



Practice Update: ICE Agrees Not to Remove, Deny Requests for Stay of Removal, or Oppose Continuances for U Visa Petitioners for 90 Days

March 22, 2021

On February 13, 2020, ASISTA and Sanctuary for Families* filed a lawsuit against ICE challenging former Acting Director Matthew Albence's authority to eliminate the prima facie determination process for U visa petitioners. See [ASISTA v. Albence, No. 3:20-cv-00206-JAM \(D. Conn.\)](#). On March 18, 2021, Judge Jeffrey A. Meyer [granted](#) the parties' joint motion to stay the proceedings for 90 days subject to [specific interim conditions](#). These conditions prohibit ICE from (1) denying a request for stay for U visa petitioners; (2) removing U visa petitioners; or (3) opposing a motion to continue for U visa petitioners during the 90 day period, subject to certain exceptions. ASISTA and Sanctuary for Families are providing this update to inform practitioners of the terms of the agreement and potential implications for representing U visa clients.

1. What is the agreement?

ASISTA and Sanctuary for Families agreed to ICE's request for a 90 day stay of the lawsuit in order to allow the agency additional time to review its policies on adjudicating requests for stay by U visa petitioners. As part of the agreement, ICE will:

- 1) Not deny new or pending stay requests filed by U visa petitioners;
- 2) Not remove any individual with a pending U visa petition; and
- 3) Not oppose a continuance for any U visa petitioner in removal proceedings,

for the duration of the 90 day stay.

These terms are subject to certain exceptions stemming from the priority categories from the [February 18, 2021 Memorandum to ICE Employees from Acting Director Tae D. Johnson providing Interim Guidance on Civil Immigration Enforcement and Removal Priorities](#) ("Johnson memorandum").

ICE retains its discretion to approve stay requests and join motions to continue removal proceedings for U visa petitioners.

2. What are the exceptions?

ICE may still remove U visa petitioners, deny stay requests, or oppose continuances for U visa petitioners who fall under the following categories:

- 1) **National security risk:** Individuals who have engaged in or are suspected of engaging in terrorism or terrorism-related activities; who have engaged in or are suspected of engaging in espionage or espionage-related activities, or whose apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States;
- 2) **Public safety risk:** Individuals who pose a current threat to public safety and have been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43) or convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or individuals not younger than 16 years of age who intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization; or
- 3) **Extraordinary cases:** Individuals who do not meet the criteria for the National Security or Public Safety priority categories as defined above, but who are nonetheless national security or public safety risks as contemplated in the Johnson memorandum.

ICE must apply the guidelines for “Preapproval for Other Priority Cases” from the Johnson memorandum in determining if a case is “extraordinary.” These guidelines require, among other things, escalating a written justification “explaining why the action otherwise constitutes a justified allocation of limited resources” through the chain of command.

NOTE: Even if a U visa petitioner meets the criteria for the national security, public safety, or extraordinary case exceptions, ICE must give further exceptional consideration before removing the petitioner, denying a stay request, or opposing a continuance, **if the individual was under 16 when he or she committed the offense in question.**

3. How long will these conditions be in effect?

This agreement is in effect from March 18, 2021 through June 15, 2021.

4. What should attorneys do if their client has a pending U visa petition and is in removal proceedings?

If the U visa petitioner needs a continuance of the removal proceedings, the attorney should e-mail the relevant Office of Chief Counsel (OCC) to ascertain their position on the motion for continuance and attach a copy of the conditions and order, as trial attorneys may be unfamiliar with them. See Appendix. Written correspondence is preferred in order to preserve a record of the request and OCC's response in case OCC violates the terms of the stay agreement. The motion for continuance should be filed as soon as possible but certainly before June 15, 2021.

5. What should attorneys do if their client has a pending stay request?

The attorney should contact the client's Deportation Officer (DO) and provide a copy of the conditions and order, as ICE officers may be unfamiliar with them. See Appendix. It may be helpful to remind the DO that ICE retains the ability to *grant* a stay of removal; this agreement only places conditions on the *denial* of a stay request. We recommend conducting any correspondence in writing in order to preserve a record of the request and ERO's response in case ERO violates the terms of the stay agreement.

6. What should attorneys do if ICE is trying to remove their client?

The attorney should contact the client's Deportation Officer and provide a copy of the conditions and order, as many ICE officers may be unfamiliar with them. See Appendix. The attorney should also submit a [request for case review](#) in accordance with ICE Enforcement and Removal Operations (ERO) procedures. We recommend conducting any correspondence in writing in order to preserve a record of the request and ERO's response in case ERO violates the terms of the stay agreement.

7. What if ICE violates the order?

ICE could violate the order by (1) removing, opposing a continuance for, or denying a stay request for, a U visa petitioner who does not fall within any of the exceptions; (2) failing to adhere to the guidelines for determining whether a U visa petitioner falls into a priority category; or (3) failing to give exceptional consideration to a U visa petitioner who was under 16 when he or she committed the offense that led to the determination that he or she falls into a priority category.

If ERO has violated the order, attorneys or petitioners should submit a request for review through [ERO's case review process](#). If OCC has violated the order, attorneys or petitioners should contact the local [OPLA field office](#) to request review of the case. We recommend conducting any correspondence in writing in order to preserve a record of the request and the agency's response.

If ERO or OPLA's response is unsatisfactory, please contact ASISTA (Amy Cheung, amy@asistahelp.org) or Sanctuary for Families (Pooja Asnani, pasnani@sffny.org) for further assistance.

*Sanctuary for Families joined as a co-plaintiff in the lawsuit on April 10, 2020.

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APPENDIX

Activity in Case 3:20-cv-00206-JAM ASISTA Immigration Assistance, Inc. v. Albence et al Order on Motion to Stay

CMECF@ctd.uscourts.gov <CMECF@ctd.uscourts.gov>
To: CMECF@ctd.uscourts.gov

Thu, Mar 18, 2021 at 12:13 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Connecticut

Notice of Electronic Filing

The following transaction was entered on 3/18/2021 at 12:13 PM EDT and filed on 3/18/2021

Case Name: ASISTA Immigration Assistance, Inc. v. Albence et al

Case Number: 3:20-cv-00206-JAM

Filer:

Document Number: 68(No document attached)

Docket Text:

ORDER GRANTING MOTION TO STAY (Doc. #[67]). The Court GRANTS the joint motion to stay subject to the specific interim conditions agreed by the parties. The parties are requested to file a status report or notice of settlement on or before June 15, 2021. It is so ordered. Signed by Judge Jeffrey A. Meyer on 3/18/2021. (Freberg, B)

3:20-cv-00206-JAM Notice has been electronically mailed to:

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3:20-cv-00206-JAM Notice has been delivered by other means to:

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASISTA IMMIGRATION ASSISTANCE,
INC., et al.,

Plaintiffs,

v.

TAE D. JOHNSON, Acting Director, in his
official capacity, et al.,

Defendants.

Case No. 3:20-cv-00206-JAM

Judge: Hon. Jeffrey A. Meyer

JOINT MOTION TO HOLD IN ABEYANCE

Pursuant to the Court's Order of March 4, 2021, the parties, having conferred, jointly move to hold this case in abeyance for a period of 90 days while U.S. Immigration and Customs Enforcement (ICE) continues actively reviewing its policies on the processing of applications for administrative stays of final orders of removal for individuals with pending U-nonimmigrant status petitions.

To protect the interests of Plaintiffs and their clients, and consistent with agency priorities, ICE commits that during the 90-day period ending June 15, 2021, it will, after individualized review of each case:

- 1) Hold on denying new or pending stay requests for individuals with pending U-nonimmigrant status petitions;
- 2) Hold on removing any person who has a pending U-nonimmigrant status petition; and
- 3) Not oppose continuing removal proceedings for any person with a pending U-nonimmigrant status petition;

except for individuals who fall into one of the following categories identified in the February 18, 2021 Memorandum to ICE Employees from Acting Director Tae D. Johnson providing Interim Guidance on Civil Immigration Enforcement and Removal Priorities:¹

- A) Priority Category 1 (National Security): Individuals who have engaged in or are suspected of engaging in terrorism or terrorism-related activities; who have engaged in or are suspected of engaging in espionage or espionage-related activities, or whose apprehension, arrest, or custody is otherwise necessary to protect the national security of the United States;
- B) Priority Category 3 (Public Safety): Individuals who pose a current threat to public safety *and* have been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43) or convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or individuals not younger than 16 years of age who intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization; or
- C) Individuals presenting extraordinary cases that do not fall within the enumerated provisions of the Priority Category 1 or Priority Category 3 sections of the Johnson memorandum but who are nonetheless national security or public safety risks as contemplated in the memorandum. Any determination that a case falls into this category is subject to the guidelines for “Preapproval for Other Priority Cases” outlined on page 6 of the February 18, 2021, Johnson memorandum.

¹ Available at https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf (last visited March 17, 2021).

If an individual falling within one of the categories enumerated above was under 16 years of age when he or she committed the offense in question, further exceptional consideration will be given before denying any pending stay request from, opposing continuation of removal proceedings for, or removing that individual.

Noncitizens or their representatives may contact the appropriate ICE field office to seek review of any ICE actions that implicate the terms of this agreement, to ensure compliance with those terms, in accordance with the process outlined at <https://www.ice.gov/ICEcasereview> (last visited March 17, 2021), or, where relevant, may contact the local field office for the Office of the Principal Legal Advisor. The parties agree to meet and confer promptly should Plaintiffs wish to raise any concerns regarding compliance with this agreement.

Accordingly, the parties respectfully request that the Court hold this case in abeyance for a period of 90 days, ending June 15, 2021.

Respectfully submitted,

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Dated: March 17, 2021

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