

August 14, 2020

Kenneth T. Cuccinelli
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

RE: Joint Comment Submitted in Response to USCIS Policy Manual Chapters on Applying Discretion in USCIS Adjudications; 1 USCIS-PM E.8 and 10 USCIS-PM A.5
Submitted via email to: USCISPolicyManual@uscis.dhs.gov

Dear Mr. Cuccinelli:

The undersigned 79 organizations assist, support, and advocate on behalf of immigrant survivors of domestic violence, sexual assault, human trafficking and other abuses. We write to object to the USCIS Policy Manual's newest provisions regarding applying discretion in USCIS adjudications¹ including employment authorization² (hereinafter, "guidance"). We are deeply concerned about the myriad ways this guidance will foreclose such survivors from the humanitarian relief that Congress specifically created for them, putting them at risk of continued harm.

Over the last several years, USCIS has created significant barriers to immigration relief in a variety of ways--some by way of seismic regulatory overhauls, others through a series of discrete and calculated procedural shifts, all designed to reduce the number of individuals seeking and/or obtaining immigration relief. This guidance is USCIS's latest attempt to leverage bureaucracy to limit access to protections.

I. USCIS' New Guidance Undermines Goals of the Violence Against Women Act and Trafficking Victims Protection Act

The bipartisan Violence Against Women Act (VAWA) in 1994 created special protections for foreign nationals who are victims of battery or extreme cruelty committed by their U.S. citizen or lawful permanent resident spouse or parent, or their adult U.S. citizen son or daughter. These protections, including the VAWA self-petition and the VAWA cancellation of removal process,

¹ Volume 1: General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis, 1 USCIS-PM E.8, available at <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>

² Volume 10: Employment Authorization, Part A, Employment Authorization Policies and Procedures, Chapter 5, Discretion, 10 USCIS-PM A.5 <https://www.uscis.gov/policy-manual/volume-10-part-a-chapter-5>

enable survivors to obtain legal immigration status independently of their abusive sponsors.³ When VAWA was reauthorized in 2000, in conjunction with the passage of the Trafficking Victims Protection Act (TVPA), a bipartisan majority in Congress established two additional remedies for immigrant survivors: the T visa to assist victims of human trafficking, and the U visa to assist noncitizen victims of certain qualifying crimes (including domestic violence, sexual assault) who are willing to assist in the investigation or prosecution of those crimes. These forms of relief recognize how abusers and perpetrators of crime often use immigration status as a tool of abuse and control,⁴ and aim to spare survivors from being forced to choose between living with abuse and facing deportation and possible separation from their children.

We are concerned that USCIS' guidance on discretion increases barriers to relief for immigrant survivors that will cause harm and exacerbate the danger they face. Congress' intent was to make survivor-based forms of immigration protections as accessible as possible to those whose circumstances are particularly precarious. But the USCIS policy manual changes directly undercut and undermine this intent by creating additional documentary requirements based on overbroad discretionary factors and by imposing requirements outside the statutory framework for survivor-based cases. Furthermore, many of the discretionary factors contained in the guidance fail to account for the impacts of abuse, posing challenges for survivors to favorably address these factors given the devastating consequences of abuse. This given, the guidance will result in particular injustices in their cases.

A. The Guidance Will Create Undue and Unnecessary Barriers for Immigrant Survivors and their Families to Access Immigration Protections

1. Additional Evidentiary Burdens

In USCIS's new guidance, the agency sets forth a non-exhaustive list of 22 factors it deems relevant to discretion, which apply to applications for adjustment of status, waivers of inadmissibility, removal of conditions on permanent residence (including domestic violence-based waivers), applications to extend or change nonimmigrant status, employment authorization, among others. In these cases, USCIS places additional evidentiary burdens on

³ VAWA Cancellation of Removal also provides relief for a parent of a child abused by a USC or LPR parent. INA 240A(b)(2)(A)

⁴ Nearly 75% of abused immigrant women in one survey, for example, reported that their spouse had never filed immigration papers to give them legal status. Abusers who eventually filed papers for their immigrant spouses waited almost 4 years to file. See Mary Ann Dutton, Leslye E. Orloff, & Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Poverty Law & Pol'y 245, 259 (2000).

applicants and petitioners to produce documentation to show that “a favorable exercise of discretion is warranted.”⁵

Given the dynamics of domestic violence and human trafficking, and the impacts of trauma, victimization, and/or economic instability, many survivors will lack access to documentation that USCIS is seeking as part of its discretionary analysis. For example, documentation regarding a “history of employment,” “history of taxes paid,” and “property or business ties” can be difficult for survivors to maintain precisely because abusers and perpetrators often deliberately sabotage survivors’ access to, or destroy, those assets. A recent example is how abusive spouses have denied victims’ access to the one-time direct cash payments for COVID-19 relief authorized under the CARES Act.⁶ This echoes the findings of a major 2019 study from the Institute for Women’s Policy Research about the direct and indirect economic effects of abuse⁷ which surveyed survivors and determined:

- Three-fourths stated that their abusers took money from them (including paychecks, savings, or public benefits);
- More than 80% said their abuser interfered with their ability to get and/or keep a job;
- Two-thirds reported abusers blocked them from finishing education or training;
- Nearly 60% said they had an abusive partner who harmed their credit score; and
- Nearly one in four said they were encouraged, pressured, or forced by their partner to engage in an illegal activity.

When creating the special protections for survivors, Congress realized the evidentiary challenges that immigrant survivors often face⁸ and mandated the special “any credible evidence” standard for these forms of relief.⁹ USCIS has since acknowledged and explained how and why they must apply this standard in survivor-based applications like VAWA self-petitions, U visa and T visa applications.¹⁰ Former INS guidance states:

⁵ See note 1 *supra*.

⁶ See Allyson Versprille and Kaustuy Basu, “Domestic Abusers Controlling Virus Relief Checks Raise Red Flags,” (BloombergTax.Com, June 25, 2020).

⁷ See Cynthia Hess and Alona Del Rosario, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers, and Economic Security* (Institute for Women’s Policy Research: Jan. 2019) and executive summary/factsheet.

⁸ Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r, Immigration and Naturalization Service (Apr. 16, 1996) at 5, available at <https://asistahelp.org/wp-content/uploads/2019/09/Aleinikoff-Memo-1996.pdf> (stating “adjudicators should give due consideration to the difficulties some self-petitioners may experience in acquiring documentation, particularly documentation that cannot be obtained without the abuser’s knowledge or consent.”)

⁹ See, e.g., INA 204(a)(1)(J), INA 214(p)(4)

¹⁰ 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: <https://asistahelp.org/wp-content/uploads/2018/10/Virtue-Memo-on-Any-Credible-Evidence-Standard-and-Extreme->

“[B]attered spouse...self-petitioners are not likely to have access to the range of documents available to the ordinary visa petitioner for a variety of reasons. Many self-petitioners have been forced to flee from their abusive spouse and do not have access to critical documents for that reason. Some abusive spouses may destroy documents in an attempt to prevent the self-petitioner from successfully filing. Other self-petitioners may be self-petitioning without the abusive spouse’s knowledge or consent and are unable to obtain documents for that reason. **Adjudicators should be aware of these issues and should evaluate the evidence submitted in that light.**”¹¹

The new USCIS guidance inappropriately penalizes survivors for the abuse they have experienced. Officers may “ask the requestor directly why he or she warrants a favorable exercise of discretion” in cases where any negative factor is present, seemingly regardless of the weight of the factor. The guidance instructs officers to document any response, or lack thereof, in the record.¹² USCIS provides no instruction on how the “any credible evidence” standard for survivor-based cases factors into its discretionary analysis.

The new guidance is so broad that it is impossible for applicants to gauge what exactly USCIS expects and where the balance of the agency’s discretionary analysis is tipping. *Any fact* related to “conduct, character, family ties, other lawful ties to the United States, immigration status, or any other humanitarian concern” may be relevant to discretion, and the applicant may already have submitted documentation to offset any negative factors of which they are aware. For survivors applying for immigration relief *pro se*, these new requirements will be especially challenging.

2. Additional Delays in Adjudication

Applicants already face staggering delays in the adjudication of immigration benefits, including survivor-based relief. These delays range from about 2 years for a VAWA self-petitioner or T visa applicant to nearly 5 years for U visa petitioners even to be put on a waitlist.¹³ Advocates report that they sometimes wait months even for USCIS to confirm receipt of an application. The new framework for discretionary analysis outlined in the guidance will add to these egregious delays. Adjudicators may consider *any* relevant factor in its discretionary analysis including but not limited to the 22 enumerated factors listed in the guidance. In any case where *any* negative

[Hardship.pdf](#) (hereinafter “Virtue Memo”); *see also* 8 CFR 214.14(c)(4); 8 CFR 214.11(d)(2)(ii). The “credible evidence” standard is also used in other survivor protections: *see, e.g.*, PM-602-0130. Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants (March 8, 2016).

¹¹ *Id.* at 5. [Emphasis added]

¹² *See* note 1 *supra*.

¹³ *See* USCIS Processing Times, available at <https://egov.uscis.gov/processing-times/>

factors are present, “the file should contain a record of the officer’s deliberations,”¹⁴ including clear annotations about the analysis conducted and weight given to the positive and negative factors in every case. USCIS provides no insight into how processing times have already been impacted by this new discretionary framework, let alone the cumulative undertow it will have on agency operations overall and over time.

3. Additional Barriers to Work Authorization

USCIS imposes unnecessary barriers for survivors by creating an additional discretionary analysis for the issuance of work authorization for Category C applicants.¹⁵ This new policy encompasses work authorization for VAWA self-petitioners, U and T visa holders with pending applications for adjustment of status,¹⁶ approved VAWA self-petitioners,¹⁷ as well as VAWA self-petitioners and those on the U visa waitlist with deferred action status.¹⁸ Survivors are already facing increased delays in the issuance of employment authorization. This new discretionary framework will further prolong these delays. For example, a VAWA self-petitioner who has *already* demonstrated good moral character as part of the underlying claim, must now also undergo a separate discretionary analysis for work authorization under the (c)(31) employment authorization category. The guidance goes beyond the scope of existing authority, and adds needless burdens on the applicant and on adjudicators who must now repeatedly analyze the same factors for each related application.¹⁹

4. USCIS’s List of Discretionary Factors Ignore Survivor Realities.

Many of the factors contained in the guidance ignore the plight of individuals applying for survivor-based forms of immigration relief and how common it is for negative factors to arise as a *consequence* of victimization, economic instability and/or trauma. In addition to examples cited above, our concerns include, but are not limited to, the following examples:

¹⁴ See note 1 *supra*.

¹⁵ See note 2 *supra*.

¹⁶ 8 CFR 274a.12(c)(9)

¹⁷ INA 204(a)(1)(K)

¹⁸ INA 204(a)(1)(D)(i)(IV); 8 CFR 214.14(d)(2); 8 CFR 274a.12(c)(14)

¹⁹ See 8 CFR 274a.12(c) stating that USCIS has discretion over the validity period for employment authorization document.

Listed Discretionary Factor	Illustrative Concerns the Factor Raises for Survivors
<p>The applicant or beneficiary’s ties to family members in the United States and the closeness of the underlying relationships.</p>	<p>Survivors applying for relief under VAWA and the TVPA may be victimized by their family members. Additionally, non-familial abusers and perpetrators often isolate survivors from their families as a way to maintain power and control. Thus, the “quality of the relationship” may be poor due to the abuse and exploitation that is the very basis of the immigration remedy at issue.²⁰</p>
<p>The applicant or beneficiary’s value and service to the community.</p>	<p>Survivors are routinely kept isolated from the community as part of the power and control tactics of abusers and traffickers. Even after the abuse and exploitation has ended, survivors focus on building economic reserves and healing from their trauma and physical abuse, and may not be able to engage in community activities or services. Again, this factor would serve to further penalize survivors for the very abuse that the immigration benefit is designed to ameliorate.</p>
<p>Likelihood that lawful permanent resident (LPR) status will ensue soon.</p>	<p>For VAWA self-petitioners who are in the F2B visa category, it may take several years before they are eligible to adjust status to become an LPR. Similarly, Congress mandated that U and T visa holders maintain at least 3 years continuous presence before they are eligible to adjust status to become an LPR.²¹ Processing delays also impact the ability to adjust, as USCIS estimates it could take between 5 and 10 years for applicants to obtain a U visa depending on when they filed.²² Considering the likelihood that LPR status will ensue “soon” as a discretionary factor ignores both the requirements set by law, and the egregious processing delays facing the agency, as well as decisions the agency itself solely controls about how to deploy its resources.</p>

²⁰ The guidance quotes *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301-301 (BIA 1996) (stating that if an individual “has relatives in the United States, the quality of their relationship must be considered in determining the weight to be awarded this equity.”)

²¹ T visa holders may also apply to adjust status sooner than the 3 year statutory period if the Attorney General deems that the investigation or prosecution of their trafficking case has been completed. *See* INA 245(I)(1)(A)

²² USCIS. U visa Filing Trends (April 2020), available at https://www.uscis.gov/sites/default/files/document/reports/Mini_U_Report-Filing_Trends_508.pdf

Listed Discretionary Factor	Illustrative Concerns the Factor Raises for Survivors
<p>Evidence regarding respect for law and order, good character, and intent to hold family responsibilities.</p>	<p>Survivors’ criminal history is often related to the abuse or exploitation. Sex trafficking survivors, for example, have, by the very definition of the crime, been forced to commit unlawful commercial sex acts. Other survivors, including survivors of domestic violence, are falsely accused of crimes including assault or domestic violence, as a form of exercising their power and control. Thus, survivors will be disadvantaged in demonstrating “respect for law and order,” specifically because of their victimization. Furthermore, evidence of “good character” is already a requirement for forms of relief like VAWA self-petitions. Thus, in these cases USCIS seems to intend to “re-litigate” through a second discretionary analysis what is statutorily well-settled as a prerequisite for eligibility. Furthermore, USCIS’ request that applicants provide letters of support from family, friends and “responsible community representatives” for something as routine as an application to renew a work permit is excessive and again disadvantages survivors who may have few connections as a direct result of the abuse and exploitation.</p>
<p>Marriage to a U.S. citizen or LPR for the primary purpose of circumventing immigration laws.</p>	<p>DHS’s own policies recognize that abusers often try to interfere with a survivor’s case, noting “[a]busers often claim their marriage is fraudulent in order to exact revenge or exert further control over the victim.”²³ Thus, we are deeply concerned about how and whether unfounded allegations of fraud by an abuser or perpetrator of crime may impact an adjudicator’s discretionary analysis. This not only violates Congressionally mandated confidentiality provisions²⁴, but also existing DHS guidance that provides “when a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, <i>DHS employees treat the information as inherently suspect.</i>”²⁵</p>

²³ Department of Homeland Security, *Implementation of Section 1367 Information Provisions*, DHS Instruction Systems. Instruction Number: 002-02-001. Revision Number: 00., available at <https://asistahelp.org/wp-content/uploads/2019/04/Implementation-of-Section-1367-Information-Provisions-Instructions.pdf>

²⁴ See, e.g., 8 USC 1367

²⁵ See note 23 *supra*. [Emphasis added]

B. The Guidance Applies a Heightened Discretionary Standard Despite Statutory Limitations

Congress expressly recognizes that survivors of abuse, crime and trafficking may be tricked, forced, or coerced by abusers and perpetrators into violating immigration and other laws, or else face unique hardship due to their victimization, including economic instability. For these reasons, a number of exemptions and waivers of inadmissibility were built into the statutory provisions for VAWA self-petitions, U and T visas.²⁶

Congress grants USCIS some discretion with respect to survivor-based relief, but under certain specified parameters, such as waivers that depend on a direct correlation to the victimization the immigration status is meant to address.²⁷ In several instances, what the discretion sections of the USCIS Policy Manual encourage is a duplicative re-examination of already-reviewed elements as part of a threshold eligibility analysis, but without regard to the underlying purpose of the immigration status sought. The net effect of this “extreme vetting” on survivors will be to delay and complicate their adjudications; give license to subjective decision-making without regard to the dynamics of violence and trauma that Congress intended; and lead to wildly inconsistent results by adjudicators across the country.

Overall, this new guidance is contradictory to the ameliorative nature of the victim-based protections and must be rescinded. USCIS is attempting to shoehorn overbroad factors regarding discretion in a way that is inconsistent with policies that more incisively account for abuse in making a discretionary determination. USCIS makes no effort to consider how victimization impacts its listed discretionary factors and in weighing the totality of circumstances in decisions involving survivors of crime and abuse. Had Congress intended to require a more expansive discretionary standard folding survivor relief in with other non-survivor relief, Congress would not have created and passed VAWA, TVPA, or the related immigration benefits arising from the numerous reauthorizations of both laws. The statutes are clear with regard to Congress’s intent to protect immigrant survivors and unambiguous as to the extent of USCIS discretion.

II. USCIS’s New Guidance Narrows Appeal Rights

There are additional implications for survivors, as well as all other applicants, that will flow simply from making more decisions “discretionary.” For example, USCIS’s guidance permits officers to deny applications based on discretion, even if the eligibility requirements are not met,

²⁶ Survivor-based exemptions and waivers include, but are not limited to: VAWA self-petition INA §§ 204(a)(1)(C), 212(a)(4)(E)(i), 212(h)(1)(C), 212(a)(9)(C)(iii); T visas INA § 212(d)(13), and U visas INA §§ 212(a)(4)(E)(ii), 212(d)(14), 245(m).

²⁷ *Id.*

which will make administrative review more complex and complicate an applicant’s ability to challenge erroneous and unsupported negative decisions. The guidance instructs that officers may include a discretionary analysis if a discretionary denial would be warranted even if the requestor had met threshold statutory and regulatory requirements. This extraneous analysis confuses the issues on appeal or motion to reopen and needlessly complicates administrative review.

III. Conclusion

This guidance represents a significant change in the adjudication of immigration benefits, both to the role of the adjudicator and to the agency’s mission, particularly with respect to survivor-based applications. Under this guidance and related policy shifts, applicants for immigration benefits, including survivors of violence, are effectively assumed guilty and must dig their way out of a hole of unknown depth and dimension before being able to prove their innocence and “worthiness.” Each case, at each step, is already encountering such significant barriers, from limiting the availability of fee waivers, tightening discretion, to increasing consequences of denials for survivor-based cases. Taken together, USCIS policy changes are dramatically limiting the number of applicants who can even hope to be granted relief, instead of ensuring that everyone who is eligible has an opportunity to access relief that Congress intended for them.

In sum, and to reinforce objections also raised by immigrants’ rights advocacy organizations in a separate joint comment, this new policy guidance should be eliminated because of the onerous burdens it will place on those seeking protections and benefits, the significant delays it will cause in processing and adjudication of applications,²⁸ and the devastating impact it will have on the lives of immigrant survivors.

Signed:

National Organizations

American Immigration Lawyers Association
 Asian Pacific Institute on Gender Based Violence
 ASISTA
 Coalition to Abolish Slavery & Trafficking (Cast)
 Freedom Network USA

²⁸ The latter impact is especially objectionable at this time. USCIS has asked Congress for a significant funding bailout while simultaneously, in this new guidance, significantly complicating many otherwise routine, straightforward applications. The policy shift will dramatically exacerbate the already staggering backlogs of 2.5 million applications that have not been processed and another 2.5 million awaiting processing times, as testified by USCIS Deputy Director for Policy Joseph Edlow before a House Judiciary Committee USCIS Oversight Hearing on July 20, 2020.

Human Rights First
 Human Trafficking Legal Center
 Kids in Need of Defense (KIND)
 National Network to End Domestic Violence
 RAICES
 Tahirih Justice Center

Regional, State and Local Organizations

California

California Partnership to End Domestic Violence
 Catholic Charities of Santa Clara County
 Colin Immigration Law
 Immigration Law Office of Isabel Machado
 Immigrant Legal Services of the Central Coast, Inc
 Los Angeles Center for Law and Justice
 Oasis Legal Services
 OLA RAZA INC
 Maitri
 Public Counsel
 Public Law Center
 Sacramento Food Bank & Family Services
 Warren Law Firm

Colorado

Violence Free Colorado

Connecticut

Law Offices of Michael Boyle

Florida

Americans for Immigrant Justice
 Florida Legal Services, Inc.
 Jacksonville Area Legal Aid Inc
 Law Office of Karina Arzumanova, P.A.

Georgia

Antonini & Cohen Immigration Law Group
 Asian Americans Advancing Justice-Atlanta

Illinois

Legal Aid Society of Metropolitan Family Services

Indiana

Indiana Coalition Against Domestic Violence, Inc.

Kansas

Kansas Coalition Against Sexual and Domestic Violence

Maine

Maine Coalition to End Domestic Violence

Maryland

Minikon Law, LLC

University of Maryland SAFE Center for Human Trafficking Survivors

Massachusetts

BU Law Immigrants' Rights and Human Trafficking Program

HarborCOV

MetroWest Legal Services

The Second Step

Minnesota

De Leon, Nestor & Torres, LLC

Roberts Immigration Law Office, Ltd.

Missouri

The Clinic at Sharma-Crawford Attorneys at Law

Gonzalez Herrera Law Firm, LLC

Nebraska

Immigrant Legal Center

Nebraska Coalition to End Sexual and Domestic Violence

Nevada

GWP Immigration Law

New York

Catholic Migration Services

Her Justice

Justice For Our Neighbors-New York

Law Office of Leslie Sultan
New York State Coalition Against Domestic Violence
The Door's Legal Services Center
The Legal Project

North Carolina

Cauley Forsythe Law Group
Mi Casa Community Services

Ohio

Advocating Opportunity
The Legal Aid Society of Cleveland

Pennsylvania

Justice at Work (f/k/a Friends of Farmworkers)
Pennsylvania Immigration Resource Center

Rhode Island

Dorcas International Institute of Rhode Island
Rhode Island Coalition Against Domestic Violence

Tennessee

Mid-South Immigration Advocates

Texas

American Gateways
Las Americas Immigrant Advocacy Center
Mosaic Family Services
Thomas Esparza Jr. PC
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Vermont

Vermont Network Against Domestic and Sexual Violence

Virginia

Poarch Thompson Law

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Northwest Immigrant Rights Project

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Tisocco Immigration PLLC

Wisconsin

Maria I. Lopez Immigration Law LLC

Wyoming

Wyoming Coalition Against Domestic Violence and Sexual Assault