They're Scared of Being Deported" *Buzzfeed* (March 16, 2017) (Stating "An ICE official...said a 2011 directive that advises immigration officers to use discretion when dealing with abuse victims remains in effect."); available at:

Through communications with ASISTA and at a 2017 AILA ICE Liaison Committee event, ICE stated that, “as of January 8, 2018, this memorandum is still in effect, but all discretionary decisions must be made consistent with the President’s Executive Orders and the Secretary’s memoranda.”¹⁴ In practice, however, ICE is consistently and egregiously undermining the spirit of this memo, with some District Offices incorrectly reporting that the Morton Memo is no longer operative.¹⁵ In a recent email sent to a *Searchlight New Mexico* journalist, ICE confirmed that the 2011 prosecutorial discretion memo (and the 2009 Stay of Removal memos discussed below) for U visa petitioners are still in effect.¹⁶

- **Practice tip:** Unless and until ICE formally rescinds the Morton Memo, continue to use it as a basis for requesting prosecutorial discretion. However, keep in mind the Morton Memo instructs officers to consider “all serious adverse factors” in their decision to exercise discretion.¹⁷ These “adverse factors” include criminal history, or indications of a threat to public safety. Given the expansive enforcement priorities outlined in the executive orders, ICE may continue to deny prosecutorial discretion requests for survivors on the basis of these “adverse factor” loopholes.
- **Practice Tip:** There have been instances in which ICE has issued NTAs for individuals who are on the U visa waitlist or U visa holders. If there has been no new criminal or immigration violation between the time of filing and placement on the waitlist, please reach out to ASISTA (questions@asistahelp.org) for liaison assistance on these cases.

Additional ICE guidance related to stays of removal for U visa applicants as well as individuals in detention will be discussed in the next section.

III. Stays of Removal

Stays of removal for U visa applicants have been more difficult to obtain following implementation of the interior enforcement executive orders. This section will discuss existing guidance on U visa applicant stays of removal, examine current trends, and discuss practice tips for U visa applicants seeking stays.

https://www.buzzfeed.com/tylerkingkade/under-trump-domestic-abuse-victims-are-more-afraid-of-being?utm_term=.ipGYd0rW1#.igQz3wa8N Nora Caplar-Brinker, “I Wish I’d Never Called the Police” *Slate* (March 19, 2017); available at:

http://www.slate.com/articles/news_and_politics/cover_story/2017/03/u_visas_gave_a_safe_path_to_citizenship_to_victims_of_abuse_under_trump.html

¹⁴ AILA ICE Liaison Committee Meeting Q&As (10/26/17) *AILA Doc. No. 18011132* (January 10, 2018).

¹⁵ Respondents to ASISTA survey respondents indicated that ICE officers in El Paso, TX, Kansas City, MO, Bloomington, MN, Harlingen, TX, Chicago, IL have indicated the 2011 Morton Memo is no longer in effect.

¹⁶ A copy of this email is available as *AILA Doc. No. 19061000*.

¹⁷ Morton Memo at 2.

A. Guidance on Stays and U visas: 2009 ICE Memos

In September 2009, ICE issued two memoranda regarding U visa applicants with final orders of removal, those who are in removal proceedings or those in detention who are seeking an administrative stay of removal:

- “Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Order of Deportation or Removal,” (hereinafter Vincent Memo); and
- “Guidance: Adjudicating Stay Requests Filed by U Nonimmigrants” (hereinafter Venturella Memo)¹⁸

These memos, along with the *Sanchez Sosa* decision (discussed below), were designed to create a safety net against the removal of survivors with applications pending. Although there have been nationwide discrepancies with regard to how ICE officials interpret and discuss these, they are still official ICE policy until future revision.¹⁹

1. Vincent Memo

The stated purpose of the Vincent Memo is to ensure compliance with the TVPRA of 2008.²⁰ Specifically, Section 204 of the TVPRA created the provisions found at INA 237(d), outlining procedures for U and T visa applicants seeking administrative stays.²¹

- The statute states that, if a U visa applicant sets forth a prima facie case for approval, then DHS may grant an administrative stay until an application for T or U status is approved or there is a final denial of the application after exhaustion of administrative appeals.²²

¹⁸ “Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Order of Deportation or Removal,” Peter S. Vincent, Principal Legal Advisor, ICE (Sept. 25, 2009) available at: https://www.ice.gov/doclib/foia/ERO_policy_memos/vincent_memo.pdf (Vincent Memo); “Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant,” David J. Venturella, Acting ICE Director (Sept. 24, 2009); available at: https://www.ice.gov/doclib/foia/ERO_policy_memos/11005_1-hd-stay_requests_filed_by_u_visa_applicants.pdf. A notable disclaimer in both the Vincent and Venturella memos is that the memos contain internal guidance to ICE, and does not create any rights, substantive or procedural, enforceable by either party.

¹⁹ See Note 16 *supra*. See also AILA Doc. No. 19061000 (Posted 6/10/2019) <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/ice-email-journalist-confirms-policy-memos>

In addition, in the fall of 2017, AILA’s ICE National Liaison Committee met with ICE officials to inquire whether the Vincent Memo remained in effect. The Committee was told that the Vincent Memo is operational; however, ICE will also consider the administration’s executive orders on immigration and the implementing guidance.

“Chasing Down the Rumors: Shift in ICE ERO Policy, Pending U Visa Application”, *AILA Doc. No. 16112144* (November 3, 2017.)

²⁰ Vincent Memo at 1.

²¹ William Wilberforce Trafficking Victims Protection Reauthorization. Pub.L. 110–457—DEC. 23, 2008

²² INA 237(d); The statute also states that the denial of stay does not preclude the U applicant from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings. INA 237(d)(2)

- Similarly, the U visa regulations affirm that noncitizens with final orders of removal are not precluded from filing a U visa application, and while the filing of a U visa has no effect on ICE's ability to execute a final order, a U visa applicant may request a stay of removal.²³

The Vincent Memo instructs that, absent certain enumerated adverse factors, ICE Field Office Directors *should* “favorably view” a stay request if the U visa applicant has established prima facie eligibility for a U visa, and consider humanitarian factors related to family members who may rely on the U visa applicant for support.²⁴ The Vincent Memo also states that, for U visa applicants in proceedings, ICE trial attorneys *shall request* a continuance to allow USCIS to make a prima facie determination (PFD).²⁵ Once a prima facie case has been established, the Vincent Memo instructs that ICE attorneys *should* consider administrative closure or seek to terminate proceedings pending final adjudication of the petition.

2. Venturella Memo

Building on this statutory authority of the 2008 TVPRA, the Venturella memo lays out the PFD process to be followed in adjudicating stays for U visa applicants in removal proceedings more generally. It also discusses procedures for U visa applicants in detention. While this memo notes ICE does have the authority to detain a U visa applicant, it states that, generally, U visa applicants *should* be released unless subject to mandatory detention or other serious adverse factors exist.²⁶ In cases where a U visa applicant is detained, the Venturella memo states that ICE Enforcement and Removal Operations (ERO) *shall inform* USCIS that the applicant is detained and request that USCIS expedite the case.²⁷

3. Process for Stay Requests for U Visa Applicants

Both the Vincent and Venturella memos contain instructions on the process for requesting administrative stays for U visa applicants, namely that:

- Upon receiving a stay request from a U visa applicant, the local Detention and Removal Office *must contact the Office of Chief Counsel (OCC)* to request a PFD from USCIS; and
- ERO *should* allow USCIS **five business days** to make the PFD, during which time the applicant may not be removed.

²³ See 8 CFR 214.14(c)(ii).

²⁴ Vincent Memo at 2. [Emphasis added]. Both the Vincent and Venturella Memos outline five situations in which a stay may not be merited. Specifically, the Venturella Memo states “A Stay of Removal on the basis of a pending application for a U-visa is not appropriate in the following situations: 1) USCIS has determined that the alien is not prima facie eligible for a U visa; 2) USCIS has denied the alien's petition for a U-visa on the merits; or 3) serious adverse factors weigh against granting a Stay of Removal. Serious adverse factors include the following: (1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns.” Venturella Memo at 2.

²⁵ Vincent Memo at 2.

²⁶ *Id.*

²⁷ *Id.*

The Venturella Memo provides further guidance to ICE ERO Officers that if ICE assumes custody of a U visa applicant, ICE “*must provide*” the applicant with an application for a stay of removal, and regardless of whether a stay has been filed, the Field Office Director *should* “use his or her discretion in making any determination about whether to remove an individual with a pending U visa petition and has demonstrated no adverse factors.” The Venturella memo instructs ICE officers that if ICE grants a stay, it should be for 180 days, and that that period of time *should be extended* “as needed” for USCIS to complete adjudication of the petition.²⁸

B. Updates in Practice: Stays of Removal & Prima Facie Determinations

As noted above, ICE agrees that these memoranda continue to be valid to the degree there is no conflict with general executive orders and other guidance.²⁹ They have, however, reported a shift in policy for U visa applicants with final orders of removal, a shift which violates their own memoranda. Specifically, ICE stated,

“If ERO encounters an individual that is out of status with an outstanding final order of removal but ICE is provided with proof that a U visa is pending, ICE counsel will seek a *prima facie* determination of the U visa application from USCIS. **If USCIS is unable to issue a *prima facie* finding within five days as contemplated in the memo, ICE ERO will process the removal order and proceed with deportation.**”³⁰

This is a drastic change in policy, without written notice or opportunity to comment or any formal rescission or revision of the Vincent Memo. Given the extensive case backlogs at USCIS, it will serve to thwart the existing protective structure created in 2009.³¹ Notwithstanding ICE's official position that the memoranda remain intact, practitioners report that some OCC offices are operating under the presumption that the Vincent memo has been rescinded and are successfully arguing before immigration judges that PFDs are only to be requested in detained matters.

Some jurisdictions report that PFDs are being considered on a case-by-case basis, or only for applicants who are in detention, while others report that ICE does not request PFDs at all.³² This lack of clarity and consistency in practice is extremely harmful to survivors and their families, as

²⁸ Venturella Memo at 3.

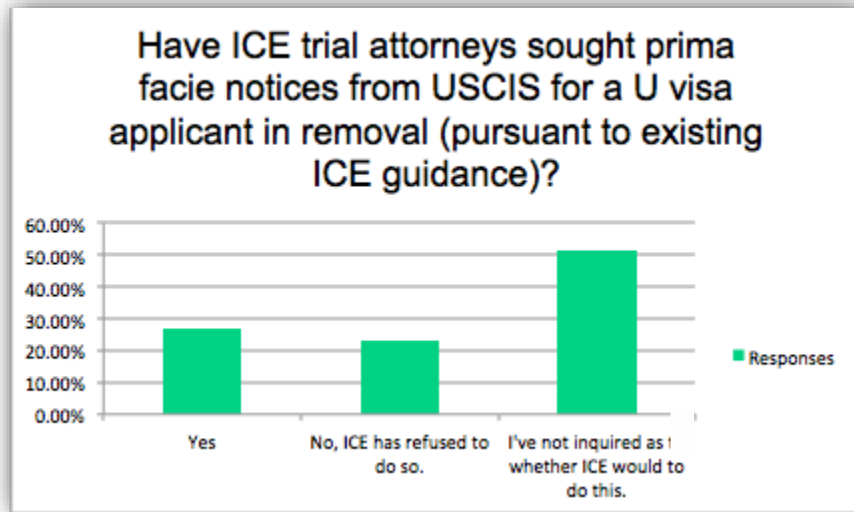
²⁹ See notes 16 and 19 *supra*.

³⁰ *Id.* Emphasis added. The memo referred to in this quote refers back to the Vincent Memo.

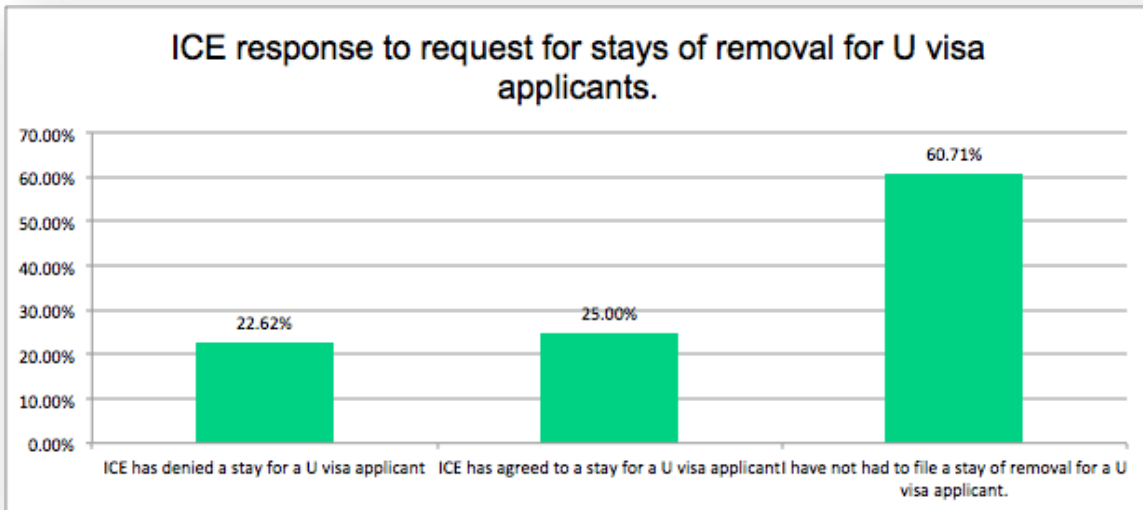
³¹ At last reported in 2017, there were 60 adjudicators working on the U visa caseload. See 2017 CIS Ombudsman report page 44. https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf, with over 229,000 applications pending. This number is inclusive of both principals and derivatives. See U visa Data Set, available at: https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=20721&field_native_doc_issue_date_value%25Bvalue%25D%25Bmonth%255D=&field_native_doc_issue_date_value_1%25Bvalue%25D%25Byear%255D=&combined=&items_per_page=10.

³² In 2018, ASISTA surveyed over 140 practitioners in over 30 states about their experiences assisting U visa applicants who are in removal proceedings or seeking stays of removal. For further information about results, contact questions@asistahelp.org

their ability to stay in the country while their applications are pending depends upon how their local ICE office views this guidance. A 2018 ASISTA survey reveals:³³



Practitioners report varied ICE practices in response to U visa applicant requests for stays of removal:³⁴



While there are practitioners who report they have had success filing stays for U visa applicants, others report that ICE officers often seem uncertain about the process. One practitioner indicated that ICE “has been confused what to do more than anything” and another reported that ICE “seemed to be unaware that they could [request PFD] and had no desire to hear about it.”³⁵ Practitioners also report that ICE has requested PFD determinations in relation to a stay request,

³³ *Id.* with 103 respondents reporting.

³⁴ *Id.* with 84 respondents reporting.

³⁵ *Id.*

but often does not hear back from USCIS about its request. Additionally, advocates report that there is confusion over which ICE division has the authority to make PFD requests.³⁶

Practitioners further indicate that U visa applicant stay requests are being denied if an applicant has a criminal history, which may comport with the Vincent and Venturella Memos in that a stay may not be warranted if there is a significant criminal history or public safety concern.³⁷ Other advocates indicate that they are often not given a reason why a stay is denied, or else are told merely that the stay has been denied as a matter of discretion.

Finally, ICE is increasingly referencing the fact that U visa petitioners may await adjudication abroad, using this argument in support of stay request denials.

- **Practice Tip:** In response to the argument that petitioners may await adjudication abroad, whether from ICE, EOIR or a federal court, it is important to point out that this position ignores the congressional goals underlying the U visa program: to encourage crime reporting by those who fear removal and to create a useful tool for law enforcement that relies on notification and cooperation from victims to ensure public safety and hold perpetrators accountable. Instead, this position accomplishes the opposite: it helps perpetrators who target noncitizens as victims, expecting them to be deported instead of accessing justice and eviscerates the trust between law enforcement and communities that live in fear.³⁸
- **Practice Tip:** Practitioners should consider formally asking that ICE request a PFD determination from USCIS, particularly in cases of imminent removal (i.e., cases involving detained applicants, applicants in removal proceedings who are ineligible for other forms of relief and where the IJ is unlikely to grant or has denied continuance, and applicants whose cases are at the appellate level). If USCIS declines to find prima facie eligibility, request that this determination be made in writing and include the reasons for the determination.

C. Practice Tips: Preparation of Requests for Stays of Removal

At the outset of their representation, practitioners should screen their U visa cases for applicants with a criminal record and/or those with prior orders of removal, as these are two factors which may increase a U visa applicant's vulnerability to an enforcement action. It is good practice to prepare requests for stays of removal (ICE Form I-246) for these applicants in advance to have on file and to use in the event there is an enforcement action and a direct risk of removal.

³⁶ *Id.*

³⁷ Vincent Memo at 2; Venturella Memo at 2.

³⁸ Katrina Castillo, et al. "Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality" (June 17, 2015); available at: http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf

- **Where to File:** Requests for stays of removal are filed with the local ERO office or, in the case of detained applicants, the ERO office that has jurisdiction over the custody of the individual.³⁹

Much of the "substantial harm" and "public interest" documentation of a U visa filing will be useful in the preparation of a stay request. In addition to required documentation (like passports and information related to criminal history)⁴⁰ practitioners should include the following documentation for a U visa applicant's stay request:

- Birth certificates of USC or LPR children;
- U visa receipt notices or other proof of U visa filing; some ICE offices request copies of the signed U visa certification and a statement on the status of the U visa application;
- Police reports or other evidence showing applicant's victimization;
- Medical records; and
- Support letters from victim advocates, health professionals or others who can articulate why the applicant should remain in the U.S. and the hardship the applicant's departure would cause.⁴¹

1. Documenting Hardship

Practitioners should supplement stay requests with positive discretionary evidence and evidence of hardship that removal would cause to the applicant and his or her family. The hardship factors present in other survivor-based cases can be a useful guide in the U visa context. In addition to documenting hardship, practitioners can also consider submitting proof that a positive exercise of discretion is warranted, including evidence of rehabilitation for applicants with a criminal history.

a . Hardship in the VAWA Context

As an example, the extreme hardship factors for VAWA cancellation include:⁴²

- The nature and extent of the physical or psychological consequences of abuse;
- The impact of loss of access to the United States courts and criminal justice system;⁴³

³⁹ To find the local ERO Office, visit: <https://www.ice.gov/contact/ero#wcm-survey-target-id>. ICE Form 246 is available at: https://www.ice.gov/sites/default/files/documents/Document/2017/ice_form_i_246.pdf.

⁴⁰ See instructions for I-246 for full list of required documentation.

⁴¹ For ideas on how to structure supporting affidavits, see ASISTA Supporting Affidavit Guidelines at http://www.asistahelp.org/documents/filelibrary/documents/DV_Advocate_Affidavit_Guidelines_8166176703E7B.pdf. This affidavit can be amended to show the necessity for the applicant to remain in the U.S.

⁴² See 8 CFR 1240.58(c); Although Congress eliminated the extreme hardship requirement for VAWA self-petitions in 2000, prior INS guidance has a useful discussion of hardship and explained these factors, now adopted and applied by EOIR to VAWA cancellation cases. See Paul Virtue, INS General Counsel, HQ 90/15-P. "Extreme Hardship and Documentary Requirements Involving Battered Spouses and Children," (No date on Document), available at: <http://bit.ly/INSCredibleEvidenceMemo>;

⁴³ *Id.* (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).

- 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);
- 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;
- 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
- 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.

As U visa applicants have suffered victimization, many of these factors may be present in their cases and worth highlighting in their applications for stay of removal. For example, a request for stay of removal could include a declaration from the applicant about the need for ongoing access to our criminal or civil system as well as how our justice system needs the applicant's input to hold perpetrators accountable. Applicants can further highlight evidence that proves if any criminal investigation or civil proceeding is necessary: letters from law enforcement, evidence of pending or ongoing criminal or civil hearings to hold the perpetrator accountable, and evidence of unresolved custody or other family law issues in civil court.

b. Hardship in the T Visa Context

Similarly, the “extreme hardship involving unusual or extreme harm” requirement of T visas, while a higher standard than extreme hardship, can present some useful factors that may be present in U visa cases.⁴⁴ For example, they include but are not limited to:

- The likelihood of re-victimization and the need, ability and willingness of foreign authorities to protect the applicant;
- The likelihood of harm that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would cause the applicant; and
- The likelihood that the applicant's individual safety would be threatened by the existence of civil unrest or armed conflict.

In addition to the special factors created for crime survivors, practitioners may also wish to supply evidence of traditional extreme hardship factors considered for other waivers and applications.⁴⁵ The USCIS Policy Manual has a useful chart that outlines examples of challenges and risks that would fall into these general categories, that include but are not limited to hardship to family

⁴⁴ 8 C.F.R. § 214.11 (i)(1). Note that the standard for T visas is different, as extreme hardship involving unusual or extreme harm is a higher standard than extreme hardship, which heightens its usefulness for general extreme hardship arguments.

⁴⁵ For general resources on hardship, *see* ILRC, “Understanding Extreme Hardship in Waivers: What is extreme hardship and how to prove it” (January 2018); available at: https://www.ilrc.org/sites/default/files/resources/understanding_extreme_hardship_waivers-ab-20180131.pdf ;

members, country conditions, social and cultural impacts, health conditions and care, and the economic hardship to the applicant and his or her family.⁴⁶

- **Practice tip:** Review hardship factors and evaluate how they are relevant to a U visa applicant's request for a stay of removal; collect supporting evidence and affidavits of support from relevant family and community members.
- **Practice tip:** In collecting documentation to support a stay request, practitioners should ask whether a U visa applicant is working with a victim advocate who can assist the applicant in finding relevant documentation related to hardship or provide their own supporting affidavit to document the hardship that removal would cause.

2. What If ICE Denies the Stay?

It is important to advise clients about the risk that applications for stays of removal may be denied, especially in this current enforcement climate. For this reason, practitioners may wish to prepare clients for options for next steps. If ICE ignores its own memoranda by not requesting a PFD from USCIS and your well-documented stay request is denied, you may wish to consider mandamus and APA action in federal court to compel them to follow their own guidance.

In these cases, practitioners may consider sending a demand letter to the local Assistant U.S. Attorney who handles immigration matters, threatening mandamus action. As with any mandamus action, the result may not necessarily garner an approval, and instead may trigger a request for evidence (RFE) for the U visa application or a denial, but it is a helpful tool for bringing to the attention of the federal judiciary ICE's failure to follow its own instructions. To be most effective, you should be ready to file the mandamus in the appropriate venue if the demand letter does not result in action by ICE. Any practitioner considering litigation on U visas (or other survivor cases) may join and participate in ASISTA's U visa litigation listserv and AILA's litigation listserv.⁴⁷

IV. Strategies for Removal Proceedings

If a U visa applicant is currently in removal proceedings, practitioners should ask the ICE trial attorney to request a PFD, outlining the authority and mandatory language in the Vincent Memo (i.e., that if a U visa applicant provides proof to ICE of a U visa filing, the ICE trial attorney **shall request** a continuance to allow USCIS to make a PFD.) As mentioned above, ICE may state that the Vincent or Venturella guidance is outdated or otherwise does not confer substantive rights upon the respondent as a policy memorandum. In these cases, practitioners should make the record that ICE has not formally or publicly rescinded these memos and thus no longer abiding by them violates basic "notice and opportunity" due process rights, so you may later raise this argument in EOIR or federal court.

⁴⁶ See also "USCIS Policy Manual Volume 9-Waivers, Part B, Extreme Hardship, Chapter 5: Extreme Hardship Considerations and Factors," available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartB-Chapter5.html>.

⁴⁷ To join ASISTA's U visa litigation listserv, contact questions@asistahelp.org, or sign up for the AILA listserv through AILA's website.

If the ICE trial attorney refuses to request a PFD, practitioners may wish to ask the immigration judge to compel the trial attorney to request one from USCIS. Practitioners should point out to the judge that the respondent has no power to seek a PFD directly from USCIS – only ICE/OCC has that authority. Therefore, if the immigration judge requires a PFD to continue the case, the judge should require OCC to seek the determination. This is the PFD, one may argue, the Board of Immigration Appeals (BIA) contemplated in *Sanchez Sosa*. For applicants in active removal proceedings, practitioners should consider terminating proceedings, seeking continuances, and utilizing the emerging EOIR status docket system where available.

A. Seeking Termination of Proceedings

Practitioners should look to see where there is an opportunity to challenge a NTA based on lack of notice and other factors.⁴⁸ It is also essential to examine whether a respondent may have a basis to terminate based on *Pereira v. Sessions* and related cases.⁴⁹ This section will cover opportunities to seek termination of proceedings based on statutory protections for survivors, as well as to seek termination for U visa applicants with approved applications.

1. Challenging NTAs: Seeking Termination Based on 8 USC § 1367 Protections

Out of recognition that abusers try to manipulate legal systems against survivors, Congress created special statutory protections, codified at 8 USC 1367, “designed to ensure that abusers and criminals cannot use the immigration system against their victims.”⁵⁰ Congress created these statutory protections for survivors because it realized “threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution.”⁵¹ Indeed, the House Report accompanying the VAWA Reauthorization of 2005 also instructed that removal proceedings filed in violation of [at 8 USC §1367] shall be dismissed.⁵²

⁴⁸ See American Immigration Council and Penn State Dickenson School of Law, “Practice Advisory: Notice to Appear Legal Challenges and Strategies” (updated February 27, 2019), available at: https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf

⁴⁹ See American Immigration Council and CLINIC, “Strategies and Considerations in the Wake of *Pereira v. Sessions*” (updated December 2018), available at: https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_pereira_advisory_-_7.20.2018_-_aic_clinic.pdf; See also NIPNLG Advisory at https://www.immigrantdefenseproject.org/wp-content/uploads/FINAL_Pereira_Advisory_updated_July_16th_2018.pdf

⁵⁰ “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005), available at: <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>.

⁵¹ Representative Conyers Jr. Congressional Record 151: 164, E2606, (December 18, 2005);, available at: <https://www.congress.gov/crec/2005/12/18/CREC-2005-12-18-pt1-PgE2605-4.pdf>.

⁵² *Id.* Original quote: “Removal proceedings filed in violation of section 384 of IIRIRA shall be dismissed.”

Practitioners should review NTAs for compliance with the 8 USC §1367 protections and seek termination of proceedings if the NTA is deficient.⁵³ These three protections at 8 USC 1367 relate to non-disclosure, prohibition on use of abuser-provided information, and certain location protections.

a. Non-disclosure

The Department of Homeland Security; Department of Justice (DOJ, including Executive Office of Immigration Review (EOIR) components); and the Department of State (DOS) are prohibited from releasing information about VAWA self-petitioners⁵⁴ as well as U or T visa applicants, except in very limited circumstances.⁵⁵ This prohibition ends when USCIS denies a survivor's application and all opportunities for appeal are exhausted.⁵⁶

b. Presumption and Prohibition Against Using Perpetrator-Based Evidence

DHS, DOJ, DOS or any of their components may not make an "adverse determination"⁵⁷ of inadmissibility or deportability based on information **solely** provided by an abuser, or a member of an abuser's household or family member. This protection applies to abused spouses and children generally as well as to those who are applying for relief through a VAWA self-petition,⁵⁸ VAWA cancellation, or U or T visa. DHS guidance instructs:

“The lack of a pending or approved VAWA self-petition does not necessarily mean that the prohibited source provisions do not apply and that the alien is not a victim of battery or extreme cruelty. Similarly, although the prohibited source prohibition with respect to T or U nonimmigrant status applies only to applicants for such relief, *the victim might be in the process of preparing an application.*”⁵⁹

Thus, DHS has instructed that this provision of 8 USC 1367 protections applies to an individual who has not yet applied for benefits under VAWA.⁶⁰

⁵³ See Dan Kesselbrenner and Sejal Zota, “NIPNLG Practice Advisory: Remedies to DHS Enforcement at Courthouses and other Protected Locations” (April 12, 2017), available at:

https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_12Apr_remedies.pdf

⁵⁴ As defined broadly in INA 101(a)(51).

⁵⁵ 8 USC 1367(b).

⁵⁶ 8 USC 1367(1)

⁵⁷ Generally, an “adverse determination” in these circumstances may include placing a survivor in removal proceedings or making a civil arrest related to the survivor’s violation of immigration laws. See John P. Torres, ICE Office of Detention and Removal, “Interim Guidance Relating to Officer Procedures Following Enactment of VAWA 2005” (Jan 22, 2007); available at: <https://www.ice.gov/doclib/foia/prosecutorial-discretion/vawa2005.pdf>.

⁵⁸ See note 54, *supra*.

⁵⁹ Department of Homeland Security, “Implementation of Section 1367 Information Provisions” DHS Instruction Systems, Instruction Number: 002-02-001. Revision Number: 00 [Emphasis added]. (hereinafter DHS Guidance Implementation of Section 1367); available at: https://www.dhs.gov/sites/default/files/publications/implementation-of-section-%201367-%20information-provisions-instruction-002-02-001_0_0.pdf

⁶⁰ William Howard, Principal Legal Advisor, Immigration and Customs Enforcement. "VAWA 2005 Amendments to the Immigration and Nationality Act and 8 USC 1367" February 1, 2007 at 5 (hereinafter “Howard Memo”); available at:

Practitioners should keep in mind that the prohibition on abuser-provided information *may not* apply if a person was convicted of a crime listed in the criminal grounds of deportability under INA 237(a)(2) and includes those convicted of crimes of moral turpitude, certain domestic violence offenses (including violation of a protection order), or controlled substance violations. DHS officers are instructed to consult with counsel to see if this exception would apply.⁶¹

DHS guidance instructs that they may independently corroborate information provided by a prohibited source, with supervisory review and approval.⁶² This can include checking available databases and criminal records.⁶³

This position, which is essentially a green light to use "fruit of the poisonous tree," serves to avoid the protections Congress established, accomplishing exactly the opposite of what the legislative branch intended. In addition to thwarting congressional intent, it discourages law enforcement from using the U visa as a tool to encourage the operation of victims.

- **Practice Tips:** Practitioners should aggressively challenge in immigration court the results of such "end-runs" around the congressional goals as constructive violations of the law and highlight how ICE's position provides a tool for abusers and thwarts law enforcement. Allege ICE violated the law when it placed a survivor in proceedings contrary to the letter and goals of this protection; the IJ should, therefore, decline jurisdiction since IJs are also accountable under the law for violating its provisions. 8 USC 1367(c) specifies that those officials who violate the provisions "shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation."

c. Location Protections

The third prong of these Congressional protections is codified in INA §239(e) and concerns enforcement actions that occur at locations where a survivor may be present, including:

- domestic violence shelters;
- rape crisis centers;
- supervised visitation centers;
- family justice centers;
- a victim services provider or a community-based organization; and
- *At a courthouse* (or in connection with an appearance at a courthouse) if the victim is there for a matter connected with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking

http://www.asistahelp.org/documents/resources/CONFVAWAICEOCCVAWA2005Confidential_4B9E06A6E1933.pdf

⁶¹ DHS Guidance Implementation of Section 1367 at 9-10. *See also* 8 USC 1367(a)(1);

⁶² *Id.* at 11.

⁶³ Howard Memo at 5.

in which the alien has been battered or subject to extreme cruelty or if the victim is a U or T visa applicant.⁶⁴

ICE guidance instructs that officers "must comply with the § 239(e) certification requirement even if the subject alien has not applied for or does not intend to apply for VAWA benefits."⁶⁵ The certification requirement, according to ICE guidance, "reflects congressional intent" that ICE proceed cautiously when making an arrest or otherwise physically encountering an alien at one of the sensitive locations without objective evidence that the alien is in the United States in violation of the immigration laws and that victims of battery, abuse, trafficking, and extreme cruelty be protected."⁶⁶

If an enforcement action occurs in one of these locations, ICE must certify on the Notice to Appear that the protections at 8 USC 1367 were complied with if the enforcement action leads to removal proceedings.⁶⁷ It is especially important to remember this protection in conjunction with ICE's policy on courthouse enforcement, which confirms that these reporting requirements still apply.⁶⁸

In making this request, it is useful to highlight the congressional intent in establishing the 8 USC 1367 protections.⁶⁹ For example, prior ICE guidance establishes that:

"ICE officers are discouraged from making arrests at these sensitive locations absent clear evidence that the alien is not entitled to victim-based benefits. Aliens encountered at rape crisis centers, domestic violence centers, or any of the sensitive locations noted in INA §239(e) are likely to be genuine VAWA self-petitioners. While INA §239(e) does not prohibit arrests of aliens at sensitive locations, it is clear that Congress intended that cases of aliens arrested at such locations be handled properly given that they may ultimately benefit from VAWA benefits."⁷⁰

If an enforcement action occurs in one of the locations mentioned in INA 239(e), practitioners should review the NTA to ensure it contains the required certification of compliance with 8 USC 1367. If the NTA does not contain the certification, practitioners should seek termination of proceedings, arguing the congressional intent establishing the protections illustrated above.⁷¹ 8

⁶⁴ INA 239(e)(2)

⁶⁵ See Howard Memo at 8.

⁶⁶ John F. Torres and Marcy M. Forman, ICE, "Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005" (February 22, 2007) (hereinafter Torres and Forman Memo); available at: <https://www.ice.gov/doclib/foia/prosecutorial-discretion/vawa2005.pdf>.

⁶⁷ INA 239(e)(1)

⁶⁸ ICE, Directive Number 11072.1: "Civil Immigration Enforcement Actions Inside Courthouses" (January 10, 2018); available at:

<https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>

⁶⁹ Leslye Orloff, "VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Protections;" available at:

https://www.lsc.gov/sites/default/files/LSC/pdfs/10.%20%20Appendix%20IX%20%20CH%203%20SA_Confidentiality_Final.pdf.

⁷⁰ Torres and Forman Memo at 5.

⁷¹ The National Immigration Project of the National Lawyers Guild created a useful practice advisory on this topic. See Daniel Kesselbrenner and Sejal Zota, "Remedies to DHS Enforcement at Courthouses and Other Protected

USC 1367 are codified protections that pre-date and supersede the enforcement priorities in the executive orders.

In presenting an argument in front of an immigration judge to terminate proceedings based upon an 8 USC 1367 violation, practitioners should assert that the burden is on ICE to show that it was not in violation of requirements of 8 USC 1367 or INA 239(e) and that it did not rely solely on information provided by an abuser or perpetrator. This is especially true as respondents will not typically have access to the evidence to know how ICE got the information to initiate the enforcement action.

- **Practice Tip:** If practitioners suspect a violation of 8 USC 1367, consider initiating an investigation with the DHS Office of Civil Rights and Civil Liberties.⁷² Similarly, practitioners may wish to submit a FOIA request to ICE to gather information regarding the enforcement activity and its initiation. As noted above, argue to immigration judges that it is in their interest to discover whether ICE has violated the law, since immigration judges are also subject to the prohibitions and sanction at 8 USC 1367. Termination is the proper action for any case initiated in violation of 8 USC 1367.
- **Practice Tip:** ICE may appeal any grant of termination. As such, practitioners should be prepared to argue their cases on appeal. Practitioners should also be prepared to appeal the denial of a termination motion, either at the end of the consideration of pending relief (i.e., in the case of denied relief or where DHS appeals a grant of relief), or through an interlocutory appeal. Even if unlikely to prevail with EOIR, practitioners could potentially explore a federal court action if they have created a compelling record that ICE and EOIR have undermined the laws Congress created for survivors.

2. Seeking Termination of Proceedings for U Visa Holders or Lawful Permanent Residents

Practitioners may seek to terminate proceedings if a survivor's case is adjudicated by USCIS.

- For survivors who are currently in removal proceedings, practitioners may seek to terminate proceedings for respondents who have obtained deferred action pursuant to placement on the waitlist or a U visa grant. Note that OCC may oppose such motions.
- If a survivor has a prior order of removal and has obtained a U visa or has adjusted status pursuant to INA 245 (m), practitioners may seek to reopen and terminate proceedings to rescind the prior order.

Locations (April 2017); available at:

https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_12Apr_remedies.pdf

⁷²DHS, "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security;" available at: <https://asistahelp.org/wp-content/uploads/2018/10/VAWA-Confidentiality-Provisions-DHS.pdf>

a. Seeking Termination for U Visa Applicants in Proceedings

The U visa regulations indicate that ICE counsel may agree, as a matter of discretion, to file a joint motion to terminate while a petition for U nonimmigrant status is being adjudicated by USCIS.⁷³ Advocates have reported that many ICE offices are not agreeing to terminate proceedings based on a pending U visa application or even when a U visa applicant is placed on the waitlist with deferred action.⁷⁴

ICE may consider joining a request to terminate proceedings if a respondent has been placed on the wait list or granted full 4-year U nonimmigrant status. This applies to both survivors who are in removal proceedings and those who have been granted a U visa but have an old order of removal issued by an immigration judge.⁷⁵

- **Practice Tip:** Advocates should seek to terminate proceedings if the respondent has been placed on the U visa waitlist while proceedings are ongoing. The waitlist was created so that approvable applicants could have some relief as they wait for a visa to become available.⁷⁶ Please reach out to ASISTA at questions@asistahelp.org if ICE is refusing to agree to a motion to continue or motion to terminate for U waitlisted cases.

b. Motions to Reopen and Terminate Proceedings for Those with Prior Orders

The U visa regulations explain that for those who have an expedited order of removal, it will be cancelled by operation of law upon the U visa grant; however, if a U visa holder has an order of removal issued by an IJ or the BIA, then they may seek a Motion to Reopen and Terminate in immigration court.⁷⁷ The regulations go on to state “ICE counsel may agree, as a matter of discretion, to join such a motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23”⁷⁸

Some advocates report that ICE will not consider joining motions to reopen to terminate until the respondent is eligible to adjust status under INA 245(m). A final unexecuted order does not bar adjustment of status as the U visa regulations specify that USCIS retains exclusive jurisdiction.⁷⁹ In these circumstances, when there is a U grant or a U visa holder has adjusted, then practitioners

⁷³ 8 CFR 214.14(c)(1)

⁷⁴ The Morton Memo does consider termination of proceedings as one of the forms of prosecutorial discretion to be considered for survivors of domestic violence, sexual assault, and human trafficking. *See* Discussion of Morton Memo *supra*. However, in this current environment, is unlikely that ICE will terminate proceedings for pending applications.

⁷⁵ It is important to remember that expedited removal orders are cancelled by operation of law upon the U visa grant. Removal orders issued by an Immigration Judge (e.g., an *in absentia* motion) must be cured by motions to reopen to terminate in immigration court.

⁷⁶ 8 CFR 214.14(d)(2), stating all eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement.

⁷⁷ 8 CFR 214.14(c)(5)(1)

⁷⁸ *Id.*

⁷⁹ 8 CFR 245.2(h)(2); 8 CFR 245(k)

may consider filing the motion to reopen *sua sponte* directly with the immigration judge if they receive any opposition by ICE.⁸⁰

- **Practice Tip:** Practitioners should consider pursuing *sua sponte* motions to terminate over DHS objection.⁸¹

B. Seeking Continuances: Utilizing *Matter of Sanchez Sosa*⁸²

A common refrain from ICE trial attorneys and immigration judges is that U visa applicants can await the adjudication of their application from abroad, citing 8 CFR § 214.14(c)(5)(i)(B). Congress did not intend for U visa applicants to be deported while awaiting decisions. This is a misconstruction of the purpose of this regulation, designed to help U visa applicants *who are abroad at the time they apply for U visas*. It is also directly contrary to the congressional goal of the law, which was to provide a safe way for noncitizens to report crimes without fear of being deported for doing so.

Sanchez Sosa is a 2012 BIA case that established “[a]s a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable [U visa petition] with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time.”⁸³ Under *Sanchez Sosa*, in granting a continuance, the immigration judge **shall** consider:

- DHS' response to the motion to continue;
- whether the underlying visa petition is prima facie approvable; and
- the reason for the continuance and other procedural factors.⁸⁴

These criteria will be discussed below.

1. DHS Response to Motion to Continue

ICE attorneys are routinely opposing Motions to Continue in cases of U visa applicants. The Vincent Memo lays out ICE's procedure for U visa applicants in removal proceedings. The Vincent Memo states, “OCC **shall request** a continuance to allow USCIS to make a *prima facie* determination.”⁸⁵ In addition, the Vincent Memo goes on to say that if a U visa applicant's

⁸⁰ One argument to support a *sua sponte* motion to reopen request is that unlike the U visa regulations at 8 CFR 214(c)(5)(i), the U adjustment regulations do not say anything about reopening a final order of removal after the U adjustment of status is approved, which may imply that agreement from an ICE TA is not required to reopen time or numerically barred motions to reopen.

⁸¹ For more information on *sua sponte* motion practice, see Vikram K. Badrinath, Helen Parsonage, and Jenna Peyton, “Time-Barred Motions to Reopen—Tips and Tricks for Success” (2015); available at: <https://www.aila.org/File/Related/14072246b.pdf>

⁸² For a general primer on continuances, please see the American Immigration Council advisory on continuances at https://americanimmigrationcouncil.org/practice_advisory/motions-continuance. See also *Ukpabi v. Mukasey*, 525 F.3d 403, 408 (6th Cir. 2008) discussing competing interests to be considered in evaluating motions for continuances.

⁸³ *Id.*

⁸⁴ 25 I&N Dec. 807 (BIA 2012)

⁸⁵ See Vincent Memo at 2. [Emphasis added].

application is found to be prima facie eligible then ICE **should** consider administratively closing or terminating the case.⁸⁶

Sanchez Sosa provides that if ICE does not oppose a continuance, then proceedings ordinarily should be continued by the immigration judge, “absent unusual, clearly identified, and supported reasons for not doing so.”⁸⁷ It further provides that “government opposition that is reasonable and supported by the record is a significant consideration while unsupported opposition doesn’t carry much weight.”⁸⁸

- **Practice Tip:** If ICE opposes a motion to continue based on *Sanchez Sosa* and has refused to follow its own memoranda, argue its opposition is "unsupported." Failing to follow their own guidance is not "reasonable" or "supported by the record." The only "supported" opposition in light of these memoranda is a prima facie denial by VSC.
- **Practice Tip:** In the face of ICE opposition to your continuance motions you may wish to cite and share with immigration judges quotes from ICE's own memoranda. Much of what ICE does in the U visa context may be used to rebut or vitiate any opposition they present to a continuance. Not only do their own memoranda make it clear *it is ICE's job* to start the prima facie process, they encourage officers to adopt an ameliorative approach to survivors when considering stays, detention and removal.

2. Whether the U Visa Application is Prima Facie Approvable

To relate this to *L-A-B-R*'s framework, the prima facie approval answers the critical question: "is there a likelihood of success."⁸⁹ The consideration of this element relates to ICE's obligation to start the PFD process through an inquiry to the USCIS Humanitarian Division charged with adjudication of U visas. The reason that USCIS is in charge of making PFDs is that they are the only part of the system with the specialized training on domestic and sexual violence and the victim of crime context. Thus, implementing the PFD system in these cases is a critical first step so that those with the appropriate training and experience may make this important determination. The only time immigration judges should have to make their own PFDs is when ICE refuses to initiate the process or VSC fails to respond to ICE requests. If an immigration judge must make a PFD on her own, *Sanchez Sosa* focuses the inquiry on the central elements of the U visa application: **qualifying crime, harm suffered, and helpfulness of the applicant.**

- **Practice Tip:** It is never too late to ask ICE to follow its own guidance. Even if practitioners are on appeal to a federal court, it will bolster the argument that the prima facie system is designed to avoid deportation of crime survivors who are helpful to law enforcement.

⁸⁶ *Id.*

⁸⁷ *Sanchez Sosa* at 813, quoting *Matter of Hashmi*, 24 I&N Dec. at 790. cf. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), holding an immigration judge need not treat as controlling DHS's consent to, opposition to, or failure to take a position on a motion for continuance. *Matter of L-A-B-R-* at 416.

⁸⁸ *Sanchez Sosa* at 813.

⁸⁹ *Id.*

a. Harm and Qualifying Criminal Activity

If the applicant does not successfully get a PFD from VSC through the ICE memo system, the immigration judges must make individual determinations about whether the applicant was a victim of a qualifying crime and suffered “substantial physical or mental abuse” based on that crime.⁹⁰ If the applicant does not establish harm or qualifying criminal activity, then there is no need to examine the helpfulness of the applicant to the investigation or prosecution of the crime.⁹¹

- **Practice Tip:** For showing harm, *Sanchez Sosa* instructs applicants to submit documentary evidence such as medical reports, therapist letters, and photos to support that they have suffered substantial physical or mental abuse.⁹² Note that the “any credible evidence standard,” a standard with which EOIR is completely unfamiliar, should apply to both the kinds of documents EOIR requests and their analysis of those documents.⁹³ For instance, it is standard and successful practice to provide “corroborating declarations” from domestic violence and other victim advocates.⁹⁴ Generally, the most effective corroboration is not a list of appointments, it is actual corroboration of the *experience* of the applicant, based on a counselor’s experience working with crime survivors.⁹⁵
- **Practice Tip:** The DHS Guide to Law Enforcement provides excellent examples and FAQs on the many permutations of “qualifying crimes.”⁹⁶ Practitioners may use it with immigration judges in the same way as with law enforcement agencies. If the crime investigated or prosecuted is not specifically listed as one of the enumerated “categories” of crimes (e.g., armed robbery as falling into the category of felonious assault or strangulation falling into the domestic violence category), you may need to explain the “category” approach to qualifying crime.⁹⁷ While immigration judges are more likely than

⁹⁰ For a non-inclusive list of harm factors, see 8 CFR 214.14(b)(1). Just as each crime survivor’s experience is different, what is substantial harm may vary by individual, as subjective experience may be as important as objective acts.

⁹¹ *Sanchez-Sosa* at 813.

⁹² *Id.*

⁹³ For suggestions on how to successfully show “any credible evidence”, see Gail Pendleton, “Practice Pointers: Ensure Your Evidence Is Credible;” available at: <https://asistahelp.org/wp-content/uploads/2018/09/Practice-Pointers-on-Any-Credible-Evidence-1.pdf>

⁹⁴ See Gail Pendleton. “Showing Substantial Physical or Mental Abuse (Harm);” available at: <https://asistahelp.org/wp-content/uploads/2018/12/Showing-Substantial-Physical-or-Mental-Abuse-.doc> See also Eunice Hyunhye Cho, et al., “A New Understanding of Substantial Abuse: Evaluating Harm in U visa Petitions for Immigrant Victims of Workplace Crime;” available at: <https://asistahelp.org/wp-content/uploads/2018/12/A-New-Understanding-of-Substantial-Abuse.pdf>

⁹⁵ See ASISTA. “Guidelines for Victims of Crime Advocate Declaration”, available at

http://www.asistahelp.org/documents/resources/U_visa_Guidelines_for_Victim_of_Cri_1D527C7ADC7D3.docx

⁹⁶ USCIS. “U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement;”, available at: https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf.

⁹⁷ For a discussion of qualifying crimes as “categories,” not fixed lists, see amicus brief and AAO decision here:

http://www.asistahelp.org/documents/resources/ASISTA_amicus_on_Category_819462D29FB5F.pdf;

http://www.asistahelp.org/documents/resources/AAO_maybe_adopts_Category_Approach_0F2B21475A433.pdf.

VSC to understand the "elements and facts" argument, you may wish to employ charts or other user-friendly illustrations to show that your client suffered a qualifying crime.

- **Practice Tip:** Indirect victim cases may be particularly difficult to explain to immigration judges. The DHS Guide noted above may prove useful.

b. Helpfulness

If the applicant has shown that they have suffered abuse and are a victim of a qualifying crime, *Sanchez Sosa* instructs the judge to next evaluate the applicant's "helpfulness" to the investigation or prosecution of that crime. *Sanchez Sosa* indicates that "helpfulness" may be shown if the applicant has a I-918 Supplement B: U Nonimmigrant Status certification.⁹⁸

- **Practice Tip:** In general, a copy of the entire U visa application including Supplement B and the I-192 waiver, should be submitted to the immigration court, as well as copies of any receipt notices in support of a Motion to Continue under *Sanchez Sosa*.⁹⁹

3. The Reason for the Continuance and Other Procedural Factors

Sanchez Sosa instructs that if an application has been filed with USCIS with a certification and the application meets the criteria to be granted, then "any delay not attributable to the Respondent 'augurs in favor of a continuance.'"¹⁰⁰ The Board also lays out other factors the IJ may consider, including:

- the history and number of continuances being granted by an Immigration Judge; and
- the length of time the application is pending,

Sanchez Sosa leaves open the question of what is a "reasonable period of time" given the current U visa backlogs with USCIS. Although the U visa processing times in 2012, when the Board issued this decision, were not nearly as significant as they are today, the reasons for NOT deporting those who are helpful to law enforcement remain as strong as ever. For instance, in an unpublished decision from 2017, the Board stated "we acknowledge the significant U backlog, but stress that processing delays are not sufficient by themselves to deny a respondent's motion to continue."¹⁰¹ Since U applicants have no control over how fast the government entertains their applications, and deporting those with signed certifications of helpfulness from law enforcement will thwart Congress' goals, IJs and the BIA should err on the side of continuing the matter. Deporting helpful victims undermines law enforcement's ability to work with undocumented crime victims.

⁹⁸ *Id.* *Sanchez Sosa* also states that ordinarily an applicant needs a Law Enforcement Certification to show good cause, absent DHS support or other circumstances that the immigration judge may find compelling. *Sanchez Sosa* at 814.

⁹⁹ *Sanchez Sosa* at 814. See also *Matter of L-A-B-R-* at 418.

¹⁰⁰ *Sanchez Sosa* at 814.

¹⁰¹ *Matter of Alvarado-Turcio*, AXXX-XXX-166 at 2. (BIA Aug 17, 2017), available at:

<https://www.scribd.com/document/360077591/Edgar-MarceloAlvarado-Turcio-A201-109-166-BIA-Aug-17-2017>.

C. Updates and Practice Tips on *Sanchez Sosa*

1. Intersection with *L-A-B-R-*

While the Attorney General's 2018 decision on *L-A-B-R-* affects continuance practice in immigration court generally,¹⁰² *Sanchez Sosa* is specific to continuances in the U visa context.¹⁰³ Some immigration judges erroneously take the position that *L-A-B-R-* gives them the authority not to grant continuances in U visa cases. However, nothing in the *L-A-B-R-* decision changes the standard in *Sanchez Sosa*.¹⁰⁴ In fact, *L-A-B-R-* states unequivocally that the decision is "consistent with Board precedents."¹⁰⁵

2. Importance of Making the Record

There is extensive recent unpublished case law from the BIA stating that immigration judges need to thoroughly analyze each motion to continue under *Sanchez Sosa*.¹⁰⁶ For example, in the 2017 unpublished BIA case, *Garcia-Diaz*, the Board held that it is improper for an immigration judge to deny a continuance to a U visa applicant without consideration of the factors outlined in *Sanchez Sosa*.¹⁰⁷ In this case, the immigration judge erred by failing to adequately consider the *Sanchez Sosa* factors and the BIA remanded the case for such an evaluation.

When representing survivors before the immigration judge be aware of the need to make the record for the possibility of appeal. Ensure that the immigration judge makes findings of facts under *Sanchez Sosa*. In addition, if DHS opposes a Motion to Continue make sure the immigration judge requires the ICE trial attorney to state the reasons for opposition on the record.

3. Following *Sanchez Sosa* Guidelines Comports with Congressional Intent

Congress created the U visa program to provide a tool for law enforcement to better serve their communities while providing protection from deportation for immigrant victims who fear coming forward. Allowing removal proceedings to progress and be adjudicated after the filing of a prima facie approvable application for U nonimmigrant status would directly contravene congressional intent. ASISTA and partner organizations recently submitted an amicus brief in the Seventh Circuit

¹⁰² See *Matter of L-A-B-R-*. For general practice advisories on *Matter of L-A-B-R-*, see AIC practice advisory on Motions to Continue available here: https://www.americanimmigrationcouncil.org/practice_advisory/motions-continuance. *Matter of Castro-Tum* is another authority that demonstrates that IJs have the regulatory authority to grant continuances under 8 C.F.R. § 1003.29 and 8 C.F.R. § 1240.6, finding that the continuances should be "for a fixed but potentially renewable period of time." *FN13 of Castro-Tum also states that a continuance is especially important in "cases involving particularly vulnerable respondents."* Note that while 8 C.F.R. § 1003.29 requires good cause for a continuance, 8 C.F.R. § 1240.6 allows the immigration judge to grant a reasonable adjournment either at his or her own instance *or* for good cause shown.

¹⁰³ *Sanchez Sosa* at 815.

¹⁰⁴ See *Matter of L-A-B-R-* at 413, 418 (citing *Sanchez Sosa* and *Hashmi* with approval).

¹⁰⁵ *Id.* at 418.

¹⁰⁶ See Index of Unpublished Decisions compiled by Immigrant and Refugee Appellate Center, at <http://www.irac.net/unpublished/index/>

¹⁰⁷ Ricardo Garcia-Diaz, AXXX-XXX 513, at 2 (BIA June 29, 2017), available at <https://www.scribd.com/document/354711594/Ricardo-Garcia-Diaz-A202-026-513-BIA-June-29-2017>.

Court of Appeals focusing on arguments on how failure to follow the guidelines in *Sanchez Sosa* contravenes the bipartisan intent in Congress in creating the U visa program in VAWA that practitioners may find useful advancing these arguments.¹⁰⁸

4. Circuit Court Decisions

Two recent circuit court decisions contain favorable discussions of *Sanchez Sosa*-based motions to continue.

a. *Caballero-Martinez v. Barr*¹⁰⁹

This case involved a respondent whose cancellation of removal claim was on appeal to the BIA. While on appeal, the respondent filed a U visa application and submitted a motion to remand for a continuance, or alternatively administratively close, before the BIA. This motion to remand was denied, citing inter alia that “[t]he regulations provide exclusive jurisdiction over [U Visa] applications to the DHS and also specifically address U [V]isa ‘petitioners’ with final orders of removal. The filing of the application has no effect on the Government’s authority to execute a final order”¹¹⁰ After receiving a receipt notice from USCIS, the respondent moved the BIA to reopen and reconsider his case again, which was denied. The respondent argued that the BIA failed to apply “‘a rebuttable presumption’ in favor of delaying removal proceedings to await the adjudication of a U [V]isa.”¹¹¹ The Eighth Circuit upheld the validity of *Sanchez Sosa* in the context of a motion before the BIA to remand to the immigration judge for a continuance pending adjudication of the U visa petition, stating “*Sanchez Sosa* suggests a completed application weighs in favor of pausing the removal process.”¹¹²

b. *Cortes-Gomez v. Barr*¹¹³

This recent Second Circuit summary order involves a respondent who was trying to obtain documentation to support his U visa application while in removal proceedings. His third continuance request was denied, and the respondent appealed, seeking remand to allow him to apply for U visa status, as at the time of his motion to remand the respondent had submitted his completed application to USCIS. The Second Circuit found that the BIA erred in denying the respondent’s motion for remand given the new evidence of the U visa filing that was submitted.

¹⁰⁸ Brian D. Straw. “Brief of ASISTA, Asian Pacific Institute On Gender-Based Violence, Casa De Esperanza, Futures Without Violence, National Alliance To End Sexual Violence, and the Tahirih Justice Center in Support of Petitioner.” U.S. Court of Appeals for the Seven Circuit. Available here: <https://asistahelp.org/new-amicus-brief-addressing-sanchez-sosa-and-continuances-for-u-applicants/>

¹⁰⁹ *Caballero-Martinez v. Barr*, No. 17-2044 (8th Cir. 2019), available at <https://law.justia.com/cases/federal/appellate-courts/ca8/17-2044/17-2044-2019-04-03.html>

¹¹⁰ *Id.* at 4.

¹¹¹ *Id.* at 9 (citing *Matter of Sanchez Sosa* at 815).

¹¹² *Id.* at 14.

¹¹³ *Cortes-Gomez, v. Barr*, 17-3967 (2nd Cir April 2019); available at: http://www.ca2.uscourts.gov/decisions/isysquery/9953eac6-6e5d-4752-993e-065d9f10279c/2/doc/17-3967_so.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/9953eac6-6e5d-4752-993e-065d9f10279c/2/hilite/ Note: This case is a summary order which does not have precedential effect.

The court held that the BIA misapplied *Sanchez Sosa* in that there is no requirement that the respondent show the continuance will be for a “reasonable period of time,” holding “A respondent cannot possibly *prove* she will not need more than a reasonable amount of time to receive a U visa, not least because she has no control over the administrative processes governing that question.”¹¹⁴

5. Challenging Denials of Continuances

If an IJ denies a motion to continue and/or orders removal prior to the adjudication of a U visa, practitioners should be prepared to file appeals to the BIA.¹¹⁵ A denial of a motion, such as a *Sanchez Sosa* motion to continue, by an immigration judge is considered a final decision that may also be reviewed by the BIA prior to the conclusion of the case in front of the immigration judge. The vehicle for challenging an immigration judge’s decision on a motion with the BIA prior to a final adjudication of other applications is an interlocutory appeal. Conversely, applicants may also seek to appeal at the time of final adjudication of other applications. Attorneys may also consider a motion to reconsider the continuance request, particularly if new evidence is available.¹¹⁶

D. I-192 Reviewability in Immigration Court

There is a current circuit split regarding the ability of immigration judges to consider I-192 waivers of inadmissibility under INA 212(d)(3). The 2016 BIA case, *Matter of Khan*, held that “immigration Judges do not have authority to adjudicate a request for a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the Immigration and Nationality Act by a petitioner for U nonimmigrant status.”¹¹⁷ However, two circuits have held that immigration judges can consider INA 212(d)(3) waivers in connection with a U visa application. In *L-D-G- v. Holder*, 744 F.3d 1022 (7th Cir. 2014), the Seventh Circuit held that U visa applicants in removal proceedings may request a § 212(d)(3) waiver from an immigration judge, which may be used to cure any inadmissibility for the U visa. In 2018, in *Meridor v. U.S. Att’y Gen.*, 891 F.3d 1302 (11th Cir. 2018), the Eleventh Circuit concurred with the Seventh, holding, “the plain language of §1182(d)(3) gives IJs authority to grant waivers of inadmissibility.”¹¹⁸

- **Practice Tip:** For more information about seeking inadmissibility waiver reviews by an immigration judge, consult National Immigrant Justice Center’s detailed advisory.¹¹⁹ Practitioners outside of the Seventh and Eleventh Circuits should consider whether such arguments can be made, and to preserve the issue for appeal.

¹¹⁴ *Id.*

¹¹⁵ See 8 CFR § 1003.1(d)(3)(ii)

¹¹⁶ 8 C.F.R. § 1003.1(d)(3)(iv)

¹¹⁷ *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016); available at:

https://www.justice.gov/sites/default/files/pages/attachments/2016/09/08/3870_0.pdf

¹¹⁸ *Meridor v. U.S. Att’y Gen.*, 891 F.3d 1302 (11th Cir. 2018), available at

<http://media.ca11.uscourts.gov/opinions/pub/files/201514569.pdf>

¹¹⁹ See NIJC advisory at https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-12/NIJC_UvisaPracticeAdvisory_2017-12-14.pdf

- **Practice Tip:** Use the Seventh and Eleventh Circuit cases to seek continuances or status docket for resolution of the circuit split; administrative closure and termination motions may also be made to preserve these issues for appeal.

E. Status Docket

At the AILA National Conference in San Francisco in June of 2018, representatives from EOIR confirmed that IJs may place cases on a “Status Docket,” and that practitioners may move the court to place the case on the docket. The docket provides an alternative to administrative closure that is akin to a lengthy continuance to allow for the adjudication of applications pending outside the court, like Us, Ts, and VAWA self-petitions. Although this practice has not been uniformly implemented at courts throughout the country, it is an important tool that the IJs have at their disposal, and that practitioners can request. For a sample Motion to Set Case to Status Docket, see Appendix II.

- **Practice Tip:** If your jurisdiction has a status docket, these are prime cases for inclusion in that system. If it does not, check with your local AILA chapter about advocacy efforts to create one in your jurisdiction.

V. Beyond Immigration Court

With the rapid policy changes coming from executive branch agencies, it is becoming increasingly imperative for practitioners to be prepared for the possibility of considering appealing cases to the BIA or pursuing federal litigation.¹²⁰ For example, for U visa applicants in removal proceedings where other strategies have been unsuccessful (i.e., denials of motions to continue and/or refusals to place cases on a status docket), practitioners can consider interlocutory appeals, BIA motions to remand, or appeals at the time of final adjudication of other applications. If practitioners are unsuccessful both with the immigration court and the BIA, practitioners can consider taking the case to the federal Circuit Court of Appeals. For any unreasonable delays or arbitrary or capricious acts by the agency, practitioners can consider a writ of mandamus or seeking an Administrative Procedures Act claim in federal court. A detailed discussion of such actions are beyond the scope of this current advisory, but for further discussion of these options and other impact litigation challenges, consider joining ASISTA’s U visa litigation listserv, by emailing questions@asistahelp.org.

¹²⁰ For more detailed background and guidance see AILA Publication *Litigating Cases in Federal Court*, by Robert Pauw, available at: <https://agora.aila.org/product/detail/3414>.

Appendix A: Sample Cover Letter for Admin Stay

DATE
Field Office Director/ERO Officer
Local ERO Office
123 Main Street
My town, NJ 12345

Via Hand Delivery

RE: NAME- A#

REQUEST FOR ORDER OF SUPERVISION/STAY OF DEPORTATION

Dear Officer NAME,

This office represents the above-named individual, a citizen of COUNTRY OF ORIGIN. My G-28 is already on file and a copy is included in this submission for your convenience.

As you are aware, on DATE, CLIENT was ordered deported by the Immigration Judge . We are writing to request that you place CLIENT on an Order of Supervision or in the alternative, that you stay his deportation. In this regard, attached is Form I-246 with filing fee of \$155.00. **[NOTE: keep in mind payment must be in U.S. cash, money order, or cashier's check]**

PARAGRAPH on client equities:

- How long has the client been living in the U.S?
- Is the client married?
- Does the client have USC or minor children?
- Does any family member have health or medical issues?
- Does the family rely on the client for financial support?
- How long has the client been paying taxes?

PARAGRAPH on what would happen if the client were to depart to the country of origin:

- What would be the financial hardship to the family if the client were deported? Does the client have a job here in the U.S.?
- What difficulties would the client have finding employment in the country of origin?
- Does the client support others who are not family members?
- Could the client get services or access systems that they are currently involved with that they rely on due to their victimization? (e.g., are there pending court dates, does the client work with a therapist or other health professional, etc.)

PARAGRAPH on family separation (if applicable):

- Would the client travel with his/her family back to the country of origin?
- What would it be like if the client's children were uprooted from their home? What systems do the children access that they would not have available to them in the country of origin?

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- Is there a possibility that the family would receive the medical and educational care in the country of origin that they currently receive in the U.S.?
- If the children were not accompanying the client back to the country of origin, what would be the effects of family separation?

Research on Family Separation: Several studies have noted the negative health impacts, such as increased depression, sleeplessness and anxiety when children are separated from a deported parent. For instance, Birdette Gardiner-Parkinson, Director of the Caribbean Community Mental Health Program at Kingsboro Jewish Medical Center in Brooklyn, states that the deportation of a parent can “adversely affect attachment and interrupt the sequence [of] emotional development.”¹²¹ Children with severe attachment disorders may “exhibit signs of depression, aggression, or withdrawal. Some children with severe attachment hoard food, eat excessively, self-stimulate, rock, or fail to thrive.”¹²²

An Urban Institute study also found significant behavioral changes among most children who had experienced immigrant parental separation.¹²³ A majority of the children displayed changes in sleep patterns, eating, and controlling their emotions.¹²⁴ More than half cried more frequently and displayed fear. *Id.* Other children were more anxious, clingy, withdrawn, angry, or aggressive following a parent’s arrest and deportation.¹²⁵

PARAGRAPH on Conditions in Country of Origin:

- What is the education, employment, and social situation back in the country of origin that would cause hardship to the client and his/her family?
- DOS Human Rights Reports: Available at: <https://www.state.gov/j/drl/rls/hrrpt/>
- Human Rights Watch World Reports: <https://www.hrw.org/world-report/2018>

PARAGRAPH on Merits of U Visa Claim:

- What harm did the client suffer?
- What was the experience like reaching out to law enforcement/the courts for help?

¹²¹ Birdette Gardiner-Parkinson & Martine Cesaire-Francoise, “Immigration Laws and Impact on Caribbean Families,” 4–6 (2005) (presented at Social Work Educators Conference, Kingston, Jam.).

¹²² *Id.* at 5. See also Marcelo and Carola Suárez-Orozco, *Making Up for Lost Time: The Experience of Separation and Reunification among Immigrant Families*, in *The New Immigration: An Interdisciplinary Reader* 179, 185 (Marcelo and Carola Suárez-Orozco ed., 2005) [hereinafter Suárez-Orozco] examining 385 early adolescents in the United States from China, Central America, the Dominican Republic, Haiti, and Mexico, 85 percent of whom experienced separation from one or both parents for extended periods because of immigration, divorce, or death. Results from the study revealed that children from separated families were more likely to show signs of depression than children who had not been separated.

¹²³ Ajay Chaudry et al., Urban Inst., “Facing Our Future: Children in the Aftermath of Immigration Enforcement (2010) [hereinafter Urban Inst.]. The study included 190 children in 85 families living in six U.S. cities. For more information on the effect of deportation on families in the United States, see the work of Families for Freedom, a New York-based multiethnic defense network run by and for families confronting deportation, available at: <http://www.familiesforfreedom.org>. Urban Inst.

¹²⁴ *Id.*

¹²⁵ *Id.* (explaining that a majority of children experienced four or more of these behavior changes) and at 53 (stating that children who experienced long-term separation from their parents were most prone to withdrawal and aggression).

- What was the result of the investigation/prosecution?

PARAGRAPH Addressing Rehabilitation for Any Negative Factors:

- If client has criminal history, include evidence of rehabilitation (e.g., certificates of treatment, completion of probation, etc.).

PARAGRAPH summarizing why the client deserves a positive exercise of discretion and the potential relief in the form of a U visa.

Based on the above, we thank you for your favorable consideration of this matter. If you require any additional information or documentation, please contact me.

Sincerely,

Attorney of Record

Appendix B: SAMPLE MOTION TO SET CASE TO STATUS DOCKET

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CA

In the Matter of:)	
)	Date:
)	Time:
Respondent)	Judge:
)	Hearing:
In Removal Proceedings)	
_____)	

RESPONDENT’S MOTION TO SET CASE TO STATUS DOCKET

Respondent, through undersigned counsel, files this Motion to Set Case to Status Docket. In support of this motion, Respondent states the following:

1. Respondent appeared at a master calendar hearing before this Court on [DATE]. Pleadings were taken at a subsequent master calendar hearing on [DATE].
2. Respondent has an upcoming individual hearing scheduled for [DATE].
3. On [DATE], Respondent filed an I-918 Application for U Nonimmigrant Status. *See Exh. B (I-918 Receipt Notice)*.
4. Respondent qualifies for U Nonimmigrant status : (1) Respondent was the victim of a felonious assault on DATE in CITY, STATE when she was held at gunpoint and fired at, (2) Respondent reported the crimes of robbery with a firearm and assault with a firearm to the police and helped in the investigation of the crimes of which she was a victim, and (3) Respondent suffered substantial emotional and psychological harm as a result of the felonious assault. *See Exh. A (Copy of I-918 Applications)(for judges who require the full filing); see also INA § 101 (a)(15)(U) and 8 CFR § 214.14.*
5. Respondent can also establish that she is deserving of an exercise of discretion, that she would suffer hardship if she were forced to leave the

United States, and that a grant of a waiver of inadmissibility is in the national interest. *See id.* Granting Respondent an I-192 waiver necessary for U Nonimmigrant Status also is in the public interest generally because local law enforcement use of U Nonimmigrant Status sends a crucial message to immigrants that they can report crime and to perpetrators that they cannot victimize immigrants with impunity. *See id.* Accordingly, Respondent meets the requirements for U Nonimmigrant status set forth under INA § 101 (a)(15)(U) and 8 CFR § 214.14.

6. At this time, because Respondent's I-918A application is pending, she respectfully requests that this Court set her case to the status docket, to allow USCIS to adjudicate her application. *See Exh. B (Receipt Notices).*

Respectfully submitted:

DATE